

# **Service Model Policy and Guidance: main guidance**

## **Version 20**

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## Introduction

1. The Parliamentary and Health Service Ombudsman's casework process is summarised in the Service Model. This guidance provides information about how our casework staff should operate in line with the Service Model and our Quality Standards and Measures.
2. The Service Charter contains 18 commitments about how we will deliver our service and what people can expect when they bring a complaint to us. The detailed information in the Service Model and this guidance helps us to deliver our service in line with the Charter commitments.
3. The intention of the guidance is to provide an additional layer of detail below the Service Model, with a particular focus on:
  - Requirements from the law (flagged as 'Legal requirement' in the text).
  - Requirements from our own policy (flagged as 'Policy requirement' in the text).
4. Those requirements set the framework within which our casework staff should operate. The guidance is not intended to prescribe the actions or process to be followed across all casework and in all circumstances. Many areas of casework require discretion and judgement and depend on the specific circumstances of the case. Any divergence from the stated requirements in the guidance should be recorded and explained on our case management system; Dynamics 365.
5. The Supervision Model specifies the tasks and supervisory tasks that are required to complete PHSO casework. The Supervision Model and supporting guidance detail the minimal supervision requirements of staff processing casework. Staff must always adhere to the Supervision Model.
6. Please note that when the text of the guidance refers generally to 'caseworkers' this covers both 'caseworkers' and 'senior caseworkers' unless specified otherwise. The distinction between what the two types of caseworkers can do is set out in the Supervision Model and the Delegation Scheme.
7. The guidance is divided into the following main sections:
  - Accessing our service
  - Can we look into your case?
  - Should we look into your case?
  - Detailed Investigation
8. The guidance references key information about Dynamics 365 processes and these are highlighted between blue lines in the text. A manual for Dynamics 365 is available.

9. The guidance is a living document and will be updated on a regular basis. It is owned and maintained, on behalf of Operations, by the Quality Directorate.
10. If you have any feedback or questions about the guidance or related issues then please email: [++Improvement@ombudsman.org.uk](mailto:++Improvement@ombudsman.org.uk)



## What can we help with? Complaint for us?

- 1.1 When a request for investigation is received the intake caseworker, or member of shared services, should check on Dynamics 365 to see if the complainant has contacted us before, and if so, complained about the same organisation. **(Policy requirement)**
  - 1.2 If the intake caseworker, or member of shared services, considers the request is new then they should create a record on Dynamics 365 and assign the case to themselves.
  - 1.3 If it is unclear whether a complainant is asking for us to investigate a complaint then this should be recorded on Dynamics 365 as an 'enquiry'. If the complaint relates to an organisation we can look at then this should be recorded on Dynamics 365 as a 'complaint'. **(Policy requirements)**
  - 1.4 If we are copied into correspondence alongside other organisations or individuals, and there is no indication the complainant is asking us to take action or respond, then we will usually record the case as an enquiry.
  - 1.5 The intake caseworker should consider the correspondence though, on a case by case basis and record the case as a 'complaint' instead if appropriate. For example, if the correspondence indicates the complainant is in dispute with the organisation as to whether local resolution is complete.
  - 1.6 If an intake caseworker plans to decline a case for investigation they must first attempt to contact the complainant on the telephone, if a number is available. **(Policy requirement)**
  - 1.7 If during telephone contact a complainant expresses a preferred method of communication, then contact should be made that way from then on. **(Policy requirements)**
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- 1.8 Any requested contact preference should be recorded using the preferred method of contact tab on the complainant's Dynamics 365 record. **(Policy requirement)**
  - 1.9 If the intake caseworker proposes to pass a case for further consideration within two weeks of the case arriving with us, they do not need to contact the complainant to discuss the case further but should still send the relevant acknowledgement letter. If the case will not be progressed within two weeks, the intake caseworker must make contact with the complainant regardless of what action we later decide to take. **(Policy requirements)**
  - 1.10 If the intake caseworker contacts the complainant (or representative if appropriate) then they should find out: **(Policy requirements)**
    - What is being complained about?
    - The injustice claimed.
    - The remedy sought (including if they are seeking financial remedy).

- The stage of the complaint within the complaints process
- Why they are unhappy with the organisation's reply to their complaint

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1.11 The complaint summary, injustice sought, and desired outcomes should be captured separately in fields on the Dynamics 365 record.

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1.12 The intake caseworker should try to capture basic information during this contact: **(Policy requirement)**

- Complainant's name and contact details.
- Names and contact details of other relevant parties (for example, aggrieved, representative, Member of Parliament (MP)).
- Names and contact details of any interested parties (including the details of medical defence organisations who are involved in the case)
- Organisation/individuals complained about.

1.13 The intake caseworker should give information to the complainant about what we can and cannot do, so as to manage their expectations and should discuss any reasonable adjustments that might be needed (further information about reasonable adjustments is available [here](#) in section 1.39). **(Policy requirement)**.

1.14 If we cannot consider the case (for example it is clearly out of remit) then not all of this information will need to be recorded.

### **Reaching and evidencing our decision**

1.15 The intake caseworker should look to get as much information as reasonably possible before taking action on a case. This may include approaching the complainant, organisation/s or anyone else we identify who may be able to provide relevant evidence.

1.16 By ensuring we have gathered all the relevant evidence, thoroughly considered that evidence and followed the proper casework processes we can clearly demonstrate that we have reached a robust, impartial decision.

### **Recording information on Dynamics 365**

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1.17 Information should be recorded and stored in the appropriate section of the Dynamics 365 record or in the documents tab and the agreed naming conventions available in the supporting guidance should be used.

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### **Declining a case when we have had no contact with the complainant**

- 1.18 If an intake caseworker has made reasonable attempts to contact a complainant, but has been unable to, they should consider if enough information is available to still make a decision. **(Policy requirement)**
- 1.19 If the intake caseworker considers we have enough information to decide if the case is out of remit or not ready for us, then this decision and the reasons for it, should be sent to the complainant (and any representatives). **(Policy requirements)** The case can then be closed.
- 1.20 If we do not have enough information to make a decision, but have an email address, we should email the complainant and explain this. A deadline should be set to provide this information, usually under a week. If we receive a request to extend this date it should be considered carefully, especially if made as part of a reasonable adjustment. If a day after the deadline (or agreed extension) the information has still not been received the complaint should be closed as withdrawn. **(Policy requirement)**
- 1.21 If we do not have an email address then the intake caseworker should contact the complainant in writing explaining we need further information before we can consider their case. The case should then be closed as withdrawn. **(Policy requirement)**

#### **If the case appears ready for further consideration or the Early Consideration Team**

##### **Triage of cases at intake stage**

- 1.22 The intake caseworker should decide if the case should be allocated to a specific caseworker team, or specialism. Where a case does not require specialist allocation, it should be passed to the ECT team for triage. This decision should be recorded on Dynamics 365. This record should include a summary of the complaint and an explanation of how we have reached our decision. **(Policy requirements)**
- 1.23 The intake caseworker should ensure enough information is recorded before the case is passed for further or early consideration **(Policy requirement)**. This includes:
- A completed complaint form or information recorded on file that answers all of the complaint form's questions.
  - All complaint responses from the organisation (including a second tier or other complaint handler response if applicable).
  - A recording of any meetings, and a transcript (if already available).
  - Consent from the aggrieved or complainant where they are being represented.
  - A telephone number for the representative and complainant.

- 1.24 When this information is not recorded it should usually be requested over the telephone. Consideration should be given though to the complainant's preferred method of communication. **(Policy requirements)**
- 1.25 If a case is ready for us, but we require further information, for example a complaint form, the intake caseworker should write to the complainant explaining this. The case should then be closed as 'further information required.' **(Policy requirements)**
- 1.26 If the complainant returns to us, and provides the information requested, the case should be restarted and passed to an Intake caseworker for review. **(Policy requirements)**
- 1.27 If a party to a complaint contacts us at any stage of our process, an acknowledgement of their contact, or a response, should be sent out to them within 10 working days, unless they are under restrictions set out in our unreasonable behaviour policy. **(Policy requirement)**

### **Telephone decisions and signposting**

- 1.28 If the intake caseworker speaks to the complainant on the telephone, and is able to give our decision, then they should do so. The intake caseworker should check whether the complainant is happy to not receive our decision in writing. **(Policy requirements)** If this is the case then the intake caseworker must ensure that any representatives (including MPs) are still informed. **(Legal requirement)**
- 1.29 If the complainant asks for the decision in writing then the intake caseworker must provide this. **(Legal requirement)** If the decision is to pass the case for further consideration, then a copy of our acknowledgement letter should also be sent to the complainant. **(Policy requirements)**
- 1.30 If the intake caseworker is deciding not to investigate a complaint then they should advise the complainant on what next steps to take. This may include signposting back to the organisation or suggesting a suitable advocacy agency. If a case is out of remit then the intake caseworker should try to identify another organisation, if possible, that can help and then direct the complainant to it. **(Policy requirements)**

### **Having good conversations**

- 1.31 Whether having conversations verbally, or interacting with someone via email or letter, we should ensure our communication with all parties is polite, sensitive and empathetic through-out the lifetime of a case.
- 1.32 We should ensure all verbal and written communication we have with parties to a case is polite, respectful and builds rapport with our complainants. **(Policy requirement)** We do this by;

- Referring to the complainant formally, unless prompted otherwise.
- Writing or speaking in a friendly but professional manner.
- Asking questions and recapping conversations, giving parties the opportunity to correct or amend this to come to an agreed understanding.
- Giving the complainant the opportunity to talk and demonstrating effective active listening.
- Speaking in a respectful tone, and;
- Addressing difficult contacts through good call handling techniques and in line with the unreasonable behaviour policy.

1.33 We should show empathy for both parties' situations in our communication throughout a case as appropriate. **(Policy requirement)** We do this by;

- Acknowledging how they have been affected, and any injustice they have told us they have experienced;
- Repeating words and phrases they have used in their communication with us to demonstrate we have listened, and understand what they have told us;
- And thanking them for sharing possibly upsetting events with us and acknowledging this must have been difficult.

1.34 The caseworker should manage communication with parties throughout the lifetime of the case. **(Policy requirement)** This includes;

- Planning communication with parties out in advance where possible;
- Sharing any planned leave with parties in advance;
- Recording conversations on Dynamics 365 and sharing copies of these contacts with parties to agree understanding if appropriate;
- Ensuring the complainant understands where they are in the casework process;
- Returning requests for call back within a reasonable timeframe (usually within 48 hours)

### Case categorisation and triage

1.35 The intake caseworker must complete a triage of the case before passing it for further consideration and decide whether a case is suitable for general, senior caseworker, or complex & significant allocation. **(Policy requirement)**

1.36 This decision should be made by reviewing the questions listed in the casework categorisation criteria in the supporting guidance. **(Policy requirement)**

1.37 The intake caseworker should categorise the case based on the information already available to them. If there is not enough information to make a decision, the case should be categorised for general allocation.

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- 1.38 The categorisation category should be set on Dynamics 365 through the triage function. The intake caseworker should respond to the questions asked and answer yes when questioned if the case belongs to the appropriate category.
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### **Priority allocation**

- 1.39 In exceptional circumstances we may decide a case should be prioritised for further consideration (such as when a complainant has a terminal illness). If the intake caseworker considers this appropriate they should discuss this with their manager first. They should then ensure this decision is fully audited on Dynamics 365 in the 'special handling' section of the case. **(Policy requirements)**

### **Providing additional support for complainants**

- 1.40 There will be occasions when a complainant may request or need further support from us in accessing the complaints process or bringing us their complaint. In these instances, the intake caseworker should take a proportionate approach to providing assistance which will depend on the individual complainant's needs.
- 1.41 Ways we can offer help include:
- Forwarding a complaint to an organisation complained about.
  - Providing details of an advocacy service.
  - Helping to get in contact with an MP and assisting with the referral process if appropriate (this must be made in writing to the MP).
  - Completing a complaint form for the complainant (this should then be sent to them for a signature).

### **Requests for reasonable adjustments under the Equality Act 2010**

- 1.42 If we receive a request for a reasonable adjustment, at any stage of the casework process, then it must be fully considered under the Equality Act and its related Codes of Practice. **(Legal requirement)**
- 1.43 Any request for a reasonable adjustment should be added to the case. If we decide an adjustment is reasonable we should clearly record the individual's disability, what reasonable adjustments are requested and when we agreed, on the complainants Dynamics 365 record. Selecting their disability type from the drop-down menu and recording the adjustment requested in the accessibility and reasonable adjustment section. Any questions about agreeing an adjustment should be escalated through line-management. **(Policy requirements)**
- 1.44 If we decide an adjustment is not reasonable then we should record what was requested, when it was requested and the reasons why we determined it was not reasonable, in the accessibility and reasonable adjustment

section on complainant's Dynamics 365 record. We should also consider if there are other ways we can assist the complainant. The Legal Team must be informed if we decide an adjustment is not reasonable. **(Policy requirements)**

- 1.45 A letter should be sent to the complainant confirming the outcome of the reasonable adjustment request and a copy of the letter should be attached to the complainant's Dynamics 365 record.
- 1.46 Assistance can be provided to caseworkers in considering a request for a reasonable adjustment by emailing [++edicasework@ombudsman.org.uk](mailto:++edicasework@ombudsman.org.uk).
- 1.47 All requests for additional accessibility outside of the Equality Act 2010 should be recorded in the accessibility section of the complainant's Dynamics 365 record.

### Anticipating adjustments

- 1.48 If during our consideration of a case we are provided with information that suggests an adjustment to our service may be required, we should consider raising this with the complainant. **(Policy requirement)** For example, if a complainant's case refers to them being partially sighted, but they have not specified they want large font print, we may wish to ask if this is required.

### Joint working cases

- 1.49 We must share cases with other Ombudsman where we identify that a complaint may partly fall within their jurisdiction. **(Legal requirement)** Most of the joint working cases we receive will involve the Local Government and Social Care Ombudsman (LGSCO).
- 1.50 If an intake caseworker identifies a case is joint working, then this should be recorded as a 'joint working case' on the Dynamics 365. If the case is joint working but not with the LGSCO then it can either be closed or passed for further consideration as appropriate and does not need to be referred to the joint working team. **(Policy requirements)**

### Joint working with the LGSCO

- 1.51 We have a joint working team, across both our Office and the LGSCO, who consider cases which involve both NHS and local authority funded actions. The following topics may indicate a case is potentially joint working;
  - Community Mental Health Teams (CMHTs)
  - Integrated mental health care teams (Partnership Trusts)
  - Assessments under the Care Act where there is also health involvement (often arises in mental health cases)
  - Children in transition

- Learning Disabilities
- Special Educational Needs (cases may involve children whose SEN includes the provision of support from NHS services)
- Speech and language therapy (SALT)
- CAMHS (Child and Adolescent Mental Health Services)
- Care Programme Approach (mental health cases)
- Safeguarding
- Deprivation of Liberty (DOLs)
- Section 117- funding or provision of services
- Continuing Care (possible overlap with joint working)
- Hospital discharge (where actions which are the responsibility of the local authority are complained about, usually in terms of actions to put in place appropriate support in the community)
- Social care - housing, benefits etc
- Jointly funded home care arrangements
- Care in residential home placements that is jointly funded e.g. FNC (Funded Nursing Contributions) + self-funder or FNC + Council
- Care in residential placements where there is an element of poor GP service
- Carer's assessments
- People in the care of a local authority
- Direct Payments

1.52 Joint working cases that are premature will usually need to complete the complaints process before being considered further. The caseworker on the joint working team can decide to transfer a premature case to the Joint Working team if appropriate. For example, the local authority complaints procedure has been concluded and further enquiries need to be made.

1.53 If the caseworker on the joint working team decides the case should be passed for their consideration, then the intake caseworker must contact the complainant and ask for their consent for us to jointly work with the LGSCO. They should then follow the process agreed with the LGSCO to handle the case. **(Policy requirement)**

1.54 Any decision made on a joint working case at assessment or investigation stage should be agreed in line with our joint working Delegation Scheme. This includes the decision to issue a provisional views or final report.

#### Joint working cases that are received on the phone

1.55 If an intake caseworker identifies a case may require joint working while taking a call on the advice line, then they should explain this to the complainant. They should ask for consent while on the call and record on the Dynamics 365 if permission is given. **(Policy requirements)** If the telephone call relates to a new case it can be closed on Dynamics 365 as being 'not properly made'.



## Parliamentary joint working cases

- 1.56 On rare occasions we receive cases that involve both a government department and local authority. If an intake caseworker identifies a properly made parliamentary case that may require joint working, they should discuss this with the joint working team. **(Policy requirement)**

## Prison complaints

- 1.57 When considering a case about a prison the intake caseworker should check whether it concerns the actions of the prison itself (such as the decision to transfer to a different prison) or the healthcare the prisoner has received. **(Policy requirement)**
- 1.58 Prison cases usually come under our parliamentary legislation and therefore we require an MP referral before we can consider them **(Legal requirement)**. These cases usually also involve the Prisons and Probation Ombudsman.
- 1.59 Complaints about healthcare at a prison are recorded against the organisation that provides the service. This will usually be an NHS organisation and the case will therefore be a health complaint.
- 1.60 When we receive a case from a prisoner we should make sure we record their prison number and include this on all correspondence. We should also include 'confidential access rights apply' at the top of the letter and on the front and back of the envelope in red pen. **(Policy requirement)**

## Obtaining information

- 1.61 The intake caseworker should tell complainants that we may need to obtain (and share) information about their case. **(Policy requirement)** Complainants who complete a complaint form are also asked to provide consent for us to obtain relevant information/papers (including medical records, for health complaints).
- 1.62 Any consent we receive to refer a case to another Ombudsman or complaint handler should be recorded in the consent section of the complainants record on Dynamics 365. **(Policy requirement)**

## Verifying caller identity

- 1.63 We should look to verify the identity of the complainant for every incoming and outgoing telephone call at each stage of our casework process. **(Policy requirement)** To do this we should be asking at least three security questions to verify the person's identity, ideally different questions each time. **(Policy requirements)** These may include:
- The first line of the complainant's address.

- Their postcode.
- The organisation they have complained about (the complainant may know the organisation by another name, such as the Jobcentre, JCP, DWP).
- The last three digits of a telephone number.
- When they last contacted us and how.

We should then check this against the details held on Dynamics 365 before sharing any information about the case. If we have any concerns about the identity of the caller we should ask further security questions. After confirming the person's identity, we must correct any out of date information on Dynamics 365. **(Policy requirements)**

- 1.64 We can decide not to ask a complainant to verify their identity, but only in limited circumstances where it would be entirely unreasonable to ask them to do so. This could be when we have only just spoken to the complainant. In these instances, we can use discretion in deciding whether to ask for this information again. **(Policy requirement)**
- 1.65 We must check that we have the authority of the complainant before releasing any information about a case to a third party. **(Policy requirement)** This includes professional advocates and MPs (for health complaints).
- 1.66 We should also be aware that we often have access to personal and sensitive information (such as a complainant's medical history) and should not share this with a third party unless the complainant is happy for us to do so. **(Policy requirement)** Please note that there is a specific policy for circumstances in which we need to release information if we think there is a risk to others.

## Section 2. Can we look into your case?

### Is the complaint about an organisation we can investigate?

2.1 If we receive a case that concerns an organisation we do not have legal powers to investigate it should be created on Dynamics 365 as a 'complaint'. Once we have then completed our work on the case it can then be closed as 'organisation out of jurisdiction'<sup>1</sup>. **(Policy requirement)**

### Is the complaint in remit?

2.2 If a complaint is about an organisation we can investigate but the complaint itself is out of remit then we still cannot investigate. The out of remit categories are listed below. Further information is available in our supporting guidance.

- Actions abroad other than consular functions<sup>2</sup> (parliamentary cases only).
- Administrative action taken on judicial authority<sup>3</sup> (parliamentary cases only).
- Alternative legal remedy achieved.<sup>4</sup>
- Commencement/conduct of civil/criminal proceedings<sup>5</sup> (parliamentary cases only).
- Commercial/contractual matters<sup>6</sup>.
- Criminal investigation or national security<sup>7</sup> (parliamentary cases only).
- Exercise of judicial/legislative functions<sup>8</sup> (parliamentary cases only).
- Ineligible complainant.<sup>9</sup>
- Out of remit - other.
- Pre-1996 clinical matters<sup>10</sup> (health cases only).
- Private healthcare (not NHS funded)<sup>11</sup> (health cases only)
- Public service personnel matters.<sup>12</sup>
- Three-year rule<sup>13</sup> (health cases only).

2.3 For more information or advice, please refer to the full text of the relevant law or to line management in the first instance. Enquiries can then be escalated to the Legal Team if necessary.

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<sup>1</sup> Schedule 2, 1967 Act; sections 2, 2A and 2B, 1993 Act

<sup>2</sup> Sections 6(5), Schedule 3 Paragraph 2, 1967 Act

<sup>3</sup> Schedule 3, Paragraphs 6A, 6B and 12, 1967 Act

<sup>4</sup> Section 5(2), 1967 Act; section 4, 1993 Act

<sup>5</sup> Schedule 3, Paragraph 6, 1967 Act

<sup>6</sup> Schedule 3, Paragraph 9, 1967 Act; section 7(2), 1993 Act

<sup>7</sup> Schedule 3 Paragraph 5, 1967 Act

<sup>8</sup> Section 5(1), 1967 Act

<sup>9</sup> Section 6, 1967 Act; section 9, 1993 Act

<sup>10</sup> Health Service Commissioners Amendment Act 1996; Commencement Order SI 1996/970 Article 2

<sup>11</sup> Sections 2 and 3, 1993 Act

<sup>12</sup> Schedule 3, paragraph 10, 1967 Act; section 7(1), 1993 Act

<sup>13</sup> Section 9(4A and B), 1993 Act

2.4 If an entire complaint falls within one (or more) of these reasons then the case should be declined for investigation. Where possible, complainants should be advised where their complaint can be sent (for example, to another Ombudsman or complaint handler).

### **The Victims' Code**

2.5 The Victims' Code sets out in law the minimum level of service victims should expect to receive from organisations within the criminal justice system. Our role is to consider complaints made to us that an organisation has failed to meet their responsibilities under the Victims' Code<sup>14</sup>.

2.6 There are some organisations which only fall under our remit when a complaint concerns the Victims' Code. The intake caseworker should therefore ensure a complaint made about these organisations does not concern the Victim's Code before declining a complaint for investigation. **(Policy requirement)**

### **Is the complaint properly made?**

2.7 If the complaint concerns an organisation in jurisdiction, the subject of which is also in remit, then the intake caseworker will need to decide if it has been properly made. If a complaint has not been properly made then we cannot propose to investigate it<sup>15</sup>. **(Policy requirement)**

### **Health case requirements**

2.8 In health cases a complaint must be made in writing to be properly made<sup>16</sup> **(Legal requirement)**. We treat complaints made by email or via our online complaint form as being in writing.

2.9 If a complainant approaches us via social media we should treat their complaint as being properly made. In these instances, we should try to contact the complainant on the telephone to discuss their case further or ask them to complete our online complaint form. This should be recorded on Dynamics 365 as a case with the relevant delivery method of 'Twitter'. **(Policy requirement)**

2.10 If we decline a complaint as not being ready for us to consider, we should explain why the complaint is not ready and, if appropriate, signpost the complainant to a suitable advocacy organisation that may be able to offer further support. **(Policy requirements)**.

2.11 If we think that a complainant may find it difficult to access an advocacy organisation, then we should consider completing a complaint form on their behalf. We should then send this to the complainant to confirm it is accurate. (We would then not treat the complaint as properly made until the form is returned with consent to proceed.) **(Policy requirement)**

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<sup>14</sup> For more information about Victims' Code cases, see the briefing note.

<sup>15</sup> Section 9 (2) 1993 Act and Section 5 (1A and B) 1967 Act

<sup>16</sup> Section 9 (2) 1993 Act

Not properly made and premature

2.12 If it appears the complaints procedure has not been completed, the intake caseworker should direct the complainant to attempt or complete local resolution first **(Policy requirement)**.

2.13 The intake caseworker should advise the complainant that, following completion of local resolution, it is a requirement that the complaint is made in writing. If appropriate, the complainant should be provided with information about our time limits. The case should then be closed as 'Not properly made - not in writing'.

Not properly made and local resolution completed

2.14 If it appears that local complaints procedures have been completed then the complainant should be told that the complaint needs to be made in writing. The intake caseworker should then direct the complainant to our website or send a copy of our complaint form. **(Policy requirements)** If appropriate, the complainant should be provided with information about the time limit.

2.15 Complaints at this stage can then be closed as 'Not properly made - not in writing'. If the complainant later returns with the same complaint in writing, then a new case will be created (with the reference connected to the previous one). **(Policy requirement)**

### **Parliamentary case requirements**

2.16 In parliamentary cases a complaint must be made in writing to a MP and then referred to us by that MP<sup>17</sup> **(Legal requirements)**. This must include the consent of the person aggrieved and a request from the MP that we investigate the complaint. **(Legal requirements)** The complainant has to make the complaint to the MP in writing but there is no requirement for the referral from the MP to us to be.

2.17 We do not need the complainant to provide written consent to the MP to pass the case to us. The intake caseworker should check that the complainant knows the MP has referred the complaint to us (for example, have they signed a complaint form). **(Policy requirement)** This is because without their consent the case cannot be properly made.

2.18 A referral that clearly comes from an MP's office and is signed by a member of their staff on their behalf as part of their delegated duties, can be treated as a properly made for our purposes.

2.19 If the Intake caseworker has any concerns over whether the referral is genuine, they should check with the referring MP's office. **(Policy requirement)**

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<sup>17</sup> Section 5 (1a) 1967 Act

2.20 Referrals can be made by any MP. But there is an unwritten convention between MPs that they will not interfere in another MP's constituency business. This means, in practice, complaints will normally be made to the complainant's own constituency MP.

#### When an MP dies or leaves office while we are handling a case

2.21 If a referring MP (Parliamentary) or MP who assisted in the making of the complaint (Health) dies or leaves office while we are handling a case, then we treat their successor as the 'appropriate' MP for the purposes of the 1967 and 1993 Acts<sup>1</sup>. (Legal requirement) We should therefore send them a copy of our decision not to investigate or copies of our draft and final report as appropriate. (Policy requirement)

2.22 While waiting for a new MP to be elected we can still send decisions not to investigate or reports to other involved parties, for example; the complainant or organisation complained about. We should clarify to the complainant that we will send a copy of the decision or report once they have a new MP. The decision not to investigate or report must then be issued to the new MP once elected. (Policy requirements)

2.23 When contacting a new MP for the first time we should explain that we are writing to them because their predecessor either referred or assisted in the making of the complaint. (Policy requirement)

2.24 If a new MP is elected during an investigation then it may be appropriate to contact them to say that we will be corresponding with them as the investigation progresses, as opposed to only making contact at the time when we are issuing the draft or final report. Such decisions should be taken on a case-by-case basis.

2.25 The caseworker should ensure a copy of the decision letter or report is sent to the MP who is elected. (Legal requirement) We do not need to send acknowledgement letters or proposal to accept for investigation letters out in these circumstances. (Policy requirement)

2.26 Once a new MP is elected their details should be added as a separate MP record on Dynamics 365. The caseworker adding the new MP should make a request that the previous record is made inactive. (Policy requirement)

#### When a complainant moves constituencies

2.27 On occasion a complainant may change their address, and in the process their parliamentary constituency, while we are still considering their case. In these circumstances we are still required to send our final decision or investigation report to the original MP who referred the case.

2.28 This is because, in Parliamentary cases, section 10(1) of the 1967 Act requires that we send a decision not to investigate or an investigation report to the referring MP (Legal requirement). Similarly in Health cases, where a complainant has chosen to put their complaint through an MP, section 14 (1 & 2) requires us to send our decision not to investigate or investigation report to any MP who assisted in the making of the complaint (**Legal requirement**).

2.29 There is nothing to prevent us from still sending decisions or reports to the ‘new MP’, if the complainant asks us to do so. We should explain in our initial contact with the ‘new’ MP the reasons we are sending them the decision or report and that this is at the request of the complainant. (**Policy requirement**)

#### When a complainant does not have an MP

2.30 Where a complainant does not have an MP, and has not previously been a UK resident<sup>18</sup>, they can contact the Chair of the Public Affairs and Constitutional Affairs Committee (PACAC), to refer the complaint on their behalf. You should direct them to contact the Chair via PACAC and **not** via the Chair’s constituency office as the referral is made in their role of Chair of PACAC, not as a constituency MP.

2.31 The contact details are:

Public Administration and Constitutional Affairs Committee  
House of Commons  
London  
SW1A 0AA  
Telephone: 020 7219 3268  
Email: [pacac@parliament.uk](mailto:pacac@parliament.uk)

#### When an MP refuses to refer a complaint

2.32 In circumstances where a complainant’s own MP will not refer the complaint, you should **not** direct them to contact the Chair of PACAC (see above).

2.33 We are not able to require an MP to refer a complaint and nor should we act on a complainant’s behalf to try and get an MP to make a referral. If a complainant wants to try and find another MP to support the referral, then we can provide them with contact details for the House of Commons. However, we should tell them that MPs will not normally act on behalf of another MP’s constituent.

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<sup>18</sup> Complaints from individuals who have previously lived in the UK should be directed to contact their previous constituency MP instead, as they will be on the electoral register in this area for up to fifteen years after leaving the UK.

## Not properly made and premature

- 2.34 If it appears the relevant complaints procedure has not been completed, the complainant should be directed to attempt or complete local resolution first. **(Policy requirement)** If appropriate, the complainant should be provided with information about the time limit.
- 2.35 The intake caseworker should advise the complainant that following completion of local resolution it is a requirement that the complaint is referred to us by an MP. **(Policy requirement)** The case should then be closed as 'No MP referral'.

## Not properly made and local resolution completed

- 2.36 If it appears local complaints procedures have been completed then the complainant should be told that the complaint needs to be referred by a MP. **(Policy requirement)** If appropriate, the complainant should be provided with information about our time limits.
- 2.37 Complaints at this stage can then be closed as 'No MP referral'. If the complainant later returns with an MP referral, then a new case will be created (with the reference connected to the previous one).

## Cases previously closed as properly made and premature

- 2.38 If a case is previously closed as premature and the complainant returns to us having completed local resolution, then we can still consider it as properly made on the merits of the previous MP referral. We do this in order to be customer-focused and to help complaints be considered as quickly as possible. The intake caseworker must ensure the complaint brought back to us still concerns the same organisation and complaint as previously raised. **(Policy requirement)**

## Complaints made by telephone

- 2.39 All complaints received over the telephone will usually be closed as 'not properly made'. This will be because there is 'no MP referral' (Parliamentary) recorded or because the complaint is 'not in writing' (Health). The intake caseworker should still try to establish if the case is ready for us, so that appropriate advice can be given. **(Policy requirement)**

## Restarting a closed case

- 2.40 If after a case is closed as 'not properly made', or 'premature' the complainant returns to us, the caseworker should review the case and determine if a new decision should be made. **(Policy requirement)**
- 2.41 If the case has not progressed from our previous decision, then the case should not be restarted and any further contact with the complainant should be recorded on the Dynamics 365 record. **(Policy requirement)**



2.42 If the case was previously not properly made, and is now in writing, or referred by an MP, the case should be restarted, and a new decision recorded. **(Policy requirement)**

2.43 If a case was previously properly made and premature, and is now ready for further consideration, the case should be restarted, and passed to early consideration for triage or our casework teams. **(Policy requirement)**

### **Is the complaint ready for us?**

2.44 If we consider a case is in remit and has been properly made then we next look at whether the complaint has been through the local complaints process. In some cases, a health organisation may ask to self-refer a complaint directly to us. If we receive these cases they should be referred directly to the Assistant Director - Casework for senior caseworker teams. Further information is available in the supporting guidance.

2.45 In health cases, the law<sup>19</sup> prevents us from conducting an investigation unless we are satisfied the complaints process has been used and exhausted, or it was not reasonable to expect the complainant to have done so. **(Legal requirement)**. There is no legal requirement for parliamentary complaints to have been looked at by the organisation complained about.

2.46 A complainant bringing a complaint to us should usually have given the organisation responsible an opportunity to formally respond and resolve their complaint before we would consider it. **(Policy requirement)**

2.47 If a complainant has not yet started the local complaints process then we will normally decline to investigate the complaint as premature for our consideration.

2.48 NHS complaint handling regulations<sup>20</sup> require a complaint to be responded to in writing. If we therefore receive a case where a health organisation has only supplied an audio response to the complainant, we should contact the organisation concerned and ask them to provide a written response to the complainant. We should then decline the case as premature. **(Policy requirement)**

2.49 In some cases, NHS organisations will offer local resolution meetings to discuss the complaint further once they have issued their formal written response. If such a meeting is offered, we should suggest to the complainant they pursue this as a suitable next step in trying to get their complaint resolved.

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<sup>19</sup> Section 4(4) and (5) 1993 Act

<sup>20</sup> Section 14 (2) The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009

- 2.50 If the complainant doesn't want to attend a meeting, we should suggest they return to the organisation complained about and ask for confirmation in writing that local resolution is now complete. The intake caseworker can confirm local resolution is complete on behalf of the complainant, if appropriate to the case, and should record the outcome of this conversation on Dynamics 365.
- 2.51 When an organisation complained about is prepared to consider a complaint further, or there are additional stages in the complaints process to complete, we will usually close a complaint as 'Premature: local resolution ongoing'.
- 2.52 Complainants whose cases we close as premature should be told about our time limit and that we can put it to one side if we consider it is reasonable to do so. **(Policy requirement)**

### **Exceptional circumstances where we may consider a premature complaint**

- 2.53 There are some exceptional circumstances where we may decide to consider a premature complaint. For example, if the complainant is suffering particular difficulties, has a terminal illness or where it is clear that the relationship between the complainant and the organisation has broken down completely.
- 2.54 If the organisation has provided a Duty of Candour response but no local resolution response, then we should consider whether there is any merit in looking further at the complaint even without a local resolution letter.
- 2.55 If we decide not to require a complainant to have completed previous procedures, the intake caseworker should record this on Dynamics 365 and explain why we should consider the case now. **(Policy requirement)**

### **Is the complainant claiming a less serious impact or injustice? Decision on our health cases**

- 2.56 We are an ombudsman provided for, and funded by, the public. We therefore need to ensure that we maintain a balance in our work between supporting those who complain to us to get a remedy for the injustice they have experienced, while ensuring we use our resources to focus on those where we can achieve the most impact and support those who need our help the most.
- 2.57 This means that in some circumstances we will take the decision to not consider a case where someone tells us that the injustice they have experienced has not had a significant or lasting impact on them, or the person they are representing. The process below sets out how we consider this.
- 2.58 Cases will usually be triaged in our early consideration team (ECT). If a case relates to a particular speciality, or is more complicated to consider for another reason, it can be transferred to another caseworker team.

2.59 Our parliamentary cases will not be triaged in the same way. This is to ensure we effectively monitor these cases for systemic insight, and that we consider a representative number of parliamentary complaints, as health casework makes up a higher proportion of the cases we receive.

#### **Process**

2.60 The caseworker should review the information we have been provided with by the complainant on how they say they have been impacted (their claimed injustice) by what has happened. They should then decide if it is significant enough for us to consider the case. **(Policy requirement)**

2.61 If the injustice is not significant enough for us to consider further, the caseworker should also consider if there is a good reason to still undertake further work on it. **(Policy requirement)**

2.62 We will usually consider a case should still be passed for further review when:

- The case relates to an issue we consider could be systemic and where we think we could add value for a larger group of people.
- The case relates to a complaint that is significantly serious which we would still want to consider further.

2.63 The caseworker should also consider if we could resolve the case with minimal intervention. **(Policy requirement)** This will usually be limited to circumstances where:

- The case can be resolved with a few telephone calls, or contacts.
- The case is simple, and the outcome sought is clearly linked to the complaint and the injustice.
- The organisation has acknowledged something went wrong and is likely to agree to a resolution. For example, where an organisation has already acknowledged a failing, and the complainant is seeking an apology.

#### Considering requested reasonable adjustments

2.64 When reviewing this information, the caseworker should ensure they consider any reasonable adjustments the complainant has requested<sup>21</sup>. **(Legal requirement)** This includes considering whether the complainant has suggested they are unable to fully explain their complaint or its impact to us because of a need for an adjustment. **(Policy requirement)** For example, due to a physical or mental health condition.

2.65 When appropriate, the caseworker should ensure they adjust their consideration accordingly and explain how they have done this. **(Policy requirement)** For example, speaking to a complainant on the telephone about their complaint and injustice prior to reaching a decision.

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<sup>21</sup> See section 1.40 of SMPG for information about handling reasonable adjustments.

## Deciding if the impact or injustice is less serious

- 2.66 The caseworker should review the claimed injustice expressed by the complainant and decide whether the impact is substantial enough for us to consider the case further. In cases where the complainant has claimed more than one injustice, the caseworker should consider the most serious when making their triage decision but take into account the cumulative effect of multiple injustices. **(Policy requirements)**
- 2.67 The caseworker should use our Severity Scale of Injustice to support their decision making by considering where the claimed injustice may sit within it. We will usually consider the injustice to a complainant is significant when the claimed injustice is level three or above. **(Policy requirements)**
- 2.68 There is no complete list of claimed injustices that may be more or less significant for us to consider. The caseworker should consider the points below though when making a decision. **(Policy requirement)** It is likely to not be a significant injustice when the complainant says the impact:
- Is limited to what a healthy person is likely to experience in their life. For example, frustration at a minor delay in accessing an oversubscribed public service.
  - Is limited to the feeling of general distress, with no additional impacts on their life.
  - Consisted of minor pain that lasted for less than a month or severe pain that lasted less than a week and caused no further problems.
- 2.69 It is more likely to be a significant injustice when the complainant says:
- The impact on them was greater than general distress. For example, stating it led to poor performance at work or job loss, needing to seek medical help for stress or increased consumption of alcohol or drugs. This will usually be for over 6 months or more.
  - The impact only lasted for a short period of time but was significant in scale. For example, a one-off traumatic event that had a lasting impact.
  - They experienced minor pain for more than a month duration, or severe pain which lasted more than a week and caused further problems.
- 2.70 When deciding whether the injustice claimed is significant, the caseworker should only focus on the injustice claimed by the complainant, and not on how serious they consider the circumstances of the complaint. **(Policy requirement)** Where a case is significantly serious, a caseworker can consider whether an exception might apply.
- 2.71 Where something serious could have happened, but didn't, the caseworker should consider the distress this caused the complainant, as opposed to any physical injury that could have occurred. **(Policy requirement)** For example, in a complaint where a nurse nearly injected the wrong medication, but did not

do so, the injustice will be the distress this near miss caused the complainant, not that the medication may have seriously injured them.

### **Recording a decision about the seriousness of the impact or injustice**

#### When we still decide to consider a case or there are other reasons to do so

2.72 If the caseworker considers they should consider a case further, or there is wider public interest, or exceptions to do so, they should decide whether the case should continue to be handled in ECT or passed for assessment. If a case is suitable for assessment, it should be added to the relevant queue for allocation. (Policy requirements)

#### When we decide not to consider a case and there are no other reasons

2.73 If the caseworker considers we should not take the case further, they should explain their reasons on the ECT decision form and contact the complainant to provide their decision. (Policy requirements) This contact will usually be by telephone but can also be in writing.

2.74 If contact is by telephone, the caseworker does not need to write to the complainant, unless they specifically request it. If a written response is requested, it must be provided. The caseworker must also ensure that a written response is provided to any MPs involved in the case. (Legal requirements)

2.75 A decision to close a case as we consider it has a less serious impact or injustice is made under our general discretion and should be closed using the code 'Triage - other reason to decline'.

#### When we consider a case could be resolved

2.76 If the caseworker considers the case could be resolved with minimal intervention, then they should take any required action in line with our resolution guidance. (Policy requirement)

2.77 If the caseworker can resolve the case, it should be closed using the closure code 'ECT triage - Resolution'. If the caseworker is unable to resolve the case, they should consider whether further work should be undertaken or if the case should be closed now. (Policy requirements)

#### If we are unsure about the decision

2.78 If the caseworker does not have enough information to make a decision on the case, they should attempt to contact the complainant in writing or over the phone for this. (Policy requirement) The case can be closed as 'further information required'.

2.79 If the caseworker has enough information to understand the complaint and the injustice but is unsure whether the claimed injustice is significant, they should consider speaking to the complainant, review the case file or seek advice from a manager. (Policy requirement)

2.80 If a case is borderline the caseworker can, in exceptional circumstances, pass it for assessment with the consent of their manager. (Policy requirement)

### **Early case consideration**

2.81 As part of ensuring we make proportionate and timely decisions, we should consider whether a case can be resolved or adjudicated prior to being passed to assessment.

2.82 Information about the types of cases that may be suitable for early consideration is available under the headings below.

### **Communicating with the complainant**

2.83 The ECT caseworker should make contact with the complainant as soon as possible. During this contact, the ECT caseworker should explain where the case has reached in our process. (Policy requirements)

2.84 A reasonable number of attempts should be made to contact the complainant before taking further action on the case. If the ECT caseworker is unable to contact the complainant after three attempts, they should consider if enough information and evidence is available to still make a decision. (Policy requirements)

2.85 If the ECT caseworker considers enough information is available, they should record this on Dynamics 365 and proceed in making a decision on the case. (Policy requirement)

2.86 If the ECT caseworker considers further information is needed prior to reaching a decision, then they should record this on Dynamics 365. This decision should be communicated to the complainant and the case can then be closed as 'withdrawn' immediately or after any deadline has been provided. (Policy requirements)

### **Declining a case prior to assessment**

2.87 As part of their consideration of a case, the ECT should consider if there is good reason to decline a case that would usually be passed to assessment.

2.88 Some typical examples of cases that may be suitable for ECT are;

- There is no indication the organisation has done anything wrong, or the response they have provided is reasonable. For example, a sincere apology in response to a staff member making an inappropriate comment.
- Where there is more work the organisation complained about could do locally.
- where the caseworker quickly identifies we could not investigate due to our specific discretion tests.
- Where the issue raised is not something we can look at, or the case is more appropriate to be handled elsewhere. For example, a complaint about an information matter may be suitable for the Information Commissioner's Office, if they can achieve the outcome requested.
- The outcome is not something we can achieve, or would decide not to recommend, despite discussion about this with the complainant. For example, we are unlikely to recommend discipline against a medical professional, and would instead refer these cases to their regulator, such as the General Medical Council.

2.89 There is no specific type of case that will always be suitable to consider closing prior to assessment. Generally, cases should be passed to assessment instead if:

- The issues are too complex.
- The injustice/impact is very serious such as potential avoidable death cases, sepsis, loss of mobility/eyesight.
- Too much work will be involved in ECT closing the case and this would be disproportionate.
- There are indications of service failings linked to a serious injustice.
- Records are needed to make the decision (generally although there may be cases where this does not apply)
- Clinical or legal advice is needed (this is generally for more detailed and not very quick advice)
- There are long delays in getting responses from an organisation

### **Reaching a decision**

2.90 Later sections of this guidance document provide policy and guidance positions on how to decline cases under our specific and general discretion. The policy positions listed within these sections still apply to cases closed at early consideration stage. (Policy requirement)

2.91 As required with all cases where we are reaching a final decision on a case, a risk assessment should be completed prior to case closure. (Policy requirement)

## **Resolving a case prior to assessment**

### **Dispute Resolution through mediation (DR)**

- 2.92 The Dispute Resolution (DR) process is about using mediation to help our complainants and the organisations we investigate come to their own resolution of a complaint, without giving our own view on the substance of the complaint.
- 2.93 Mediation will not be offered on every case, as it will be looked into on a case-by-case basis and not all complaints are suited to this process.
- 2.94 Cases are either allocated to the DR team after intake but can be reallocated to the DR team if appropriate. DR cases can relate to any organisation we investigate.
- 2.95 Any case that is ready for further consideration may be appropriate for the DR process. If a caseworker believes DR may be suitable on a case assigned to them, they should consult with a member of the DR team to identify whether the case is suitable for their consideration. The caseworker may wish to discuss with their manager before approaching the DR team.
- 2.96 Complainants going through the DR process cannot request a review as we have not made a decision on their complaint. If you are unsure what to do in these circumstances, please seek manager guidance.

### **Passing a case to DR**

- 2.97 An initial conversation between the caseworker and the complainant about possible DR should take place to ensure the complainant wants to go through the mediation process. A caseworker in the DR team will have a similar discussion with the organisation.
- 2.98 If any party is unwilling to participate, the case will remain with the original caseworker, will not go through the DR process and will be assessed in line with our Service Model.
- 2.99 If both the organisation and complainant agree to go through the mediation process, the caseworker will send a consent form to the complainant, and the DR caseworker will send a consent form to the organisation. Once consent has been returned from both parties, the case will be transferred to the DR team for the DR process to begin. If consent is not provided, the case will remain with the original caseworker and will not go through the DR process.

### **Once the case has been accepted by DR**

- 2.100 The caseworker will speak with the complainant and the organisation separately, to hear what has happened, what their views on the complaint are and find out what they would like to achieve from DR.



- 2.101 During these conversations, the caseworker should establish if either party has a preferred method of contact or if any reasonable adjustments need to be made.
- 2.102 Once the initial information gathering has taken place, the caseworker will hold a meeting with both parties called a resolution conference. This will be either in person, by teleconference or videoconference.
- 2.103 The caseworker should ensure both parties communicate constructively about the complaint and go over the options for resolution, during the resolution conference. Any outcomes reached during the resolution conference need to be agreed by both parties.

### **Resolving a case through mediation**

- 2.104 If the case is resolved through mediation, the caseworker will then send a Resolution Agreement letter to both parties along with a record of what has been agreed and will confirm that the process has ended. We will then close the case on Dynamics.
- 2.105 As the DR caseworker has not made a decision on the issues of complaint, and instead has facilitated a resolution between the parties, no compliance process will follow. Actions agreed in a resolution conference are not PHSO recommendations and the caseworker does not need to produce a compliance plan.
- 2.106 If the parties cannot agree on an outcome, the caseworker will then be considered further in line with our Service Model Guidance.

### **Closing a case partly through mediation**

- 2.107 If parts of the complaint can be resolved through mediation, this should be recorded within complaint components in Dynamics 365, and closed with the relevant mediation outcomes.
- 2.108 The DR caseworker will then assess and make decisions on the other complaint components in line with our Service Model Guidance.

### **Resolution**

- 2.109 Resolution means delivering an answer or outcome for a complainant that resolves the complaint they have brought to us. This must be a complaint we can legally consider but could include complaints that are not properly made or ready for us to look at. **(Policy requirement)**
- 2.110 We must have taken specific action in order for a complaint issue to be considered resolved. **(Policy requirement)** This could include moving a complaint further along the local resolution process if the delays are the subject of the complaint. If an organisation was already taking the action

required or decides to take further action on a case as we are now involved, this is not a resolution.

- 2.111 In order to class a case as a resolution at early consideration stage we should seek agreement from the complainant that the case has been resolved to their satisfaction. **(Policy requirement)**
- 2.112 If a complainant does not consider our action has resolved their case, we should decide whether we consider the case should be passed for further consideration or should be closed using our discretion. **(Policy requirement)**
- 2.113 If passing the case for further consideration the DR caseworker should ensure they record on the case the action they have taken, the outcome they achieved for the complainant, and why this has not resolved the complainant's concerns. **(Policy requirement)**
- 2.114 A case can be closed overall as a resolution when either the majority of complaint issues raised with us are considered resolved, or where a complaint concerns a significant issue and several minor issues, and the significant issue is resolved.
- 2.115 There are no set criteria to the type of cases where a resolution should be attempted. Generally, though these resolutions should be achievable without requiring a large amount of additional information or evidence.
- 2.116 Some examples of the types of cases that could be suitable include;
- When an organisation has acknowledged failings, but not put things right or offered financial compensation. For example, asking for an organisation to pay for property it agreed it was responsible for losing.
  - When an organisation has not responded to all of the issues within a complaint and they agree to provide a further response.
- 2.117 There is no definition of a resolution in our legislation. A case closed as a resolution is a decision not to investigate and must be issued in line with the normal legal requirements. **(Legal requirement)**

#### Closing a resolution case

- 2.118 If a case is resolved within early consideration it should be closed under one of two closure codes, dependent on whether the case was ready for further consideration or not.
- Cases ready for further consideration, but completed by the DR caseworker, should be closed as 'general discretion - resolution'. **(Policy requirement)** For example, our intervention secures the apology a complainant wanted, but couldn't get themselves.
  - Cases which are not ready for further consideration, where the DR caseworker have resolved the complaint to the complainant's satisfaction should be closed as 'premature - resolution'. **(Policy requirement)** For example, our contact with an organisation gets the

complainant the outcome wanted, without the complainant completing the complaints process, or getting an MP referral.

## Complaints considered by other organisations

### Second tier complaint handlers

2.119 In some cases, a second tier complaint handler has been involved in replying to a complaint as an additional stage of their complaints process. Where this is the case we would usually expect a complainant to have completed this stage before we consider investigating. **(Policy requirement)**

2.120 Where complaints have not completed that second tier, they would normally be declined as premature. A second tier complaint handler can be an entirely separate organisation within our jurisdiction or a separate part of an organisation in our jurisdiction that acts as a complaint handler (such as the Independent Case Examiner).

2.121 An intake caseworker considering this type of complaint should record it as being about the original organisation unless the complainant has specifically said they only want to complain about the second tier. **(Policy requirement)** The case can then be closed or passed for further consideration.

2.122 We can, in exceptional circumstances, decide to consider a complaint further if the second tier has not been completed. For example, if the complainant is suffering particular difficulties, has a terminal illness or where it is clear that the relationship between the complainant and the organisation has broken down completely.

2.123 In these cases, the intake caseworker should clearly record why we are deciding to take this action, and this should be recorded on Dynamics 365. **(Policy requirement)**

### Second tier complaints when allocated to a caseworker

2.124 If a complaint is passed to a caseworker, then, during their initial contact with the complainant, they should confirm whether they are asking for us to investigate the actions of both the organisation and second tier. The caseworker should allow the complainant to lead this conversation and should only record the complaint as put to us. **(Policy requirement)**

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2.125 The caseworker should add either the original organisation, second tier, or both to the case to reflect the complaint made and the organisations complained about. The actions of any contractor acting on behalf of the organisation should also be recorded as a separate organisation. **(Policy requirements)**

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2.126 If the complainant only wants us to consider the actions of the original organisation then the caseworker should still confirm why the complainant remains unhappy with the second tier's response. **(Policy requirement)**

2.127 On some occasions the complainant may say they only want to complain about the original organisation, but the complaint described also concerns the second tier's actions. In these instances, the caseworker should ensure they explain this to the complainant so they can make an informed choice concerning what they would like us to investigate. **(Policy requirement)**

Examples of this type of issue include that:

- The remedy suggested by the second tier was unreasonable or did not go far enough to resolve the complaint.
- The second tier reached a conclusion based on inaccurate facts or misleading information.
- The service provided by the second tier was unreasonable or there was an unnecessary delay.

(It is still for the complainant to decide if they want us to only investigate the original organisation.)

2.128 If the complainant decides they only want us to consider the original organisation or second tier, then our work on a complaint should be limited to that organisation and all records should reflect this approach. **(Policy requirement)**

2.129 The caseworker can request any information they need during their further consideration of a case from both the organisation and second tier. If we decide to propose to investigate the complaint then the caseworker should give both the organisation and second tier the opportunity to comment. **(Policy requirement)**

Second tier complaints where both the organisation and second tier have been complained about

2.130 If a case concerns both the organisation and second tier then we can record different decisions about both. **(Policy requirement)** For example, in a case where the caseworker sees potential failings in an organisation's actions, but none in the second tier's, then different decisions should be recorded to reflect this.

Second tier complaints where only the organisation is complained about

2.131 Where a case only concerns an original organisation, the caseworker can still consider the second tier response as part of their work on a case if appropriate. The caseworker should still only record a case and decision against the organisation and this approach should be reflected in all communication had on the case. This means if the caseworker sees potential failings in an organisation's actions, but that the second tier's response resolved the complaint; then the decision should still be recorded in relation to the organisation. **(Policy requirement)**

Second tier complaints where only the second tier is complained about

- 2.132 On rare occasions we may receive a complaint that only concerns the actions of the second tier. These will usually concern the service received or a delay, rather than the decision. In these cases, the caseworker should check these specific issues have been raised with the second tier and consider whether the response provided was reasonable. **(Policy requirement)**
- 2.133 The caseworker should only record the case and decision about the second tier and this approach should be reflected in all communication on the case. **(Policy requirement)**

Passing a second tier complaint for investigation

- 2.134 If the caseworker decides a complaint should be passed for investigation then the complaint summary should only concern the organisation(s) we have assessed. The 'proposal to investigate' letters should be sent to the organisation(s) complained about, named people (if involved), any other services acting on their behalf and the second tier. **(Policy requirement)**

**Complaint handlers in health cases**

- 2.135 Under Section 7 of the NHS Complaints Regulations<sup>22</sup> a complainant has the option of approaching either the provider or the commissioner with their complaint. In these cases, the complaints process only needs to be completed with one of the organisations. **(Legal requirement)**
- 2.136 An intake caseworker considering this type of complaint should record it about the provider unless the complainant has specifically said the case concerns the commissioner only **(Policy requirement)**. The case can then be closed or passed for further consideration.

Cases passed for further consideration

- 2.137 If a complaint is passed to a caseworker, then during their initial contact with the complainant they should confirm whether they are asking for us to investigate the actions of both the organisation and commissioner. The caseworker should allow the complainant to lead this conversation and should only record the complaint as put to them. **(Policy requirement)**
- 
- 2.138 If the complaint concerns both organisations, then when recording complaint components on the case the caseworker should ensure complaint components are recorded about both the organisation and the commissioner, even if the areas of complaint are the same.
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- 2.139 If the complainant only wants us to consider the actions of the original organisation then the caseworker should still confirm why the complainant

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<sup>22</sup> The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009

remains unhappy with the commissioner's response and whether there is a specific complaint about the commissioning of the service, such as how it was funded. **(Policy requirement)**

2.140 If the complainant decides they want us to consider only the original organisation or commissioner, then our assessment should be limited to that organisation and all records should reflect this approach. **(Policy requirement)**

2.141 The caseworker can still request any information required during our assessment from both the organisation and commissioner and should give both the option to comment if we accept the case in principle for investigation. **(Policy requirement)**

Complaints where both the organisation and commissioner are being complained about

2.142 If a case concerns both the organisation and commissioner then we should make separate decisions about both. **(Policy requirement)** For example, in a case where the caseworker sees potential failings in an organisation's actions, but none in the commissioner's, then different decisions should be recorded.

Complaints where only the organisation is complained about and not the commissioner

2.143 Where a case only concerns an original organisation, the caseworker should still consider the response provided by the commissioner as part of their assessment. **(Policy requirement)** We may be able to reach a decision on whether to propose to investigate the complaint largely based upon the response from the commissioner, if we decide the actions of the second tier in resolving the complaint were reasonable.

2.144 The caseworker should only record a case and decision about the organisation and this approach should be reflected in all communication on the case. This means if the caseworker sees potential failings in an organisation's actions, but none in the commissioner's response then the decision should still be recorded in relation to the organisation's actions. **(Policy requirement)**

Complaints where only the commissioner is complained about

2.145 We may receive a complaint that only concerns the actions of the commissioner. For example, these may only concern a decision whether to fund treatment or to use a specific organisation to provide services. In these cases, the caseworker should check these specific issues have been raised and addressed and decide whether the response provided was reasonable. **(Policy requirement)**

- 2.146 The caseworker should only record the case and decision about the commissioner and this approach should be reflected in all communication on the case. **(Policy requirement)**

## Continuing Healthcare

Cases where a review has not been completed

- 2.147 When a Clinical Commissioning Group (CCG) is considering a person's eligibility for funding, a checklist will be completed to see whether the person needs a full assessment. If a completed checklist indicates that a full assessment is needed, this will be completed using a Decision Support Tool. If we receive a complaint about a decision where a person has been found not to be eligible at the checklist stage, we should check that the CCG has reviewed this decision.
- 2.148 If we receive a complaint about a decision where a person has been found not to be eligible after a full assessment, we should check whether there has been a review by the CCG and NHS England. If there has not been a review by NHS England we should signpost the person making the complaint to NHS England's review process. **(Policy requirements)**
- 2.149 In this type of complaint, we should record the relevant CCG as the organisation to assess. **(Policy requirement)**

Cases where a review has been completed

- 2.150 NHS England is legally responsible for carrying out independent reviews of CCGs' decisions on whether people should receive funding. NHS England's reviews are to make sure that the decisions made by CCGs were correct. NHS England's review is a separate legal responsibility and is not carried out on behalf of CCGs. Consequently, NHS England's reviews are a function of NHS England and not second-tier complaint handling on behalf of CCGs.
- 2.151 If we receive a complaint when there has already been a review by NHS England, we should check with the person making the complaint why they are unhappy with NHS England's review. In most cases, if we have a complaint about NHS England's review, we should send a letter to the person who made the complaint explaining that we will only be investigating NHS England's review and that we will not be investigating the CCG as its actions have already been considered by NHS England.
- 2.152 In this type of complaint, we should record the relevant NHS commissioning region as the organisation to assess. **(Policy requirement)**
- 2.153 There will be some cases where it might be appropriate to investigate before there has been a review by NHS England and some cases where we might need to investigate both the CCG and NHS England. These cases should be discussed with a manager.

- 2.154 The caseworker should ensure in these instances that there are written complaints about both the CCG and NHS England on file and that both the CCG and NHS commissioning region have been added as organisations complained about (either as the organisation on the case or as a complaint component). **(Policy requirements)**

### **Individual Funding Requests**

- 2.155 An Individual Funding Request (IFR) is an application to fund healthcare which falls outside the range of services and treatments which are routinely commissioned. Only a doctor can apply for an IFR on behalf of a patient.
- 2.156 The NHS Directions allow CCGs to make decisions about which services will and will not be funded on the NHS. Each CCG has its own policies for certain treatments and an IFR policy. Where a commissioning policy already exists, CCGs will consider whether there are sufficient grounds to agree funding. Where no commissioning policy exists, CCGs will consider whether individual funding can be supported.
- 2.157 If a complaint is received about a decision where funding has been declined, the caseworker should check that the application submitted to the CCG includes the information outlined by the patient. They should also check which policy has been used and confirm whether the CCG's decision is in accordance with its policies and the NHS Directions. They should also consider if the policy itself appears reasonable. **(Policy requirements)**

### **[Joint working cases](#)**

- 2.158 Policy and guidance about joint working is available within section 1. Please click on the title to navigate to this section.

### **Allocation**

- 2.159 All cases sent for further consideration will automatically go into a central queue on Dynamics 365 for allocation. This queue will be monitored, and cases will be allocated to an appropriate caseworker using the triage category applied by the intake caseworker.
- 2.160 If we determine the case is one we can look at and is ready for us to consider, it will be allocated and assigned to a caseworker. **(Policy requirement)**
- 2.161 If an appropriate caseworker is not available to take a case then the case will remain in the queue until one becomes available.

### **Case Categorisation**

- 2.162 The caseworker should conduct a more detailed case categorisation triage by reviewing the questions listed in the casework criteria in our supporting guidance. **(Policy requirement)**



- 2.163 Further information on when a case may be suitable for complex health investigation referral is available in our supporting guidance.
- 2.164 These categories are not exhaustive and if a caseworker considers a case should be allocated differently, but does not meet the case criteria listed, they should raise this with their manager.
- 2.165 If the caseworker decides the case is still suitable for them to complete, they should record the agreed category on the Decision Form.
- 2.166 If they consider the case is no longer suitable for them to complete, then they should record the reasons on the Dynamics 365 record and seek their manager's approval for the case category to be changed and the case re-allocated.
- 2.167 If the case needs to be assigned to a different caseworker, then this should be completed in line with the reallocation process detailed in our supporting guidance.
- 2.168 If the caseworker does not consider the case suitable for complex or significant allocation, but believes the case could highlight a systemic issue, they should send details of the case to the Assistant Director - Casework for complex and senior caseworker teams.
- 2.169 The caseworker should review the case category again if, during consideration of the case, they become aware of new information that would mean the case was no longer suitable for them to consider. In these instances, they should raise this with their manager and the decision whether to reallocate the case should be made based on the individual circumstances of the case, and how close it is to completion.
- 2.170 Guidance on auditing your decision is available at the end of this section.

### **Referring a case to complex investigations**

- 2.171 If the caseworker considers a case should be classified as complex then they should discuss this with their manager and then email the Assistant Director responsible for the complex teams. **(Policy requirement)** The email should give the case details, who the case has been discussed with and why it is considered complex.
- 2.172 If this is agreed, the category should be amended on the Decision Form. If there is a physical file this should be sent to the caseworker if allocated, or the person who agreed the referral.

## Starting our further consideration of a case

- 2.173 When we conduct a further consideration of a case we are reaching a view to whether the information and evidence we have received, as well as any advice we have sought, means an investigation can, and should, be proposed. We refer to this as a primary investigation.
- 2.174 We should ensure as much as possible when reaching this view, that we have obtained all of the information we need, including from the complainant, organisation(s) and anyone else we identify as being able to provide relevant evidence<sup>23</sup>.
- 2.175 When requesting evidence from an organisation or complainant, we should explain why it is relevant to our consideration/investigation of the case. Where information is requested, the caseworker should inform the organisation of our decision if they propose to decline a case for investigation. **(Policy requirements)**
- 2.176 The caseworker must review and consider this evidence thoroughly and approach the case with an open mind, analysing each complaint on its own merits, and taking relevant factors into consideration. This analysis should then be appropriately recorded, prior to a decision being made. **(Policy requirements)**
- 2.177 As a first step, the caseworker should consider the remit of the case and whether the person bringing the complaint to us is suitable to do so, prior to making any other decision. **(Policy requirements)**
- 2.178 The caseworker should go on to consider whether we should propose to investigate a complaint, or whether to decline it using our specific and general discretions. **(Policy requirement)** A decision to decline could be for many reasons, including that we consider the organisation has responded reasonably, has already put things right, or taken action that will prevent a complaint from happening again.
- 2.179 If we consider an investigation may be appropriate, the caseworker should ensure they fully consider all of the required tests prior to proposing to investigate. **(Policy requirements)**
- 2.180 If we decide to decline a case for investigation, the caseworker must ensure the decision they reach is robust. They should provide a single reason and rationale on the decision form in line with the detailed guidance set out in other sections of this document. **(Policy requirements)**
- 2.181 On occasion the caseworker may identify multiple reasons to decline a case for investigation. If more than one robust decision is available, then the
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caseworker should prioritise using our specific discretion tests over our general discretion ones. **(Policy requirements)**

- 2.182 In any instances where the caseworker feels a complaint has been raised that may be of wider importance, they should discuss this with their manager, and escalate as appropriate, prior to reaching a decision. For example, cases where a caseworker may identify a possible wide-spread systemic issue.
- 2.183 Further information about how we should use different types of evidence can be found in section 6, which you can navigate to by clicking [here](#).
- 2.184 The caseworker should record their consideration on the Decision Form. If supervised by a manager the caseworker should assume the form is agreed at the relevant parts of the Supervision Model. **(Policy requirements)**
- 2.185 If the case relates to a family health service provider, (for example a GP) and the final response is signed out by an individual rather than a complaints manager, then that individual should be recorded as the organisation to consider, rather than the individual practice or surgery. **(Policy requirement)**
- 2.186 If it is obvious that the complaint relates to the Duty of Candour this should be flagged on Dynamics 365.

### Proportionality

- 2.187 This policy and guidance is intended as a decision making framework to proportionate decision making. **(Policy requirement)** This guidance is not intended to prescribe every action that should be followed in order to conclude a case. Further information is available in our proportionality principles.
- 2.188 The caseworker should use their discretion and judgment to take a proportionate approach to concluding a case when it is appropriate to do so. Consequential departures from requirements set out elsewhere in the service model must be recorded and explained on the decision form. **(Policy requirements)**

### Contacting the complainant

- 2.189 The caseworker should contact the complainant as soon as possible, and before reaching any decision on their case. This includes reaching a decision to whether to limit the number and types of issues we will be considering. During this contact, the caseworker should clarify that the purpose of undertaking further consideration of a complaint is to decide whether to send a case for detailed investigation. **(Policy requirements)**
- 2.190 The default position is that our initial contact should be by telephone. If a complainant tells us they have a preferred method of communication during

initial contact, then we should use that method instead from then on. **(Policy requirements)**

- 2.191 If a telephone number or preferred method of contact has not been provided, we should write to (or email) the complainant to make the initial contact. The caseworker should request a contact number and the complainants preferred contact method.
- 2.192 If the complainant has provided us with details about how they would like to be contacted verbally or in writing, and their requests are reasonable, we should aim to be flexible and accommodate this. For example, if someone asks to only be contacted on a Wednesday as this is their day off.
- 2.193 This also includes avoiding contacting the complainant on any dates they have told us they are not available, such as being out of the country, or are particularly sensitive (such as the anniversary of a death).
- 2.194 A reasonable number of attempts should be made to contact the complainant before taking further action on the case. If it is not possible to contact the complainant, then a record should be created for each unsuccessful contact attempt. **(Policy requirements)**
- 2.195 The caseworker should try to call the complainant three times over two days, and if they are unable to get in contact with the complainant, they should consider if enough information and evidence is available to still make a decision.
- 2.196 During contact with the complainant, the caseworker should have an open conversation and cover the areas listed below and record any information gathered on Dynamics 365:
- Verify the identity of the person we are calling (further information available at this section [here](#))
  - Introduce self and role
  - Check if it is an appropriate time to speak about the case (if it is not a suitable time, agree an alternative date.)
  - Acknowledge the individual circumstances of the complaint, and how the complainant has told us they have been affected by it.
  - Explain where the case has reached in our process and that we will consider if we can take action on the case now, or it should be passed for detailed investigation.
  - If a reasonable adjustment has been requested agree and record a suitable method of contact (further information available [here](#))
  - Establish any other information required to complete the consideration of the case (for example; reasons for a delay in bringing a complaint to us)
  - Discuss the complaint in more detail and ensure a claimed injustice and outcome have been recorded. (Outcome is particularly important if the

case relates to the Duty of Candour as we may not be able to achieve certain outcomes sought)

- Where relevant explain that clinical advice might be sought as part of the information we gather to make our decision. Further information on our clinical advice processes and advisers is available on our [website](#).
- If a financial outcome is what the complainant is seeking, the amounts sought must be discussed along with our severity scale
- Manage the complainant's expectations if we are already aware the case is one we are unlikely to investigate, or the outcome is one we are unlikely to achieve (for example the amount of financial remedy sought is higher than we would usually recommend)
- Explain our timescales and when the complainant will likely hear from us next
- Consider whether the case is suitable for Early Dispute Resolution
- Provide contact details should the complainant need to speak to us again

2.197 This can take place over more than one contact if appropriate. For example, if new information comes to light later in the case.

2.198 The caseworker should record any information they have gathered, including attempts to contact the complainant, on Dynamics 365.

2.199 If a party to a complaint contacts us at any stage of our process, an acknowledgement of their contact, or a response, should be sent out to them within 10 working days, unless they are under restrictions set out in our unreasonable behaviour policy. **(Policy requirement)**

2.200 If the caseworker considers they have enough information and evidence to make a decision on a case, then they should record this on Dynamics 365. This decision should be communicated to the complainant and the case should then be declined or passed for investigation as appropriate. **(Policy requirements)**

2.201 If the caseworker considers they require further information or evidence before making a decision on a case, then they should record this on Dynamics 365. This decision should be communicated to the complainant and the case should then be closed as 'withdrawn'. **(Policy requirements)**

2.202 If a complainant makes contact with us after we have closed a case as withdrawn the caseworker who previously dealt with it should arrange for a new case to be created on Dynamics 365.

## **Contacting the MP**

2.203 When a complaint has been referred by an MP, the caseworker should contact the MP once the case is allocated. They should explain they will be the caseworker considering the complaint provide their contact details should an update be required. **(Policy requirements)**

## **Creating the summary of complaint**

- 2.204 When a caseworker receives a case, they should review the complaint raised with us. The caseworker should have a detailed discussion with the complainant about their case to inform and develop a summary that we will proceed with.
- 2.205 During this conversation the caseworker should explore what issues are the most important to the complainant and have an open discussion about where we should focus our attention when considering their case.
- 2.206 Where an issue is less important to the complainant the caseworker should seek their agreement to leave it outside of the summary. However, remember to consider if you think the issue is important too. There is no specific definition of what is meant by less important, and the caseworker should consider this on a case-by-case basis.
- 2.207 Where reaching an agreement is not possible, the caseworker will make the final decision on what issues they will proceed with. In deciding what further action to take they should consider whether leaving the issues out would be more proportionate to the case, and any impact this could have on the customer service we provide.
- 2.208 The caseworker should ensure the complainant understands fully how we have summarised their complaint, and what issues we will, and will not be proceeding with. Any issues the caseworker has agreed with the complainant we will not be considering, should be recorded on the decision form.
- 2.209 The caseworker should record the finalised summary on the decision form. They should limit their focus to only these issues when conducting their further consideration of the case. These issues should be added to the case as complaint components.
- 2.210 If, following our discussion with the complainant, we decide that we will not continue with any aspect of their complaint, the case should be closed as 'other reason to decline'.
- 2.211 The caseworker should ensure the notes of the conversation, and any correspondence to the complainant, are recorded on CMS.

## **Recording complaint components**

- 2.212 A complaint component is a way of recording information about areas of complaint on Dynamics 365. We also use them to record decisions on cases at primary and detailed investigation stage.
- 2.213 Following a discussion with the complainant about the summary of complaint, the caseworker should ensure they understand each area of complaint raised by the complainant, including any concerns raised about the way the complaint was handled. The caseworker should then group these

distinct areas of complaint together under separate headings to form our complaint components. **(Policy requirements)**

- 2.214 Complaint components are the level at which we make and record decisions. The caseworker does not need to perform an exhaustive exercise to split complaints by component. Each component will have a separate decision recorded against it, and therefore it must be possible to make a decision for each separate component identified.
- 2.215 Complaints under each heading will therefore usually relate though to similar clinical or administrative settings or events where the claimed injustice and outcome are likely to be similar. For example, separating misdiagnosis at a GP appointment out from rude communication from a receptionist.
- 2.216 There will usually be more than one complaint component on a case, but one is the minimum that must be added. **(Policy requirement)** A case may only have one component if it relates to a single issue.
- 2.217 The caseworker should be mindful of each component when completing an assessment and consider them separately as appropriate. **(Policy requirement)** For example, there may be an alternative legal remedy available for misdiagnosis of a medical condition, but not for rude communication.
- 2.218 The caseworker must ensure a complaint component is added on Dynamics 365 to reflect each head of complaint they have identified they will proceed with following discussion with the complainant. Only one component should be added for each area of complaint. **(Policy requirements)**
- 2.219 The caseworker must ensure that all of the relevant fields on the complaint component are completed as best as possible, including a summary description. Where more than one option from the drop-down lists is applicable, the caseworker should pick the most relevant one. **(Policy requirements)**
- 2.220 If we decide not to investigate a complaint component for any reason, the caseworker should ensure there is a clear audit trail on the Dynamics 365 record explaining why and document the material evidence they have used on the Decision Form to reach this decision. **(Policy requirements)**
- 2.221 A decision should be recorded separately against each individual complaint component added to the case. **(Policy requirements)**

## **Recording information on Dynamics 365**

- 2.222 A complaint component is a way of recording information about areas of complaint on Dynamics 365. We also use them to record decisions on cases at assessment and investigation stage.

- 2.223 Information should be recorded and stored in the Dynamics 365 record or in the documents tab and the agreed naming conventions in Annex I should be used.

## Initial consideration

### Is the complainant suitable?

- 2.224 The law<sup>24</sup> says that the aggrieved must make a complaint themselves unless there is any reason they are unable to do so. If the aggrieved is deceased or otherwise incapable of bringing the complaint themselves, then the law allows them to have someone bring the complaint to us on their behalf. **(Legal requirements)**.
- 2.225 If for any reason the person bringing the complaint to us is not the aggrieved then the caseworker must consider if they are suitable to bring a complaint to us. **(Policy requirement)**
- 2.226 We must be careful when deciding whether a person is suitable to complain on behalf of someone else. This is because if we accept an inappropriate person as a complainant we might release private and personal information they should not have access to.
- 2.227 The caseworker should therefore consider the type of information that person might see, as part of their decision about whether a person complaining to us is suitable to do so. **(Policy requirement)**
- 2.228 We will usually only consider a person to be suitable to bring a complaint to us on someone else's behalf if the aggrieved is deceased, lacks mental capacity or is considered too young to understand that they can raise a complaint.

### Does the aggrieved have capacity?

- 2.229 If a complaint is received that is made on behalf of someone said to be unable to complain, the caseworker must start with the assumption that the person is capable of bringing the complaint to us. **(Policy requirement)**
- 2.230 When evidence is not available to show the aggrieved lacks capacity the caseworker should make checks to establish if this is the case. **(Policy requirement)** This could be by contacting them directly or someone else who may be able to tell us if the aggrieved is capable of bringing the complaint. In some circumstances it may also be appropriate to request medical records and/or seek clinical advice.

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<sup>24</sup> Section 6 (2) 1967 Act; Section 9 (3) 1993 Act



2.231 Sometimes information has already been submitted that shows that the aggrieved does not have capacity. In these cases, the caseworker does not need to request further information. **(Policy requirement)**

#### Complaints made on behalf of children

2.232 When a parent or guardian brings a case to us on behalf of a child, the caseworker should consider whether the child is capable of bringing it themselves. **(Policy requirement)** There is no set age where a child becomes suitable to complain to us and the caseworker should ensure they take into account the child's age and maturity.

Is the complainant suitable to bring us the case?

2.233 If the caseworker is satisfied the aggrieved cannot complain for themselves, they must still check whether the person bringing the case to us is suitable to do so, on their behalf. **(Policy requirement)**

2.234 The law<sup>25</sup> says if someone is unable to act for themselves, a complaint to us can be made by a personal representative (such as the executor of an estate), a family member<sup>26</sup>, or an individual or organisation suitable to represent him. **(Legal requirement)**

2.235 If a complaint is received from someone who is not a personal representative or family member we can still decide to accept a complaint from them but must consider whether they are a suitable person to represent the complainant. **(Legal requirement)**

2.236 If a complaint is received from a personal representative or family member, we should still consider if there is any reason why it may still be inappropriate for them to represent the complainant. **(Policy requirement)**

2.237 In reaching a decision to whether a person is suitable to represent the aggrieved person, we should consider: **(Policy requirement)**

- Whether there is a conflict of interest?
- If there is evidence to suggest that the affected person wouldn't want the person complaining on their behalf to have access to their confidential information?
- Is there any suggestion that the person complaining is not acting in the affected person's best interest?

2.238 If we decide the aggrieved is not capable of complaining to us, and the person bringing the complaint is suitable, then the caseworker should record the person bringing the complaint to us as the complainant. This is referred to as a representative (person) on Dynamics 365. **(Policy requirement)**

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<sup>25</sup> Health Service Commissioners Act 1993 section 9 (1b)

<sup>26</sup> The legal definition of a family member does not always refer to blood relatives.

## Representatives acting on behalf of adults with capacity

- 2.239 The aggrieved/person affected by the complaint can choose someone to represent them for the purposes of bringing a complaint to us (for example a friend). In these cases, the aggrieved should be recorded as the complainant and the person acting for them as a representative. **(Policy requirement)**
- 2.240 If the representative works for an organisation (for example as an advocate or lawyer) they should be recorded on Dynamics 365 as a representative (organisation). **(Policy requirement)**
- 2.241 If a complaint is received where a representative is acting on behalf of someone who has capacity, then the caseworker will need to obtain the consent of the aggrieved, which can be taken over the telephone. The caseworker should also consider if the representative is suitable to represent the complainant under the same considerations as stated above. **(Policy requirement)**

## Further Decision Considerations

### Precedent checks

- 2.242 Precedent checks should be completed by the caseworker when making a decision about whether there have been failings or there is an unremedied injustice. These are electronic checks carried out on the records we hold about the organisation/s we are investigating using the complaint components we have on Dynamics 365. We look to identify recurring issues about these organisations dating back over the past two years. The purpose is to identify possible trends and give the caseworker some context about the organisation. If appropriate, we might also identify other cases with the same complainant and check if named person(s) had been previously complained about.

### Is the complaint in remit?

- 2.243 The caseworker should confirm that all complaints made to us are in our remit. If a complaint is out of remit, if possible, the caseworker should try to identify if another organisation is suitable to help with their complaint and then direct the complainant to it. For further guidance on remit, please see the [remit section](#) and supporting guidance.

### Is it premature? Reconsideration

- 2.244 On occasion, a caseworker may receive a case where following a more detailed look, or conversation with the complainant or organisation, it becomes apparent a particular complaint has not yet completed the relevant complaints process.
- 2.245 If a particular complaint is not ready for us, the caseworker can close it as premature for our consideration and ask for the complainant to go back to the organisation with their further concerns. They should first consider

whether this is the most appropriate decision to make. **(Policy requirement)**  
Points to consider include:

- Is there anything further the organisation can do to resolve the complaint such as hold a local resolution meeting?
- Has the relationship between the complainant and organisation broken down so far that further attempts at local resolution would be very difficult?
- Is the complaint so small in scale, that to require the organisation to consider it now would be disproportionate?
- Are events long ago, and rely on evidence that may be even more difficult to get the longer we wait?
- Would it be fair to the complainant and organisation to consider the complaint on the opportunities they have had to resolve it so far? For example, if the organisation has had multiple opportunities to respond to a complaint, and they have not done so, this may be unfair on the complainant.
- Is there a more appropriate reason to close this complaint now? For example, if there is an alternative legal remedy available and we consider the complainant should pursue it, there will be time limits for when a complainant could make a claim.

2.246 The caseworker should consider, where appropriate to do so, if there would be any benefit to seek a further view from either the complainant or organisation before making a decision.

2.247 On some occasions, the caseworker may feel it is appropriate to send the complainant back to the organisation. In this instance, the caseworker should ensure they have a conversation with the organisation to make an agreement that they are happy to provide any further response, prior to informing the complainant.

2.248 If we close a case as premature, we have decided that the complaint put to us at that time is not one that we should investigate. The complainant should be told about the time limit when the case is closed (so that they know to bring the complaint back to us as quickly as possible if they need to do so). If a person does complain to us again about the same matters, (for example, if they remain unhappy once local resolution is complete), that is a new complaint.

### **Is the complaint within time?**

2.249 We must consider the time limit in every case before making a decision to investigate a complaint.

2.250 For health complaints, the aggrieved must refer<sup>27</sup> the complaint to us within one year from the day they first became aware that they had a reason to complain<sup>28</sup> **(Legal requirement)**.

2.251 For Parliamentary complaints, the aggrieved must refer<sup>29</sup> the matter to an MP within 12 months from the day they first became aware that they had a reason to complain<sup>30</sup> **(Legal requirement)**.

### **When did someone have notice to complain?**

2.252 The date the complainant had reason to complain is not always the same date the incident occurred. For example, an unexpected complication from a surgery may not come to light until several months later when it had begun to cause health problems for the complainant.

2.253 A complainant may be aware of an issue at the time, but not experience a serious impact until a later date. For example, a complainant receives poor dental treatment that leaves them in a lot of pain, but they do not raise a complaint about this until several months later when the pain leads to a serious gum infection. In this instance the date of the initial dental treatment would usually be when the complainant had notice to complain. Not when the injustice became serious enough they decided to complain about it.

### **Deciding whether to exercise discretion**

2.254 If a complaint comes to us outside of the 12 month time limit, we must consider whether to put the time limit to one side. In doing so we should consider the complainant's reason for the delay and the time it has taken them to pursue local resolution. **(Policy requirements)**

2.255 When deciding if we should apply our discretion, the caseworker must consider the reasons the case has been delayed in reaching us for the entire relevant time period. **(Policy requirement)**

2.256 There are no specific reasons why a complainant's delay could be considered reasonable grounds for us to exercise our discretion. We should therefore consider the reasons given on a case by case basis. If there has been any unjustifiable delay by the complainant, we would be less likely to set aside the time limit.

### **Complainant's reasons for the delay**

2.257 The caseworker should have either spoken to the complainant or attempted to do so before making a decision on whether to set aside the time limit **(Policy requirement)**. This includes cases where the complainant has

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<sup>27</sup> Subject to our discretion to set aside the time limit.

<sup>28</sup> Section 9(4) 1993 Act

<sup>29</sup> Subject to our discretion to set aside the time limit.

<sup>30</sup> Section 6(3), 1967 Act

given a clear and detailed explanation in correspondence explaining the reasons for the delay.

- 2.258 The caseworker should keep a clear audit trail of their consideration of each of the complainant's reasons for the delay. This must be clearly demonstrated within reaching a final decision.

### **Time taken for organisation to respond to complaint**

- 2.259 A complaint may come to us outside of the time limit because the complainant was waiting for local resolution to be completed. If an organisation has taken a long time to consider a complaint (whether through delay or because the issue was complex) that then comes to us out of time, we are very likely to consider putting the time-limit to one side.
- 2.260 We consider the date a complainant could first raise a formal complaint to be the date they had reason to complain. A complainant may not raise a complaint on this date for many reasons, for example, they were unwell in hospital. These reasons should be recorded under the complainant's reason for the delay.
- 2.261 If the complainant has been responsible for delays in the complaint process (for example, not putting their initial complaint to the organisation promptly or delaying bring the complaint to us after local resolution was completed) then we would need to consider whether those delays were justified.

### **Considering the time limit on health complaints received during the pause on cases**

- 2.262 We stopped accepting health complaints between 26 March and 30 June 2020 to not place additional pressure on the NHS during a national emergency. Some complainants will not have brought a case to us during this period as a result of this, and this may have led to their complaint falling outside of our time limits.
- 2.263 To ensure we take a fair approach to the time limit in these circumstances, we should exercise discretion on any case which would have been in time if made to us between 26 March and 30 June 2020, as long as it is sent to us by 31 August 2020. **(Policy requirement)** This does not apply to cases that were out of time already.
- 2.264 A caseworker considering a complaint that meets the above criteria, should exercise their discretion to still consider it, unless there are exceptional reasons not to. **(Policy requirement)** A decision to close a case as out of time in exceptional circumstances should be approved by an Assistant Director.

2.265 A caseworker considering a complaint that does not meet the above criteria, should still take the time it took us to start reconsidering cases, into account, where relevant, when deciding whether to set the time limit to one side.  
**(Policy requirement)**

Should all the above factors be considered?

2.266 This will depend on the case. For some cases it may be necessary to consider all the above factors when reaching a decision. In others, we may only need to consider a single factor. These considerations should be made according to the circumstances of the case.

Exceptional circumstances test

2.267 In exceptional circumstances we may decide to exercise our discretion and consider a case where the above two factors do not apply. In these instances, an Assistant Director - Casework should agree the decision, and provide reasons for doing so.

How to deal with previously premature cases

2.268 We must consider how the time limit applies to the new complaint, from the date that the complainant became aware of what they are complaining about. We will take into account whether the complainant was informed about our time limits when we explained that their complaint was premature - if we didn't warn them it is more likely that we will put the time limit to one side.

Part in time and part out of time

2.269 In some cases, different parts of the complaint may be both in and out of time. For example, the substance of a complaint could be out of time, but specific concerns about complaint handling could be in time. In these instances, we need to take a view on whether they are separate complaints for the purposes of the time limit and if so make separate decisions about the application of the time limit. These separate decisions can then be recorded against the relevant complaint components.

Documenting our decision

2.270 If a complaint is out of time, regardless of whether we decide to set aside the time limit or not, we should always ensure that there is a clear record to explain why we have reached our decision. It is not enough, for example, to say that there was no reason to set aside the time limit or to say that the time limit did not apply; we must be clear about our reasons for deciding why we did or did not decide to put the time limit to one side. We should provide enough detail and have a clear enough audit trail so that anyone else who is looking at the case can quickly and easily see the reasons for the decision.

## Does the complainant have an alternative legal remedy?

2.271 The law<sup>31</sup> says we cannot investigate if there is or was a legal remedy that the aggrieved could pursue or could have pursued, unless it is (or was) not reasonable for them to do so (**Legal requirement**). These legal remedies include established methods of challenging a decision. For example; a potential claim of clinical negligence or an option to pursue a Judicial Review.

2.272 If the aggrieved has not pursued legal action, or pursued a legal remedy but has returned to us with outstanding outcomes not achievable through legal action, the caseworker should consider: (**Policy requirement**)

- Is or was there an alternative legal remedy?
- If so, is it/was it reasonable for the aggrieved to use it?

2.273 When making a decision on alternative legal remedy the caseworker must consider the individual circumstances of the complainant and the case, and ensure this analysis is fully recorded on the decision form. (**Policy requirement**)

2.274 The caseworker must review whether an alternative legal remedy exists, and whether it would be reasonable to expect a complainant to pursue one, throughout the lifetime of the case (including during an investigation). (**Policy requirement**)

## Communicating with the complainant about alternative legal remedy

2.275 If the caseworker becomes aware that the complainant is seeking financial redress for non-financial loss they should discuss with the complainant the amount they would consider reasonable to resolve their complaint. This conversation should include an explanation of the usual amounts of financial redress we would recommend given the injustice claimed. (**Policy requirements**)

2.276 If the amount sought is higher than we usually recommend<sup>32</sup>, this should be explained to the complainant. They should be given the opportunity to reconsider the level of financial redress sought before we make a decision about whether it is reasonable to expect them to pursue an alternative legal remedy. (**Policy requirement**)

## When we consider an alternative legal remedy has already been pursued

2.277 We do not have the remit to consider complaints where the aggrieved has already resorted to a court or tribunal that did (or could have but didn't) provide the full remedy sought. Cases where this has occurred should be

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<sup>31</sup> Section 5(2), 1967 Act; Section 4, 1993 Act

<sup>32</sup> Case examples of the types of financial remedy we may usually recommend can be found in our typology of injustice.

closed as 'out of remit - alternative legal remedy achieved'. **(Policy requirements)**

2.278 We usually consider that a complainant has resorted to an alternative legal remedy when a court or tribunal has already made a decision on their case. If the complainant therefore informs us they did pursue, or are currently pursuing, legal action on their case, we should confirm where they have reached within the process before deciding whether an alternative legal remedy has already been achieved. **(Policy requirement)**

2.279 If a complainant has already resorted to legal action but not all of the outcomes sought could have been provided by a court or tribunal, we could still consider this complaint. In these instances, the outcomes we could achieve would be limited to those not available through legal action.

Deciding if an alternative legal remedy exists or did exist

2.280 We need to consider whether a court or tribunal could provide, or could have provided, a complete remedy for the matter complained about. **(Legal requirement)**

2.281 The availability of a legal remedy will depend on the individual circumstances of the case, and there is no definitive list of all legal routes available to someone. The most common ones we should consider though include possible claims of clinical negligence, routes of appeal through benefit tribunals, and challenges through Judicial Review.

2.282 When deciding whether a legal remedy exists, the caseworker should not only consider whether a claim is available, but also whether it achieves the outcome sought by the complainant. **(Policy requirement)**

2.283 If we can clearly see a potential claim in negligence, we should consider bringing that to the attention of the complainant, regardless of what they have said they want to achieve. **(Policy requirement)** It will be for the complainant to decide though whether they want to consider taking legal action.

2.284 We do not consider legal action taken against a complainant to constitute an alternative legal remedy. This is because they have no say in whether proceedings are initiated against them and therefore cannot be seen to have 'resorted' to a remedy. The caseworker can still consider though whether a court setting was the most appropriate place for a complainant's concerns to have been addressed.

2.285 A consideration of a case by a Coroner<sup>33</sup> does not constitute an alternative legal remedy. This is because certain deaths must be referred to a Coroner to determine the cause. The individual also has no say in whether proceedings are initiated in the case of a Coroner's inquest.

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<sup>33</sup> Further guidance on Coroners and inquests is available in the legal briefing note



2.286 If the complainant is solely seeking regulatory action or a legal decision that the Duty of Candour was breached, then it might be more appropriate for the courts to deal with the complaint or the CQC to be made aware of the issues as another dispute forum.

Deciding if it is or was reasonable to expect the complainant to pursue an alternative legal remedy

2.287 In reaching this decision, points to consider, and discuss with the complainant if relevant include (but are not limited to):

- Whether the legal route is or was the only way that the complainant could obtain (or could have obtained) the outcome they are seeking. For example, the overturning of a planning decision.
- The amount of financial remedy being sought and whether pursuing legal action would cost more than, or take up a disproportionate amount of, this remedy. (Further information about financial remedy is available at 2.177)
- Whether legal action would achieve all of the outcomes the aggrieved is looking for. (Further information about mixed outcomes is available at 2.183)
- The ability of the complainant to obtain the relevant funding for making the claim. (Further information on assessing a complainant's financial circumstances is available at 2.187)
- How difficult it would be to make the claim due to the complexity of the legal action required.
- If the complainant does not want to pursue legal action and there is a good reason why. For example, the complainant is able to show they are very intimidated or frightened of attending court.
- The age and particular circumstances of the complainant. For example, a complainant may have a physical or mental health condition that would make it difficult to pursue a claim.
- The time that would be needed to pursue legal action. For example, a complainant has a terminal illness and we can achieve the outcome they want.

### Financial remedy as an outcome

2.288 In deciding whether it is reasonable for a complainant to pursue an alternative legal remedy the caseworker should consider the level of the amount sought, and whether we are likely to recommend it in relation to the injustice claimed. **(Policy requirement)**

2.289 The caseworker should use the typology of injustice to establish if the figure sought by the complainant is in excess of the levels we may usually recommend.

2.290 If we consider that for the amount requested the cost and/or time of taking legal action would be disproportionate, we will usually decide it is unreasonable to expect the complainant to pursue an alternative legal remedy.

2.291 If the amount requested is in excess of the usual amounts we would recommend the caseworker should first discuss this with the complainant. If following a conversation with the complainant they still want a level of financial remedy we would be unlikely to recommend, the caseworker should assess the complainant's financial position to see if they have the ability to afford to pursue legal action themselves **(Policy requirements)**. Further guidance on how to do this is available below.

When the complainant is unable to provide a figure for the remedy sought

2.292 In some instances, a complainant may be seeking a financial remedy, but are unable to provide a specific amount they would want to resolve their case, despite further discussion. In these instances, the caseworker should give information about the amounts of financial remedy we would usually recommend in similar circumstances.

2.293 If the complainant agrees that the amounts we would usually recommend are suitable, we can decide it is unreasonable to expect them to pursue an alternative legal remedy without having a specific figure agreed.

2.294 The caseworker must be clear in recording their decision that we are proceeding on the basis that any financial remedy suggested will be in line with amounts we have previously recommended, and our typology. **(Policy requirement)**

### **Mixed outcomes**

2.295 A complainant may ask us to recommend a mixture of remedies some of which can be achieved through legal action. For example, a request for a payment to be made to compensate for an injustice experienced as a result of service failure, alongside a request for improvements to be made to prevent service failure from reoccurring.

2.296 The caseworker should still consider if an alternative legal remedy is appropriate, even when some of the outcomes requested by the complainant cannot be achieved through legal action. This includes consideration of whether any financial remedy sought is an amount we are likely to recommend. **(Policy requirements)**

2.297 A court can make wide ranging recommendations outside of financial redress. In considering what remedies can be achieved through legal action though, the caseworker should consider what the complainant is likely to achieve as a direct result of pursuing legal action. For example; a financial remedy in relation to a clinical negligence claim.

2.298 If we decide it is appropriate for the complainant to pursue an alternative legal remedy first, we should inform the complainant that they can return to us with any outcomes not achieved through the courts afterwards. We should also provide details of our time limit. **(Policy requirements)**

## Assessing a complainant's financial position

- 2.299 In some circumstances we may decide it is not reasonable to expect a complainant to pursue an alternative legal remedy if they are seeking a higher amount of financial remedy than we would usually recommend but their financial position means they are unable to pursue legal action.
- 2.300 In order to reach a decision on a complainant's financial position we should ask them whether they have the financial capability to pay for legal action, and if not, their reasons why. **(Policy requirement)**
- 2.301 If a complainant tells us they can afford an alternative legal remedy, we are likely to decide it is reasonable for them to pursue one. In these instances, we should close the case as 'reasonable to pursue an alternative legal remedy'.
- 2.302 The caseworker should consider any reasons the complainant provides to why they may be unable to afford legal action and if this means it would be unreasonable to expect the complainant to pursue an alternative legal remedy. In making this decision the caseworker should take account of the potential cost of taking legal action for the complainant. The caseworker should not ask the complainant to provide any financial information as evidence in reaching this decision. **(Policy requirements)**
- 2.303 If the complainant has requested a larger financial amount than we can usually achieve, the caseworker should also consider the potential cost of legal action and whether the time it may take a complainant to take legal action is unreasonable.
- 2.304 There are no specific criteria to when we may decide a complainant cannot afford legal action and our consideration should be on a case by case basis. **(Policy requirement)** We are likely though to consider a complainant being on a low income, or being in difficult financial circumstances, as a good reason not to expect them to pursue an alternative legal remedy.

## Risk assessment

- 2.305 Case risk should be assessed at the point at which a decision is being made not to investigate. **(Policy requirement)** Please refer to risk section in [section 10](#). Please remember that risk assessment should include consideration of any conflicts of interest (both of the casework staff and of senior staff).

## Section 3. Should we look into your case?

### Is there another dispute resolution forum?

- 3.1 Some complaints can be looked at by both us and another complaint handler. We would usually consider though, that only one investigation should take place. The caseworker should consider which organisation is more appropriately placed to consider the complaint and achieve the remedy sought. **(Policy requirements)**
- 3.2 If the caseworker is unsure about whether the case is more suitable for the other complaint handler then they should discuss the case with them first. **(Policy requirement)**

### Are there any indications of maladministration or service failure?

- 3.3 There is no specific definition of maladministration or service failure. Our normal approach is to identify (using relevant standards) what should have happened, what did happen and then whether any gap between the two amounted to maladministration or service failure. At this stage of the process the caseworker only needs to be looking to see whether there are any indications of maladministration or service failure, and this does not need to be fully evidenced in order for a case to be investigated.
- 3.4 The caseworker should look at whether the organisation has already admitted to any failings in the service they provided. They should also consider any relevant standards or guidelines which will help them to reach a view on whether the actions of the organisation were reasonable. **(Policy requirements)** This may include getting advice from a clinician or member of the Legal Team if proportionate to do so. These considerations should then be clearly recorded on the Decision Form. **(Policy requirement)**
- 3.5 On occasion the caseworker may not be able to reach a view on whether something has gone wrong without seeking substantial amounts of advice or by taking a disproportionate amount of time. This may also include cases where a large amount of papers are required, or which concern complex issues. The caseworker can decide to propose to investigate a complaint on the basis, that due to the size and complexity of issues, the case would best be resolved through investigation. They should ensure a clear audit trail exists to demonstrate how they reached this decision. **(Policy requirements)**

### Are there any indications of injustice flowing from the maladministration or service failure?

- 3.6 When the caseworker sees indications of maladministration or service failure, they need to consider if they may have led to an unremedied injustice to the complainant. When making this decision the caseworker only needs to be looking for indications of whether there **could** be an unremedied injustice, and this does not need to be fully evidenced for a case to be investigated.

3.7 The caseworker must consider whether the injustice claimed is likely to have happened as a result of the claimed failings.

### **Is the injustice still unremedied?**

3.8 The caseworker must also look at what action the organisation has already taken to put things right and whether this appears to have resolved the case. They can seek advice (usually from a clinician or the Legal Team) to establish this, if it is proportionate to do so. These considerations should then be clearly recorded on the Decision Form. It is for us to decide whether an organisation's actions have resolved a complaint. The caseworker should therefore take into consideration the outcome the complainant is seeking from an investigation, but not be led by it in making a decision. A case where the injustice has been fully resolved may not be suitable for investigation.

3.9 In some instances, the caseworker will be unable to reach a view without substantial amounts of advice or by taking a disproportionate amount of time. This may also include cases where a large amount of papers are required or where a case concerns complex issues. They can decide to propose to investigate a complaint on the basis due to the size and complexity of issues the case would best be resolved through investigation. They should ensure a clear audit trail exists to demonstrate how they reached this decision.

### **Reasons we may still decide not to investigate**

3.10 There will be occasions when we decide that there are other reasons why we should not investigate a complaint made to us. These include:

- If the outcome sought is not reasonable in relation to the claimed injustice.
- If the outcome sought is not achievable.
- That an investigation would not be practical, would not reach a satisfactory conclusion and there would be no value in providing that response through an investigation.
- That the complainant is unhappy with the investigation we are proposing to undertake, and we cannot reach agreement on how to proceed.
- That the nature/theme of the complaint is one that may not be appropriate for us to investigate.
- That another organisation is considering the same issues (such as the Coroners' Court or General Medical Council) and it seems appropriate for us to wait for the outcome of their work first.
- That after a closer look at the case we establish it is out of remit or not yet ready for us to consider.

3.11 If the caseworker considers we should not propose to investigate a complaint for one of these reasons, then this should be clearly audited on Dynamics 365 and will usually be closed as 'other reason to decline'. **(Policy requirement)**

## Clinical advice

- 3.12 Clinical advice should be sought when we need the knowledge or expertise of a clinician in order to make a decision on a case. This will usually only be when a caseworker cannot be expected to have the relevant knowledge themselves or is unable to obtain or understand the information required. The caseworker should therefore check relevant standards or guidelines for the answers to clinical questions before making a request. **(Policy requirements)**
- 3.13 Clinical advice will usually be requested as part of a documented discussion (face to face or over the telephone) but can also be provided in writing. Generally, requests that cover a long period of care or require an explanation of more complex clinical treatment are more likely to be suited to written advice. The caseworker should make an appropriate decision based on the individual facts of the case. **(Policy requirements)**
- 3.14 When making a request the caseworker should ensure it is clear, informed and proportionate. The request should be in relation to the complaint being considered and the questions should be focused and specific to the clinical aspects of the complaint. **(Policy requirements)**
- 3.15 When advice is needed from more than one discipline this should be done, where possible, at the same time. (if advice about the impact of any failings from a different speciality is needed this will usually have to be done sequentially.) If we are involving several advisers consider whether a case conference would be helpful.
- 3.16 If we have received clinical advice on a case, we should explain how we have used it in reaching our decision. We should take account of any advice received but we need to remember that the view we express in our final report, and indeed in our provisional views, are our own and advice should only inform it.
- 3.17 If the caseworker receives advice on a case that seems inconsistent or requires further explanation for any reason, they should question or challenge it. **(Policy requirement)**.
- 3.18 If there are any questions or clarifications needed for advice we have received, the caseworker should seek follow up advice from the clinician who provided it originally, to address our further questions. This follow up advice should be requested as normal. **(Policy requirements)**
- 3.19 If the caseworker has any concerns about the quality of the advice they have received, they should discuss it with a lead clinician. **(Policy requirement)**
- 3.20 If a complainant requests the name of the clinician who has provided advice, they should refer this to the Information Rights Team for consideration. If a complainant explains they wish to refer the clinician to their regulatory organisation because of their advice, then the caseworker should make a lead clinician aware. **(Policy requirements)**

3.21 Further information about getting clinical advice and when written evidence may be appropriate is available in the supporting guidance. An induction and guidance pack is also available for our internal clinical advisers<sup>34</sup>.

### **Our clinical standard**

3.22 When we are considering complaints about clinical care and treatment we consider whether there has been “good clinical care and treatment”. We aim to establish what would have been good clinical care and treatment in the situation complained about, and to decide whether the care and treatment complained about fell short of that.

3.23 We will seek to establish what constituted good clinical care and treatment on the facts of the case by reference to a range of material, including relevant standards or guidance, the accounts of the complainant and the clinician or organisation complained about, and any other relevant records and information.

3.24 Relevant standards or guidance we may consider include National Institute for Health and Care Excellence guidance, clinical pathways, professional regulators’ Codes of Practice and guidance, guidance from Royal Colleges, local protocols or policies, and published research including clinical textbooks or research reported in peer review journal articles.

3.25 In deciding whether a standard or guidance was relevant in the situation complained about we will consider factors such as whether it was in place at the time of events complained about or whether it was applicable to the care and treatment the person received and to the setting in which their care and treatment took place.

3.26 We will ask the clinician or organisation complained about to tell us what if any standards or guidance they based their practice on, whether they followed them or departed from them in the situation complained about and why. If there is a relevant standard or guidance and the clinician’s decisions, actions and judgement do not appear to have been in line with it, we will consider what evidence there may be to explain this. We will reach a decision about whether there has been good clinical care and treatment. In doing so we will consider the explanations of those complained about and balance them against the relevant standards or guidance.

3.27 We will also consider the ‘Principles of Good Administration’ insofar as they apply to the clinical context.

### **Using the standard**

3.28 Our new approach has a clearer focus on the importance of the organisation’s or clinician’s explanation for how they reached decisions about care and

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<sup>34</sup> [Clinical Adviser guidance](#)

treatment. It also provides greater clarity on the material we will consider, and what we will do with it.

- 3.29 We will continue to reference relevant recognisable professional standards or guidance when available and appropriate to the case. However, we will now be asking organisations and named persons to tell us what standard or guidance they applied when they provided the care and treatment. This includes telling us whether they followed or departed from that standard, and if so, why.
- 3.30 We will then apply the standard the organisation said they used when providing the care and treatment unless we establish it was not appropriate in the circumstances of the case. If an organisation does not provide us with a standard to use, our adviser will select the relevant standard to apply.
- 3.31 Where a standard does not exist, our advisers will refer specifically to guidance (often from regulatory bodies) when considering whether the care and treatment provided amounted to good clinical care and treatment. This will mean we will no longer rely on 'established good practice' based on clinical opinion alone. For example, saying record keeping was in line with General Medical Council keeping records guidelines. We can also consider the principles of good administration where applicable.
- 3.32 Finally, we will always ask why clinicians took the approach they did. We will then consider that explanation against the standards identified.
- 3.33 This approach will offer those complained about an earlier and clearer opportunity to explain how they reached decisions about care and treatment and make our approach more transparent for complainants and people who use our service. If we follow this approach consistently we consider that the problems identified by the court will not arise in future.

### **Applying our standard**

- 3.34 We will ask the organisation, and named person if applicable, to tell us what standard they applied when providing the care and treatment complained about. This will usually be when we confirm our investigation.
- 3.35 In reaching a decision as to whether the clinical care and treatment provided was reasonable, we should consider the evidence provided to us by all parties to the complaint. **(Policy requirement)** By evidence we would include but are not limited to; eyewitness accounts provided by the complainant or others present, medical records, and clinical advice.
- 3.36 We can still decide to place more weight in considering some pieces of evidence over others if appropriate. For example, unbiased first-hand evidence recorded at the time of events over a third hand account provided a year later. If we do so, we should record our rationale on the decision form. **(Policy requirement)**



3.37 In reaching a view on whether the care and treatment provided was reasonable we should ensure we use a clinician who is suitably qualified and experienced. **(Policy requirement)**

If a standard is provided

3.38 If an organisation or named person tells us they have used a particular standard, we should look to apply this in reviewing if the care and treatment provided was reasonable. We must check though that the standard suggested is appropriate and relevant to the circumstances of the case and complaint. **(Policy requirements)**

3.39 The caseworker should ensure they communicate in any request for clinical advice that a standard has been provided by the organisation or named person. This should include mention of, or a link to, any specific comments the organisation or named person has made about the approach they took. **(Policy requirements)**

3.40 If the standard provided is not appropriate to the case, this should be documented on our decision form. In these circumstances we should apply a suitable standard our adviser selects instead. **(Policy requirements)** This would include where the standard itself is not credible, was not in use at the time, or was not appropriate given the person's medical conditions or prognosis.

3.41 We should make the organisation, and if applicable the named person, aware if we do not decide to use the standard they have provided. **(Policy requirement)** This will ideally take place prior to us issuing our provisional views.

If a standard has not been provided

3.42 If an organisation or named person does not confirm a standard to us, but also does not explain why one wasn't applied, or is not applicable, the clinician can select the standard we apply.

3.43 If we do not hear from the organisation by the deadline we have provided, we do not need to wait for a standard to be supplied to us, or ask the organisation to provide us with a standard again, in order to continue with our investigation. **(Policy requirement)**

3.44 We can consider and apply any recognised standard, including guidance, published professional research, or peer review journal that is appropriate as long as it is applicable to the care and treatment provided, and was available at the time the events complained about took place.

3.45 If we establish two relevant standards we could use are contradictory, we should consider which one is most applicable to the circumstances of the case and explain any reasons we may use one over the other. **(Policy requirement)**

### If an extension is requested

- 3.46 We ask organisations to provide us with the standard they have used, alongside our request for papers, as part of our confirmation of investigation letters. These letters should include a reasonable date for a response to be provided within (usually two weeks). **(Policy requirement)**
- 3.47 If an organisation requests an extension to the date we have given to provide a standard, we should decide if the timescale suggested is reasonable. In reaching a view we should balance our public commitment to give organisations the opportunity to be judged by the standard they applied, alongside the importance of ensuring a proportionate and timely investigation. **(Policy requirements)**

### If a standard is not applicable

- 3.48 If an organisation or named person informs us during our investigation, or at provisional views stage, that a standard is not applicable for the care and treatment provided, we should ask them why if they haven't provided this information already. **(Policy requirement)** Our clinical adviser can then determine if the reasons provided were suitable, and if not, apply a suitable standard instead.
- 3.49 If a caseworker and/or clinical advisor is unable to establish an applicable standard to use then details of the case should be escalated to the relevant Assistant Director and lead clinician. **(Policy requirement)**

### **Legal advice**

- 3.50 Legal advice should be sought whenever you are unclear if you have sufficient knowledge in order to progress or reach a view on a case. This advice will then be used to help us put together our provisional views.
- 3.51 Any legal advice provided by the Legal Team is subject to legal privilege. This means we do not have authority from the Legal Team to share the content of the request made, or the advice we receive. The risk is that if we share that information in part, we lose that privilege and we can be required to share it in full and with all parties. We therefore should only reference legal advice with the involvement of the Legal Team. **(Policy requirement)**
- 3.52 On occasion a caseworker may want to refer to a legal position they have received advice on in a decision letter (at further consideration stage) or report. In these instances, they should use the advice received to help explain the relevant point of law in their own words. They should not directly quote the legal advice though and if needed, can seek advice on the drafting from the Legal Team. **(Policy requirement)**
- 3.53 If the caseworker considers it is highly important that they reference the legal advice provided directly, or disclose legal advice has been taken or

received, then they should discuss this with the Legal Team before doing so.  
**(Policy requirement)**

3.54 If a complainant asks us directly if we have asked for or received legal advice then we can confirm that we have. We should clarify in our response though that we will not be sharing the advice itself. If the complainant asks for the advice, then this should be referred to the Legal Team.

3.55 The following paragraph should be sent to complainants or organisations to explain our position on legal advice if required.

*“During the course of our investigation it is possible that we may need to seek legal advice on any matter that relates to the interpretation of legislation, and our powers to conduct or continue an investigation as a result of current law. That advice is confidential to PHSO and we will not be sharing with you either the content of the request we make or the advice we receive. In most of the work we undertake, it is not usual that we need to obtain or consider legal advice.”*

#### **Other advice**

3.56 The caseworker should record any advice they get on a case which is received from a manager, or peer, which assists them in progressing or reaching, a decision on their case. Any Equality, Diversity or Inclusion advice should be requested and recorded onto the specialist advice section of the Dynamics record. **(Policy requirement)**

#### **Resolving cases without an investigation (resolution)**

3.57 Resolution means delivering an answer or outcome for a complainant that resolves the complaint they have brought to us. This must be a complaint we can legally consider but could include complaints that are not properly made or ready for us to look at. **(Policy requirement)**

3.58 It is for us, and not the person bringing the complaint to us, to decide whether the actions taken have resolved the complaint. Usually, the actions will be taken by the organisation concerned, however it is possible to resolve a complaint through our own actions such as providing a clear explanation about what happened, when the complaints handling has been poor. This would not include cases we may close as adjudications, as we have not made a judgement about the substance of the complaint.

3.59 We must have taken specific action in order for a complaint issue to be considered resolved. **(Policy requirement)** This could include moving a complaint further along the local resolution process if the delays are the subject of the complaint. If an organisation was already taking the action required or decides to take further action on a case as we are now involved, this is not a resolution.

- 3.60 A case can be closed overall as a resolution when either the majority of complaint issues raised with us are considered resolved, or where a complaint concerns a significant issue and several minor issues, and the significant issue is resolved.
- 3.61 The caseworker should consider attempting a resolution where it appears that, with minimal intervention, they could achieve a satisfactory result for the complainant. **(Policy requirement)** This could include asking an organisation to provide financial redress, or to consider service improvements.
- 3.62 The caseworker can only **request** that action is taken to resolve a complaint and it should be made clear to both the complainant and organisation that we are not making recommendations as part of a formal investigation at this stage. **(Policy requirement)**
- 3.63 If an organisation decides not to agree to a resolution, then this should be clearly audited on Dynamics 365. The caseworker may then decide we should propose to investigate the case.
- 3.64 If a resolution is agreed the caseworker should record it on the compliance section within Dynamics and close the item once completed. As a resolution is not a recommendation, the compliance escalation process should not be followed, and the caseworker should consider any next steps if the resolution is not completed. **(Policy requirements)**
- 3.65 There is no definition of a resolution in our legislation. A case closed as a resolution is a decision not to investigate and must be issued in line with the normal requirements. **(Legal requirement)**

### Cases we are more likely to investigate

#### Potentially avoidable death

- 3.66 We define avoidable death as when it is more likely than not that the person would have survived if the failings in care which we have identified had not happened.
- 3.67 We start from the presumption that we will investigate health complaints where there are indications of serious service failure which could have impacted on an individual's chances of survival. However, we must still exercise discretion appropriately and there will be exceptional circumstances in which we do not investigate such cases. **(Policy requirement)**

#### Avoidable serious harm and wider public interest

- 3.68 We are also more likely to investigate complaints where there are indications of avoidable serious harm. **(Policy requirement)** We consider avoidable serious harm to be when, on the balance of probabilities, the person would not have experienced whatever the serious impact was, for example

ongoing pain and disability or prolonged mental illness, had the service failure not occurred.

3.69 We are also more likely to investigate if there is a wider public interest.

**(Policy requirement)** This could include, for example, where we have identified a systemic issue with an organisation's process or where a large number of people have been affected.

3.70 In considering whether to investigate these cases, we should still exercise our discretion appropriately and there will be exceptional circumstances where we will decide not to investigate. **(Policy requirement)**

### **Proposal to investigate**

3.71 The law<sup>35</sup> requires us to give the organisation complained about and any person<sup>36</sup> specifically named in a complaint the opportunity to comment on any allegations raised about them. **(Legal requirements)** We must not confirm, verbally or in writing, that we will investigate a case until the deadline we have given for comments to be made has passed or all parties have responded. **(Policy requirement)**

3.72 The caseworker should give the organisation and any named persons the opportunity to comment by sending a 'proposal to investigate' letter promptly after we decide the case may require investigation. The letter should include the scope of the complaint we propose to investigate as well as the claimed injustice and the outcome sought (which must be something both we and the organisation can achieve). This letter should also clarify that we are asking for comments about the allegations made (not just on our proposal to investigate). **(Policy requirements)**

3.73 The caseworker should also send a copy of our 'proposal to investigate' letter to the complainant and, where relevant, the aggrieved, representative and MP. This should be sent promptly after we decide the case may require investigation. In this letter they should make it clear that we have not yet started our investigation and this decision will be made once any comments on our 'proposal to investigate' have been considered. **(Policy requirements)**

3.74 Templates are available on Dynamics 365.

3.75 We will sometimes decide not to investigate all of the issues the complainant has raised. In these instances, the caseworker must clearly tell the complainant in the proposal to investigate letter which issues we do and do not propose to investigate and the reasons for those decisions. **(Policy requirement)**

3.76 We will usually give ten working days as a timescale to all parties for comments to be received by. This deadline should be included in the letter. If a

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<sup>35</sup> 1967 Act, Section 7(1); 1993 Act, Section 11(1)

<sup>36</sup> 'Person' includes companies, partnerships, sub-contractors as well as individuals.

request is received to extend the time allowed to provide comments, we should consider it on a case by case basis. If we agree a new date for comments to be received by, this should be recorded on Dynamics 365. **(Policy requirements)**

- 3.77 When a case involves a family health service provider, (for example a GP practice) the caseworker should confirm with the organisation the type of contract it holds to provide NHS services. **(Policy requirement)** This will usually be either a personal (PMS/PDS) or general (GMS/GDS) contract. If the organisation is unsure what contract type they have, we can ask them to send it to us.
- 3.78 We should ensure we have relevant details about the contract the organisation holds to ensure the correct details are recorded on the case. **(Policy requirement)** This is because the type of contract held can affect who we should be investigating.
- 3.79 If we have already obtained an agreement that the organisation does not want to receive our provisional views in cases we do not propose to uphold, then this should be mentioned in the proposal to investigate letter. This is to remind the organisation of this agreement and give them the opportunity to say if they do want to see our provisional views. **(Policy requirement)**

#### Writing to the organisation - parliamentary complaints

- 3.80 The caseworker will usually send the proposal to investigate letter to the Permanent Secretary if the complaint concerns a government department or to the Chief Executive if it concerns an executive agency.

#### Where a second tier or other complaint handler have been involved

- 3.81 The caseworker should always address the letter to the named 'Principal Officer'. However, the caseworker will need to check our individual arrangements with organisations to confirm who else this letter should be sent to. **(Policy requirement)** Where an organisation has a specific liaison or focal point for our casework the caseworker should also send a copy to them.
- 3.82 If we decide to only investigate the actions of either the organisation (who provided the service to the complainant) or the second tier, we are only required to give the organisation we propose to investigate the opportunity to comment<sup>37</sup> (including any contractors providing a service on their behalf).
- 3.83 We should still write to any organisation that has been involved in the complaint or how it has been handled though to ask for comments if this is required for the purposes of the investigation or report. **(Policy requirement)** (For example we consider we need comments from a named person or the organisation on events complained about.) Where the second tier complaint handler is only acting as a complaint handler on behalf of an organisation we

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<sup>37</sup> 1967 Act, Section 7(1); 1993 Act, Section 11(1)

can investigate, then we are legally required to give the original organisation the opportunity to comment.<sup>38</sup> **(Legal requirement)**

- 3.84 If we decide to only investigate the actions of either the organisation (who provided the service to the complainant) or the second tier, we are only required to give the organisation we propose to investigate the opportunity to comment<sup>39</sup> (including any contractors providing a service on their behalf). **(Legal requirement)** It is our policy that the caseworker should still write to any other organisation who has been involved in the complaint or how it has been handled to ask for their comments. **(Policy requirement)**

#### Writing to the organisation - health complaints

- 3.85 We are required to give the health service organisation, family health service provider or independent provider the opportunity to comment on any allegations made in the complaint<sup>40</sup>. **(Legal requirement)**
- 3.86 Where a complaint is made about a health service organisation we should normally write to the Chief Executive and copy to the relevant complaints team or complaints manager within that organisation. In respect of a family health service provider we should write direct to that organisation (for example a GP practice). **(Policy requirements)**
- 3.87 Where an independent provider is to be investigated, we should write to the Chief Executive (or equivalent) of the provider. Note: this should be directed to the provider organisation (for example, UK Specialist Hospitals Ltd) rather than only to the provider location (for example, a treatment centre). **(Policy requirements)**

#### Named persons

- 3.88 The law<sup>41</sup> requires us to offer any person specifically named in the complaint as ‘having taken or authorised the actions complained of’ the opportunity to comment on any allegations made in the complaint. **(Legal requirement)**
- 3.89 The caseworker should record on Dynamics 365 anyone mentioned in the complaint as a named person who meets this definition. **(Policy requirement)** This applies in both health and parliamentary cases and includes the actions of any administrative staff complained about as well as those of clinical professionals. A named ‘person’ could also consist of an organisation such as a company or partnership. (For example, a company carrying out work on behalf of an organisation in jurisdiction.) If unsure, our default position should be to

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<sup>38</sup> This is because any second tier complaint handler who handles complaints on behalf of an organisation we can investigate is taking administrative action on behalf of that organisation. We therefore must give that organisation the opportunity to comment.

<sup>39</sup> 1967 Act, Section 7(1); 1993 Act, Section 11(1)

<sup>40</sup> 1993 Act, section 11

<sup>41</sup> 1967 Act, Section 7(1); 1993 Act, Section 11(1)

include the individual or organisation as a named person to ensure we meet our legal obligations. **(Policy requirement)**

- 3.90 The caseworker should send the proposal to investigate to the organisation complained about and ask for it to be forwarded to the named person. **(Policy requirement)** Where needed, they should check in advance that the named person still works there.
- 3.91 In instances where an individual or organisation are named in the complaint, but their details are unknown, the caseworker should contact the organisation complained about to find out if they are still an employee. If the named person is a clinician they should also ask for details of their position at the organisation and details of any professional registration. If these details cannot be established then a record should be made on Dynamics 365. **(Policy requirements)**
- 3.92 Our letter must make it clear that the named person's actions will specifically be investigated and that they have their own opportunity to comment on the allegations made. **(Policy requirement)** They should also be invited to contact us directly if they wish to discuss the complaint further.
- 3.93 We should make all reasonable efforts to trace a named person to give them the opportunity to comment. For example, we should consider contacting the last known employer of the named person, or their professional organisation, and ask them for the named person's contact details. However, if we cannot do so (within a reasonable time) we may proceed without having a response from the named person. This decision should be taken on a case by case basis and taking into account all relevant circumstances, including the seriousness of the allegations made against the named person. **(Policy requirements)**
- 3.94 Template proposal to investigate letters are available on Dynamics 365.

### **Other considerations before proposing to investigate**

#### **Linked to lead**

- 3.95 In some types of complaint, especially where a large number of people have been affected by the same error and seek a similar remedy, we might choose to investigate a small number of lead complaints that exemplify the issues complained about.
- 3.96 Those not being treated as lead cases will be declined but with the details of the complaint retained to allow us to take action, as necessary, to contact the complainant once the lead complaint or investigation is completed. If a complaint is subsequently made to us about a matter already covered by a lead investigation, then we will also close the complaint as being linked to the lead investigation and retain the details of the complaint with the other linked cases.
- 3.97 The decision to close a case as linked to lead should be explained on the Decision Form. The case we are closing should also be connected to the linked



case. On Dynamics 365 this decision should be recorded as 'other reason to decline'.

#### Prioritising a case for investigation

- 3.98 In exceptional circumstances we may decide a case should be prioritised for investigation (such as when a complainant has a terminal illness). If the caseworker considers this appropriate they should discuss this with their line manager first. They should then ensure this decision is fully audited on Dynamics 365. **(Policy requirement)**

#### Material evidence and adding organisations

- 3.99 We define material evidence as '*evidence we have considered that we have either relied upon or has influenced our assessment*'. At the point that the assessment decision is made, the caseworker should ensure that the material evidence is appropriately flagged and referenced on the Decision Form **(Policy requirement)**.

- 3.100 Once the proposal to investigate has been issued, the caseworker should go onto the investigation record and add the organisations to investigate on the organisations tab.

#### Concluding our further consideration of a case

##### Reaching and evidencing our decision

- 3.101 Before reaching a decision on the case, we should ensure as much as possible, that we have obtained all of the information we need, including from the complainant, organisation/s and anyone else we identify as being able to provide relevant evidence.
- 3.102 By ensuring we have gathered all the relevant evidence, thoroughly considered that evidence and followed the proper casework processes we can clearly demonstrate that we have reached a robust, impartial decision.
- 3.103 When requesting evidence from an organisation or complainant, we should explain why it is relevant to our consideration/investigation of the case.
- 3.104 Further information about how we should use different types of evidence can be found [here](#).

##### Recording case allocation

- 3.105 In most cases the caseworker who completed the assessment will also undertake the investigation. Once the proposal to investigate has been issued, the caseworker should ensure the box for 'Case Allocated' is completed.

## Approving decisions

- 3.106 A decision to decline a complaint for investigation or to issue a proposal to investigate should be agreed in line with the Delegation Scheme and the Supervision Model **(Policy requirement)**. Unless otherwise stated it is not a requirement for the member of staff approving the decision to also physically sign out the decision.

## Issuing decisions not to investigate

- 3.107 In parliamentary cases the decision letter should be addressed to the complainant with a copy sent to the referring MP<sup>42</sup> under a brief covering letter. **(Legal requirement)**
- 3.108 In health cases the decision letter should be addressed directly to the complainant<sup>43</sup> (and a copy sent under a brief covering letter to any MP involved). **(Legal requirement)**
- 3.109 If there is a separate aggrieved party who is not the complainant then we should consider on a case-by-case basis as to whether a separate copy of the decision letter should also be sent to them.
- 3.110 Professional representatives or advocates can also be sent copies of decision letters providing we have appropriate authorisation from the complainant/aggrieved for them to act on their behalf. (In cases where the representative or advocate is the complainant then the letter will have been addressed directly to them in any case.)

## Sharing our decisions

- 3.111 Our decision letters should be in plain English by default. We should consider though the individual needs of the complainant. For example, if the complainant has asked a complex legal question that may require legal language in response, we should not shy away from using it if we are confident the complainant will understand it.
- 3.112 We should reference and explain in our decision letter how we have used the material evidence we received, requested, or acquired, from all parties to the complaint in reaching our decision. **(Policy requirement)**
- 3.113 If we have received clinical advice, the caseworker should ensure they explain to the complainant the qualifications of any advisor who provided it, and our reasons for asking for them to provide advice on their case. **(Policy requirement)** For example, why their particular discipline is relevant to the complaint.

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<sup>42</sup> Section 10(1), 1967 Act.

<sup>43</sup> Section 14(2), 1993 Act.

- 3.114 If we decide not to investigate a case and there is an alternative route available to the complainant, then the caseworker should inform them of it. This may include signposting back to the organisation or suggesting a suitable advocacy agency. If a case is out of remit then the caseworker should try to identify another organisation, if possible, that can help and then direct the complainant to it. **(Policy requirements)**
- 3.115 If we decide not to investigate the case, but have already contacted the organisation complained about during our further consideration, we must tell them our decision not to investigate. **(Policy requirement)**
- 3.116 We should ensure our reports are proportionate in length and detail to the complexity and risk rating of the complaint, the number of issues raised and the severity of the injustice claimed. **(Policy requirement)** Our letter may also be longer if a decision is finely balanced, or we need to explain conflicting information or evidence.

### **Recording an organisational decision**

- 3.117 If we are closing the case in its entirety,, then after a decision has been made against each complaint component, an overall decision should be recorded for the organisation. **(Policy requirement)**
- 3.118 At further consideration stage, if we are closing the case and have resolved any component of the complaint, the organisational decision should be recorded as 'resolution'. **(Policy requirement)**
- 3.119 If no component is being closed as a 'resolution' then our closure code should reflect the main reason we are deciding not to pursue any complaint against the organisation. **(Policy requirement)**
- 3.120 If we are proposing to investigate any complaint component within a case the organisational decision should be recorded as 'propose to investigate'. Any parts of the case we are not investigating should have decisions recorded against them at component level. **(Policy requirements)**
- 3.121 Following completion of an investigation the organisation decision code should be updated to reflect the outcome of the investigation. **(Policy requirement)**
- 3.122 The overall closure code used at further consideration or investigation stage should be considered on a case by case basis. However, in reaching a view on the appropriate closure reason the caseworker should consider how the majority of the complaint components have been closed and their relative size and importance to the complainant. **(Policy requirements)**

### **Risk assessment**

- 3.123 Case risk should be assessed at the point at which a decision is being made not to investigate or at which a proposal to investigate is being sent. **(Policy**

**requirement)** Please remember that risk assessment should include consideration of any conflicts of interest (both of the casework staff and of senior staff). Please refer to the risk section in [section 10](#).

3.124 If a case is deemed high risk as a result of this review, then it should be considered in line with the high risk case escalation process as detailed in [section 10](#).

## Section 4. Detailed investigation: Introduction

- 4.1 This section is to be used by caseworkers when undertaking a detailed investigation. It is intended to provide guidance on the considerations that must be made at each of the 5 main steps of the detailed investigation process.
- 4.2 Whilst there are some actions that must be undertaken due to legal and policy requirements, large parts of the detailed investigative process rely on discretion and judgement. Any divergence from the stated requirements in the guidance should be recorded and explained on Dynamics 365.
- 4.3 The 5 steps of the process are:
- Review, confirm and plan the investigation
  - Undertaking the investigation - gathering evidence
  - Undertaking the investigation - analysing the evidence
  - Communicating our provisional views
  - Communicating the final decision
- 4.4 Additionally, there are 7 investigation milestones which detail the key stages of an investigation. Each milestone should be recorded and dated on Dynamics 365 once the required actions have been carried out. The 7 milestones are:
- Milestone 1: Investigation Allocated (note: this is completed at the point that the proposal to investigate is issued)
  - Milestone 2: Investigation Confirmed
  - Milestone 3: Evidence/Advice requested
  - Milestone 4: Ready for analysis
  - Milestone 5: Our provisional views shared with the body and complainant
  - Milestone 6: Receipt of comments on our provisional views
  - Milestone 7: Final Report issued

## **Section 5. Detailed investigation: Review, confirm and plan the investigation**

### **Case file review**

5.1 The investigation will normally be carried out by the caseworker who conducted the further consideration of the case.. However, if reallocated then the new caseworker should review the case to determine:

- What has happened so far.
- Reasons for investigating.
- What was in the proposed investigation scope.
- Whether there have been any replies to the proposal to investigate letters.
- Whether the appropriate case papers have been requested/received.
- Any risk issues.
- Any diversity issues.
- Any communication preferences.
- What complaint components have been added and whether these require revision
- If additional named persons need to be added, or those we are no longer considering as part of the case removed.

### **Comments on proposed detailed investigation**

5.2 The law<sup>44</sup> requires us to give organisations and individuals an opportunity to comment on the complaint that has been brought to us (not on the proposal to investigate), so we need to take a decision on whether to go ahead with the investigation, having seen any comments made on the complaint.

5.3 There is no requirement to follow up with the organisation to get a response. We may confirm the investigation without having had the response within the timeframe set in the proposal to investigate letter. If there is delay at this stage or a suggestion of non-cooperation, then that should be taken into account in the risk assessment.

5.4 If an organisation challenges our jurisdiction then the risk rating should be reviewed, and advice sought from the Legal Team.

5.5 Any response to the proposal to investigate should be looked at by the caseworker and a decision taken on whether to go ahead, based upon what the organisation has said:

- Organisation declines to comment or there is nothing in the reply that casts doubt on the proposed investigation: case accepted and investigation proceeds.
- Organisation's comments cast doubt on the proposed investigation or suggest that it would be inappropriate or unnecessary to proceed (including where the

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<sup>44</sup> 1967 Act Section 7 1993 Act Section 11

organisation offers an appropriate resolution): the investigation is not confirmed, if we accept the organisation's response.

## Scope

- 5.6 Using the proposed investigation scope, case papers and any comments received; carry out a detailed scoping of the investigation (**Policy requirement**). This should involve carefully picking out the main points of the complaint to be investigated and then clearly and concisely setting them out, together with the claimed injustice and outcome sought so that all parties are clear about the focus of the investigation.
- 5.7 The caseworker should ensure that the parties understand and accept the scope of the investigation before the investigation is confirmed (**Policy requirement**). Without acceptance of the scope from the complainant, we cannot continue the investigation. If the complainant is unhappy with the scope, then the caseworker will need to make a proportionate judgement on whether it is worthwhile pursuing acceptance in light of the issues scoped. For example, we may decide to continue talking to the complainant to get the scope agreed if the alleged service failure/ maladministration or claimed injustice is more serious.
- 5.8 If the organisation complained about does not accept the scope, the matter should be escalated to a line manager to discuss the most appropriate way forward.

## Expanding the scope

- 5.9 We can expand the complaint and include additional factors not already raised by the complainant as long as they are relevant to the substantive complaint or the alleged injustice. We should look at whether the additional factors can reasonably be considered to be related. For example, if we consider there to have been a significant delay or there are issues around quality of complaint handling these could be relevant and added in.
- 5.10 If we want to widen the scope of the complaint, we should agree the amended scope with the complainant (**Policy requirement**). We should not proceed with the widened complaint if the complainant does not agree. (In that case we would have to decide whether it was possible to carry out a proper investigation if it was limited to the original complaint and, if not, we should consider whether to discontinue). If we do widen the scope, this should be accurately recorded, and the organisation provided with details of the amended scope.

## Missing clinical records

- 5.11 In instances where the caseworker has scoped what they propose to investigate but medical/clinical records are missing due to availability or completeness of records, they will need to consider the impact this may have on their investigation and eventual findings.

- 5.12 If the impact on the investigation is insignificant, the caseworker does not need to re-issue the scope. The caseworker can make a comment that information is missing; however, this cannot be referenced as a failing. If the caseworker has concerns, they should seek manager advice. **(Policy requirement)**
- 5.13 If the impact on the investigation is significant, the caseworker should reconsider and amend the scope, explaining clearly that record keeping will now be included. The caseworker should ensure they update the injustice and outcome in relation to this part of the complaint. The caseworker should then re-issue to the organisation and complainant. If the caseworker has any concerns, they should seek legal advice. **(Policy requirements)**
- 5.14 The caseworker will not usually refer the complainant back to the organisation for further local resolution on the basis of record keeping.
- 5.15 Where the caseworker considers it is essential to enable them to arrive at a decision that they send the complainant back to the organisation to raise a separate complaint about the record keeping aspect, they should seek legal advice prior to doing so. **(Policy requirement)**

## **Planning**

- 5.16 An investigation plan should be documented on all cases **(Policy requirement)**. The plan should show how the caseworker intends to close the case by the target date chosen - including dates when the key activities will take place by. A good plan should:
- Be proportionate to the complaint. More straightforward cases are more likely to have a much more concise plan.
  - Have a clear timetable in it, which sets out what actions are to be taken and by when.
  - Be clear about exactly what evidence we are likely to need, how we will gather that and by when. It is also important to clearly document the reason why we want to obtain this evidence, making sure we are clear on how this evidence will help address the points of complaint.
  - Reflect the complaint. For example, if the scope has changed then we should note this.
  - Be a live document that reflects developments on the case. The plan should therefore be updated whenever necessary.
- 5.17 The investigation plan will usually be recorded directly onto the relevant section of the Decision Form. More complicated plans can be recorded using separate documents on Dynamics 365, but their location should still be referenced on the Decision Form. There are no specific requirements to what should be included in the plan, and it does not need to follow a specific structure. It should, however, cover the points above. An optional Investigation plan template is available.



- 5.18 The plan should be discussed, ideally by telephone, with all parties to the complaint, in all investigations **(Policy requirement)**. The plan should explain the intended target date for conclusion of the investigation and the key milestones of activity. For example, evidence we are likely to obtain, interviews we may conduct, when our provisional views are likely to be shared.
- 5.19 The caseworker should agree how, and how often, they will communicate with the parties and record this. If there are any changes to the plan, then they should be informed as soon as possible, and the updated plan explained to them.

### **Delays on cases**

- 5.20 If there is going to be, or has been, a delay on the case then there needs to be an accurate record of this explaining why **(Policy requirement)**. It does not matter where the note is recorded (on the plan or as a separate task note on the case) as long as there is a record.
- 5.21 If the case looks like it is going to be delayed beyond the target date, this should be discussed with a manager as soon as possible for them to consider how to proceed. If the target date is moved, there must be an audit trail on Dynamics 365 detailing the decision to move the target date, the reason/s why and who the decision was made by. Changes to target dates must be agreed at Operations Manager level or above.

### **Updating the plan and general audit trails**

- 5.22 As the plan is a live document, any significant updates must be made in the original version, with clear indication, in the plan itself, of the date it was updated and why.
- 5.23 Any activity or decisions on a case must be accurately recorded on Dynamics 365 by the caseworker or manager (this includes significant discussion on a case in a 1:1 meeting) **(Policy requirement)**.
- 5.24 When a manager conducts a review of a case other than at a 1:1 - this must also be recorded on Dynamics 365 by the manager, giving their view on the progress and any actions set out to conclude the case. **(Policy requirement)**

### **Complex and significant case requirements: planning and precedent checks**

#### **Planning**

- 5.25 The plan should be taken to a planning meeting with two Operations Managers (if two are not available, the meeting should go ahead with one), one of whom will formally agree the plan **(Policy requirement)**. During this meeting the caseworker should flag any particular concerns relating to, for example, the scope of the investigation and any specific discretion considerations.

5.26 An investigation plan should be documented on all cases (**Policy requirement**). The plan should show how the caseworker intends to close the case by the target date chosen - including dates when the key activities will take place by.

5.27 Complex investigation plans should usually be recorded on the Decision Form. More complicated plans can be recorded using separate documents on Dynamics 365, but their location should still be referenced on the Decision Form. An optional Complex Investigation Plan template is available.

### Provisional views

5.28 Once the scope is confirmed we should set out our provisional views of a case using the provisional views template<sup>45</sup>.

5.29 Our provisional views should set out an initial view of the facts of the case and what any information or advice we receive is telling us. Our provisional views are entirely subject to change dependent on any comments we receive when issued.

5.30 Templates are available on Dynamics 365.

5.31 Any communication we therefore have with any party to a case should not suggest we have already reached a decision or are not open to any additional information they may wish to provide. For example, we should refer to our provisional views, rather than a decision. Contacting the parties at the start of the investigation

5.32 Contact with the complainant should take place in all cases (**Policy requirement**), ideally by phone. However, the caseworker should consider the complainant's preferences and availability which may mean contacting them by letter or email instead.

5.33 Ideally, contact with the complainant should take place once the investigation has been scoped and the plan written so that both the scope and plan can be discussed with them at the same time and acceptance obtained. The caseworker should therefore aim to cover the following points when contacting the complainant:

- Verify the identity of the person we are calling (further information available [here](#)).
- Discuss investigation scope, check that this is understood and accepted.
- Discuss the investigation plan including key activity milestones and intended target date.
- Explain how we will conduct the investigation including the difference between our provisional views and final reports. (establish the facts, look at what happened, what should have happened and whether there was a gap)

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<sup>45</sup> More detailed information about the content provisional views should contain is available in section\_\_

- Identify any further useful information.
- Establish any diversity issues, communication preferences or reasonable adjustments needed (further information available [here](#)).
- Confirm the ongoing communication arrangements, give an overview of how we will conduct the case and provide estimated timescales.

(Note: if the caseworker undertaking the investigation is different to the one completing the further consideration of a case, they should also ensure they introduce themselves and provide their contact details.)

5.34 If it is not possible to contact the complainant, record why and details of how and how often the contact has been attempted.

### **Contacting the parties throughout the detailed investigation**

5.35 Relevant information should be shared with all parties throughout the life of the case. **(Policy requirement)** These contact points are opportunities to explain what the evidence is showing us, or to talk to the parties about what our provisional views might be.

5.36 We must ensure that we take into consideration any concerns raised by all parties through-out our investigation and be open to consider any further information they wish to share with us. **(Policy requirement)**

5.37 In accordance with our legislation<sup>46</sup>, we can only release information we obtain if it is necessary to do so as part of our investigation or to help us explain our provisional views. However, this does not stop us from sharing information about the investigation with those involved in it and keeping them regularly informed, for example about the clinical advice we have received and what it is telling us. We want those involved to be able to follow our progress and thought processes about a case, whilst remaining impartial and not letting them influence our provisional views of a case or final decision.

5.38 Any communication with the parties involved in a case must be clearly and accurately documented and recorded on the electronic casefile.

### **Confirming the detailed investigation**

5.39 We must only confirm the investigation once our deadline for comments has passed, or all parties have responded. **(Policy requirement)**

5.40 We should write to the parties we sent our proposal to investigate letters to confirm we have decided to investigate and the scope we have decided to use in writing. **(Policy requirement)** This is to ensure all parties are clear what we will be investigating and there is no requirement on the complainant or organisation to provide further agreement to the scope before we proceed with the investigation.

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<sup>46</sup> 1967 Act Section 11 and 1993 Act Section 15.

- 5.41 We must ensure, when we confirm the investigation in writing that we are clear with the parties that this is the point at which the investigation has begun and that we have provided them with the opportunity to comment. This includes referencing the date the investigation was confirmed. **(Policy requirements)**
- 5.42 Templates are available on Dynamics 365.
- 5.43 We should also ensure that there is an accurate record on Dynamics 365 explaining that we have now confirmed the investigation and any other comments or feedback we have received about the scope. **(Policy requirement)**
- 5.44 When writing to an organisation or named person about a complaint relating to clinical issues, we should ask them to supply any relevant standards they used when providing the care and treatment complained about. **(Policy requirement)**
- 5.45 We should be clear from the beginning with all parties about what our investigative approach is (that we will establish the facts and look at what happened, what should have happened and whether there was a gap between the two) and the standards we use (Ombudsman's Principles, legal, policy and administrative), including, where possible to say at this stage, relevant professional standards.
- 5.46 At the point at which the caseworker confirms the investigation, milestone 2 ('Investigation confirmed') should be recorded and dated on Dynamics 365 as complete.
- 5.47 If having received comments on the proposed investigation scope, we decide we do not want to confirm the investigation; this should be handled as a closure at further consideration stage, and the relevant decision codes should be used.
- 5.48 If an investigation is not confirmed then we must provide the relevant parties with our reasons for doing so, because we are taking a decision not to investigate.<sup>47</sup>

## **Risk assessment**

- 5.49 A risk assessment must be conducted when we confirm an investigation. **(Policy requirement)** Please remember that risk assessment should include consideration of any conflicts of interest (both of the casework staff and of senior staff). Please refer to the risk section in [section 10](#) for further information.

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<sup>47</sup> 1967 Act, Section 10(1). 1993 Act, Section 14(1)-(2)

5.50 If a case is deemed high risk as a result of this review, then it should be considered in line with the high risk case escalation process as detailed in [section 10](#).

## Discontinuation

5.51 Discontinuation can occur at any point during an investigation and may be considered for a variety of reasons. For example, death of the complainant, where the complainant requests it or where an alternative legal remedy has been obtained.

5.52 Any case, which the caseworker thinks should be discontinued, should be discussed with a line manager. The complainant should be told what we are proposing to do and why, and to be given an opportunity to give their views before the final decision is made. In some circumstances it may also be appropriate to seek the views of the organisation under investigation. Once comments have been obtained our final decision should be signed off in line with the [Delegation Scheme](#)<sup>48</sup>.

5.53 A case may also be discontinued in exceptional instances where the relationship with a complainant has broken down so far as to make the case impossible, or highly impractical, to progress. The reasons for taking this action must be fully recorded on the case and be approved by an Assistant Director and the legal team. The caseworker should also check the case has been handled in line with our Unreasonable Behaviour policy. **(Policy requirements)**

5.54 If the complainant says they no longer want to proceed with the investigation, we should let the organisation know and any objections they may have around discontinuing should be considered.

5.55 We should also consider whether or not it is appropriate to still continue with the investigation despite the complainant's request to discontinue. Some factors to consider include:

- If we are near the end of the process and it would be unfair on those complained about not to complete the investigation.
- There is evidence of serious or systemic failings which needs to be addressed.
- The case raises issues of wider public interest.

5.56 If the caseworker is unsure how best to proceed, they should speak to their line manager and then document the discussion clearly on Dynamics 365. Any other proposal to discontinue should follow the process set out above.

5.57 If we decide not to investigate a case and there is an alternative route available to the complainant, then the caseworker should inform them of it. This may include signposting back to the organisation or suggesting a suitable advocacy agency. If a case is out of remit then the caseworker should try to

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<sup>48</sup> The final decision on a joint working case should be approved in line with our [joint working Delegation Scheme](#).

identify another organisation, if possible, that can help and then direct the complainant to it. **(Policy requirements)**

### **Resolving a case without a finding**

- 5.58 Sometimes we may resolve an investigation prior to making a finding. This is when we are able to deliver an answer or outcome for an issue of complaint brought to us without making a formal recommendation.
- 5.59 This would include cases where we have mediated an outcome, or agreed an organisation needs to undertake further work to resolve a complaint. For example, an organisation who provides the outcome requested by a complainant prior to our investigation being completed.
- 5.60 For us to close an investigation prior to making a finding, the case must be one we had the legal power to consider. We must also have taken this action before issuing our provisional views on the case. **(Policy requirements)**
- 5.61 It is for us, and not the complainant or organisation, to decide whether the actions we have taken have resolved the complaint. Usually, the actions will be taken by the organisation concerned, however it is possible to resolve a complaint through our own actions, such as providing a better explanation in relation to poor complaints handling.
- 5.62 We must have taken specific action in order for us to consider a complaint to be resolved without making a finding. **(Policy requirement)** This could include moving a complaint further along the local resolution process if the delays are the subject of the complaint. If an organisation was already taking the action required or decides to take further action on a case as we are now involved, this is not 'resolved without a finding'.
- 5.63 A case can be closed overall as a 'resolved without a finding' when either the majority of complaint issues raised with us are considered resolved, or where a complaint concerns a significant issue and several minor issues, and the significant issue is resolved.

### **Milestones**

- 5.64 It is not a requirement to carry out all of the actions within each step in a specific order. The caseworker can also move ahead to the next stage of the Investigation before all the actions under the previous stage have been completed, if it is appropriate to do so. For example, if the caseworker has not yet spoken to the complainant but requests clinical advice because they are clear on the questions to ask the adviser.
- 5.65 However, only once all the actions under each step have been carried out, should the milestone be recorded as completed **(Policy requirement)**. The seven investigation milestones provide evidence of case progression and give an indication of where there might be delays in the casework process, so it is important that the milestones are accurately recorded at the relevant time.

## **Reallocation**

5.66 If it becomes necessary to reallocate a case then the specific process to be followed is set out in our supporting guidance.

## Section 6. Detailed investigation: Undertaking the investigation - gathering evidence

### Gathering evidence

6.1 At the planning stage, the caseworker will have set out what evidence is likely to be needed, how it will be obtained and by when. The caseworker will need to obtain the evidence set out in the plan. This may mean obtaining any or all of the following:

- Organisation's copies of original papers (unless originals are needed)
- Answers to specific enquiries from the organisation.
- Further evidence from the complainant.
- Evidence from third parties.
- Relevant standards (that is, the professional, administrative and legal standards that cover what is being complained about).
- Professional advice.

6.2 All information, evidence or professional advice received on the case should be recorded on Dynamics 365 in line with our naming conventions, which are listed in supporting guidance

6.3 Our principles on how to balance evidence is available in supporting guidance.

6.4 We can obtain evidence in writing (including by email), by telephone, in person, at interviews, during telephone conferences or in case conferences. We should always aim to obtain evidence by whatever method is quickest and most proportionate (**Policy requirement**). Where possible, this should be done by telephone or email.

6.5 When seeking professional advice (legal, clinical, other specialist), we must be specific about the advice needed from advisers and ensure that we specify timescales for when the advice/evidence requested should be provided by. (**Policy requirement**) If we are involving several advisers, consider whether a case conference would be helpful.

6.6 We should obtain copies of original papers, although there may be some occasions where the originals will be required (if we have reason to doubt the copy). We normally accept as primary evidence the files/papers of second tier or other complaint handling bodies (which will include within them copies of an original organisation's papers).

6.7 If a complainant or organisation raises new information with us during our investigation (prior to provisional views stage) we should consider this on its merits and consider whether we require any new evidence as a result. For example, if an organisation provides us with research about the use of a new drug we may not have considered, we may want to request further clinical advice about its use before reaching a provisional view.



## **Proportionality**

6.8 We should ensure that the method we are using to obtain evidence is proportionate to the importance of the evidence we are trying to obtain.  
(Policy requirement)

6.9 A proportionate approach would:

- Relate to the agreed scope.
- Include being aware of and considering any broader patient safety or public interest (taking account of other individuals affected and any systemic concerns as well as the individual claimed injustice).
- Ensure a sufficient response is provided to all parts of the agreed scope.
- Be cost effective when carrying out the investigation, whilst taking account of customer service and legal requirements. For example, where information or evidence is unavailable or difficult to obtain then we should take into account the importance of that evidence when deciding if and how to pursue it.

## **Powers to obtain information**

6.10 We have wide-ranging powers to request information or documents relevant to an investigation from any person<sup>49</sup>. This includes asking to see any legal papers or advice that the organisation complained about has obtained as part of their investigation.

6.11 It may be necessary when undertaking certain enquiries to refer to the Ombudsman's legal powers. If we experience difficulties at any stage of an investigation in obtaining documents or evidence from any party (for example, an organisation refusing to provide information) then the case should be escalated, initially to the relevant line manager. Further escalation, including to the Legal Team, should be undertaken as required.

6.12 We may not always need to make an enquiry of the organisation within jurisdiction to obtain guidance and legislation as we may be able to obtain details through our own information sources or from external sources.

## **Documentary evidence**

6.13 Consider what documents are needed from the complainant or body. Clinical records are an obvious source of evidence, but we should consider any documentation that the organisation may have which may help us reach a fair decision. Records can be obtained electronically, for example, on disks or electronic files.

6.14 In some circumstances, the amount or format (for example, computer files) of evidence may make it difficult for it to be sent to us. Where it is more practical or efficient to do so, consider arranging to visit the premises where the evidence is held. Such visits can also be justified on the grounds of efficiency if it would be quicker to view evidence on site than having it sent to

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<sup>49</sup> 1967 Act, section 8. 1993 Act, section 12

us. If possible, such visits could be combined with conducting interviews with members of staff.

### **Contradictory information and advice**

- 6.15 On occasion we may be given information or advice on a case which is inconsistent or differs in opinion to other information or advice we have already received. For example, we receive advice from two different clinicians that give us alternative views to whether the treatment provided was reasonable.
- 6.16 Where we propose to use this information or advice as evidence in reaching our provisional views on a case, or in deciding how it should be handled, we should provide reasons to why we believe one piece of evidence should be treated as more accurate or persuasive over the other. The caseworker should consider the reliability of the information or advice and who has provided it. For example, one of the clinicians may be a specialist in that clinical area. **(Policy requirements)**
- 6.17 We should inform the parties involved in the case that this contradictory information or advice exists, by referencing it in our provisional views cover letter. **(Policy requirement)**
- 6.18 We should aim to prevent inconsistent clinical advice referrals by ensuring requests are submitted in line with our guidance and the clinical advice principles. A Lead Clinician should be made aware if contradictory clinical advice is received from our clinicians.

### **Clinical advice**

- 6.19 Policy and guidance about clinical advice is available within section 3. Please click on the hyperlink to navigate to this section.

### **Legal advice**

- 6.20 Policy and guidance about legal advice is available within section 3. Please click on the title to navigate to this section.

### **Other advice**

- 6.21 The caseworker should record any advice they get on a case which is received from a manager, or peer, which assists them in progressing, or reaching, a decision on their case.

### **Information from third parties**

- 6.22 Requesting information from parties to the complaint or third parties should ideally be done over the phone or by email. The timescale we set for receipt of the information will depend on the case and information requested. If the caseworker is requesting information by email, they should use the Egress

switch functionality and follow the Office's Protective Marking Scheme, which will classify and mark the information according to the level of sensitivity and impact if wrongly disclosed. When emailing stakeholders and other external organisations these emails should be marked as Sensitive. For more information about preparing documents for sharing, Egress and the Protective Marking Scheme please contact our Information Security Manager.

## Interviews

- 6.23 Consider whether it would be beneficial to conduct interviews, particularly in cases where the documentary evidence does not provide a clear picture of events or where we need to look into a particular area of concern.
- 6.24 Interviews can be in person or by telephone. The caseworker will need to consider the most appropriate method of doing so. If interviews are needed, the interviewees should be notified and the interviews arranged as soon as possible after the planning stage, even if the intention is to actually conduct the interview at a later stage (for example, after getting the clinical advice).
- 6.25 Notes of interviews should be written up and shared with those interviewed as soon as possible and comments sought on them. For lengthier or more complex interviews, it may be appropriate to record the interview and send the recording for transcription. Business Support can arrange this.

### Arranging and conducting face-to-face interviews

- 6.26 Consider the most suitable location for the interview to be conducted in private (interviews can be held at our offices or elsewhere), including whether an independent venue such as an MP's constituency office or an advocate's office might be more appropriate. This may be the case if the interview is also going to be potentially distressing for the interviewee.
- 6.27 If staff members are setting up face-to-face interviews then they should discuss personal security and any relevant risk elements with line management as part of the planning for that interview. **(Policy requirement)**
- 6.28 If staff are carrying out off-site interviews with complainants and other third parties then an off site interview risk assessment form must also be completed, agreed by the relevant line manager and then saved to Dynamics 365.
- 6.29 Casework staff should attend a face-to-face interview, with a manager, colleague or clinician also present. **(Policy requirement)**
- 6.30 Interviewees may in some cases (because of individual preference or because of the sensitivity of the case content) make a specific request as to the gender of our interviewer. In those circumstances we should consider such requests on their individual merits.

6.31 Natural justice requires that the process of gathering evidence by interviewing must be fair. We should ensure, when interviewing any of the parties to the complaint, that they have a summary of the complaint being investigated. **(Policy requirement)** It may also be appropriate to provide a list of topics to be covered at the interview, plus (especially where the relevant events occurred some time ago or where they are to be asked to comment on the written material) a list (or copies) of the documents to which reference is to be made during the interview.

#### Arranging and conducting face-to-face interviews: the interviewee

6.32 Inform the interviewee that they can choose and arrange for a friend, colleague, legal adviser, trades union representative or defence organisation representative to attend with them if they wish.

6.33 It is generally our position that anyone attending with the interviewee may observe but is not expected to participate in the interview. There may be exceptions to that, particularly for young or vulnerable people. We should also make clear to anyone accompanying the interviewee that they need to respect the privacy of the investigation. (Note: we do not have to allow a complainant or a witness to be represented or accompanied. It is a matter for our discretion and in some cases it may be inappropriate or hinder the investigation to allow it<sup>50</sup>. For example, we might consider it inappropriate for someone from the interviewee's direct line management chain to accompany them, as this might inhibit the discussion).

#### Information Security

6.34 Our information is a key asset and needs careful and special protection against disclosure in accordance with its sensitivity and legislative requirements. Care is required when information is moved in and out of the office (whether physically or electronically). We take the need to protect the information we hold very seriously.

6.35 When communicating by email to a non-secure account, steps need to be taken to mitigate the risks non-secure email presents. This includes seeking consent, password protecting documents and double checking email addresses have been typed correctly.

6.36 When sending or returning original evidence we need to decide if this should be sent by Royal Mail, Recorded Delivery or DX. For irreplaceable items such as original medical records, birth certificates, it is advisable to send these by DX.

6.37 If Word documents such as letters or reports are sent to parties to the complaint by email, Egress (which provides security when sending information via non secure email) will encrypt emails and attachments that we classify as Sensitive according to the Office's Protective Marking Scheme.

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<sup>50</sup>Section 11(3)(b), 1993 Act. Section 7(2), 1967 Act.

## Material Evidence

- 6.38 We define material evidence as *‘evidence we have considered that we have either relied upon or has influenced our investigation’*. At the point that we share our provisional views, the caseworker should ensure that the material evidence is appropriately flagged and referenced on the Decision Form (**Policy requirement**). Instructions on recording material evidence on Dynamics 365 are available in the Dynamics manual.
- 6.39 Any requests for material evidence should be passed through to the information rights team for review and consideration.

## Milestones

- 6.40 At the point at which the caseworker considers that all the evidence/information/advice required to undertake the investigation has been requested, Milestone 3 (‘Evidence/advice requested’) on Dynamics 365 should be recorded as completed.
- 6.41 Once that information has been received and the case is ready for analysis, the caseworker should record Milestone 4 (‘Ready for analysis’) as completed on Dynamics 365.

## Section 7. Investigation: Undertaking the investigation - analysing the evidence.

### Analysing the evidence

- 7.1 Before reaching provisional views on a case, we should ensure as far as possible, that we have obtained all of the information we need, including from the complainant, organisation/s and anyone else we identify as being able to provide relevant evidence.
- 7.2 In order to reach a provisional view on a case, we should consider and weigh up all the evidence that is available, ensuring that our provisional views are based on all the relevant evidence, is consistent with the facts and ignores irrelevant information. **(Policy requirement)**
- 7.3 We should take account of any advice received but we need to remember that the view we express in our provisional views are our own and advice should only inform it. We must clearly record the view that we have taken on any advice, including where we have initially considered not to follow and why. **(Policy requirement)**
- 7.4 If we receive evidence on a case that seems inconsistent or requires further explanation for any reason, we should be prepared to question or challenge it. This may involve speaking with the person or organisation who provided it and asking further questions or asking for the same evidence to be provided from a different source.
- 7.5 We should highlight and address any problems arising from contradictory evidence, the unavailability of important evidence or the reliability of oral evidence<sup>51</sup>.
- 7.6 We should ensure we assess all of the evidence we receive and give it fair and independent consideration. This includes equally considering evidence provided by the complainant and organisation complained about.
- 7.7 To assist with reaching a provisional view we should look to provide reasoned answers, as far as possible, to the following questions:
- Did something go wrong (looking at what did happen compared with what should have happened and referencing applicable standards).
  - If so, was it serious enough to be maladministration or service failure?
  - Did the maladministration or service failure lead to an unremedied injustice?
  - Is a remedy appropriate? (We should take into account what the complainant says they are looking for)
  - Is the proposed outcome consistent with other cases and any remedy proportionate to the injustice?

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<sup>51</sup> See section 6.14 for further guidance on contradictory evidence.

## **What did happen (did something go wrong)**

7.8 Determining what happened can be established using the evidence gathered during the investigation, depending on the type of case and nature of the issues complained about.

7.9 Where there is conflicting evidence or uncertainty about what did happen, we should consider whether something is more likely or not to have happened, based on the simple balance of probability.

7.10 In some cases, there may not be enough evidence, or the evidence is so equally balanced that even on the balance of probability we cannot come to a view. In such cases, we should clearly explain why this is the case. **(Policy requirement)**

## **What should have happened**

7.11 It is for us to decide what standards should be used when trying to determine what should have happened. These will usually include:

- Ombudsman's Principles.
- Legislation, statutory powers and duties.
- Local policy and procedure.
- Other rules governing the service provided.
- Relevant professional standards.
- Any other recognised quality standards in place at the time of the events complained about.
- Standards provided by the organisation

7.12 When reaching a view, we must refer to whichever relevant standards we have used to determine what should have happened. **(Policy requirement)**

7.13 If we want to use legislation as a standard in our casework we must be sure we can understand and interpret what we are referencing accurately. We also need to be sure we are referencing the legislation correctly and appropriately considering the individual circumstances of the case.

7.14 If the caseworker therefore has any uncertainty about applying the relevant legislation as a standard in the case they are dealing with, then they must first seek legal advice. **(Policy requirement)**

## **Was there a gap between what happened and what should have happened?**

7.15 We must identify whether there was a gap between what happened and what should have happened. This should be done by comparing our view about what did happen against the standards relevant to the case. **(Policy requirement)**

7.16 We should not consider or reach a view on complaints that have not been brought to us<sup>52</sup> and are therefore not within the scope of the investigation. **(Legal requirement)** However, we can make factual comments about such matters. For example, referencing poor clinical records if it impacts on our ability to determine what happened, even if a complaint about clinical records has not been brought to us.

7.17 We also need to ensure that we do not make legal determinations as it is not our role to adjudicate on matters of law or to determine whether the law has been breached: that is a matter for the courts. However, we can take a view on whether an organisation has complied with the law (we often use the law as a relevant standard). We provide an alternative to taking a case to court but are not a substitute court. We ask different questions from those asked in a court and look at different issues. The courts determine whether people have suffered damage as a result of unlawful actions, the Ombudsman considers whether people have suffered injustice as a consequence of maladministration or service failure. We have a wider range of remedies available than the courts.

### Audio evidence

7.18 We should consider the weight we give audio evidence in our investigation as we would any other form of evidence **(Policy requirement)**. This includes taking into consideration the possibility that audio evidence can be altered or falsified.

7.19 If we are asked to consider audio evidence during our investigation of a case, then we should seek confirmation to whether permission was initially obtained from the organisation for the recording to be made, and subsequently disclosed to us. **(Policy requirement)**

7.20 If we learn that audio evidence submitted to us has been secretly recorded, and/or permission not sought for it to be used, then we should consider; **(Policy requirement)**

- If the recording is relevant, and how this will impact on reaching a decision, or whether there is other evidence we can use.
- The accuracy of the recording and if it covers all or part of the conversation and whether the recording has been edited.
- Whether we can identify the people in the recording.
- Whether using the recording is fair. For example consideration of whether one party member knew the conversation was being recorded, potentially affecting the tone of the discussion.
- If there is justification for the recording and whether this should be excluded from the investigation.
- For further guidance, please refer to the [Covert Recording Briefing Note](#).

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<sup>52</sup> *R (Redmond) v Health Service Commissioner [2004] EWHC 1847*



7.21 If we listen to the recording and find it amounts to evidence of a potential failing, then the recording will form part of our material evidence. **(Policy requirement)**

7.22 The caseworker should share a copy of the recording with the organisation, named person, and the complainant and explain that we would like them to listen to it and allow them to provide their comments. If they object, the caseworker must consider whether to proceed. The Caseworker should not use the evidence without sharing it. **(Policy requirement)**

### **Information received by the complainant from a third party (hearsay evidence)**

7.23 We may be asked by a person involved in our investigation to consider oral or written information they heard or received from a third party as evidence that an action or event took place. For example, 'Mr Jones says Mrs Smith told him the GP said he was rude'.

7.24 We should take into account any information the complainant has provided from a third party when conducting an investigation. We may have to place less weight on this information in reaching a provisional view if we are unable to verify it for ourselves. **(Policy requirement)**

7.25 Before using information provided by a third party we should consider whether a direct source of evidence is available that could be used for the same purpose. **(Policy requirement)** For example, a prescription from a pharmacy showing the wrong dose of medication was prescribed may serve the same purpose as a complainant saying another patient told them a GP mentioned the incorrect dose to a colleague.

7.26 If a direct source of evidence is unavailable, or we still want to use information provided by the complainant from a third party in our investigation, then we should try to verify its accuracy. **(Policy requirement)** This could include contacting the third party directly. For example, if a third party provides a written statement pertinent to our investigation, and leaves a telephone number, it would be reasonable for us to try to call them.

7.27 If we are unsure of the third party's details, we can consider taking reasonable steps to locate them. We should make sure though that this is appropriate and proportionate to the circumstances of the case.

7.28 We can still reference third party information we have been unable to verify in our investigation report if we consider it necessary to do so. We should be clear though on why we have used this information, and the weight we have placed on it in reaching a view.

**If there was a gap between what should have happened and what did happen, was this so far below the relevant standard that it amounted to maladministration or service failure?**

- 7.29 In order to determine whether an error amounts to maladministration/service failure we need to make a judgement about how serious it was.
- 7.30 We should carry out a proportionate and focused analysis on the most relevant issues of complaint, taking a holistic view of the complaint and taking an ‘in the round’ view. We do not have to take a view that maladministration/service failure may have occurred on every point of the complaint.
- 7.31 At the same time however, we need to be careful not to lose sight of something which was such a serious failing on its own that it tips the scales towards service failure. Another possibility is that a series of minor faults mean that, on balance, we consider service failure may have occurred.
- 7.32 We should use relevant standards and any advice received to help determine the seriousness of the error identified. We should clearly document whether the gap between what happened and what should have happened does or does not amount to maladministration/service failure and the reasons for our view.  
**(Policy requirement)**
- 7.33 As not every error will be maladministration or service failure, it is very important that we make clear when something has fallen below the standard and when something has fallen so far below the standard to be maladministration or service failure. In order to differentiate between the two, it may be helpful to refer to errors which fall below the standard as ‘mistakes’, ‘shortcomings’, or referring to ‘what went wrong’. For those which fall so far below the standard, we can use the terms maladministration and service failure, along with ‘failings’ and ‘fault’ for example. Regardless of how we describe the error, we must be clear if it is maladministration or service failure  
**(Policy requirement).**

### **Suspected criminal behaviour**

- 7.34 If, during our consideration of a case, we find information that suggests that someone may have committed a criminal act, then the case risk rating should be reviewed, the details of the case escalated to the relevant Assistant Director - casework, and advice sought from the legal team. Any action we decide to take will be based upon the specific circumstances of the case.
- 7.35 This applies to actions by any party to the complaint, including complainants and organisations/individuals complained about. For example, we might see information that suggests that an individual has committed benefit fraud or that an organisation has falsified medical records.

### **Duty of Candour**

- 7.36 We may receive complaints where the Duty of Candour has not previously been raised or considered, but we identify that there is a relevant Duty of Candour issue failing. Therefore, staff should be aware that the Duty of Candour may be relevant to a complaint even where it has not been raised earlier.

## Did it lead to an unremedied injustice?

7.37 Where we reach a provisional view that maladministration or service failure has taken place we need to consider whether it led to an injustice - that is whether the failing led to an adverse impact on the parties involved (complainant and/or aggrieved). If it did, then we need to take a view on whether the injustice has been put right (**Policy requirement**).

7.38 Our initial view may be that a failing did not lead to an injustice or an injustice was suffered but not because of the maladministration or service failure. There are some cases in which it can never be known (even on the balance of probabilities) if there is a link between what went wrong and the claimed injustice. There are other cases where we will find that the link between maladministration and the claimed injustice is not established.

7.39 The key question is 'did the injustice claimed occur in consequence of the maladministration/service failure we have found' (not other things that may or may not have gone wrong). In health cases we are often guided on this by our clinical advisers, for example in relation to chances of survival, or impact of delay in treatment.

7.40 We can take a view about injustice which relates to the claimed injustice, but we cannot invent injustice. If we think that an injustice flows from the maladministration/service failure but the complainant has not raised this with us, we should ask them if they want us to consider it during our investigation.

7.41 Injustice could include:

- Loss through actual costs incurred. For example, care fees, private healthcare, and loss of benefits.
- Other financial loss. For example, loss of a financial or physical asset (such as loss or damage to possessions), reduction in an asset's value, and loss of financial opportunity.
- Being denied an opportunity. For example, to make a choice in the light of the full facts or risks (such as an informed consent decision in relation to a surgical procedure).
- Inconvenience and distress as a result of failures in service provision (for example, delay in receiving a benefit, worry over the effect of misinformation, cancelled operations, misdiagnosis) or where the handling of the complaint in itself has been prolonged or inadequate.

7.42 The Typology of injustice contains definitions of the injustice types that have been identified from our casework.

7.43 If the injustice did happen because of the maladministration or service failure then we need to look at whether the injustice is still unremedied because, in some cases, the organisation complained about may have provided an appropriate remedy.

## What can the organisation do to remedy any injustice?

Remedy for the individual and those similarly affected

7.44 We use the Principles for Remedy to determine our approach to securing remedy. The remedy should be appropriate and proportionate to the injustice sustained. When an injustice is unremedied, our general approach is that we seek to put people back in the position they would have been in had the maladministration or poor service not occurred (**Policy requirement**).

7.45 We should have regard to the outcome the complainant/aggrieved is seeking when determining the remedy. However, the remedy should be determined by the impact on the individual. In some cases, we will need to contact the complainant to manage their expectations and explain that the remedy we are proposing to make is not the outcome they were seeking. If the complainant/aggrieved does not want us to proceed with the remedy, then we do not have to do so.

7.46 In cases where the injustice cannot be put right, compensation may be appropriate. Most often this is where we recommend payments related to personal impact such as distress, frustration, pain and inconvenience. Our severity of injustice scale, typology, and casework discussions help us determine appropriate remedies together with reference to precedents and considering the circumstances of the individual case. Remedies will be determined by the impact on the individual (or individuals) concerned.

7.47 The types of remedy that we might seek to obtain will be tailored to the individual circumstances of the case (while taking account of similar cases).

Appropriate remedies can include:

- Apologies, explanations or acknowledging responsibility - an apology should always be by personal communication from a suitably senior person within the organisation in jurisdiction to the aggrieved or his or her representatives. The apology should be specific in what it is addressing rather than general and should be for the injustice. Expressions of regret and apology made through this Office rather than direct to the aggrieved are not an appropriate form of remedy.
- Remedial action such as reviewing or changing a decision.
- Revising published material or revising procedures to prevent a recurrence.
- Financial compensation.

7.48 We should remember that it is for us to determine whether a remedy offered or proposed is appropriate.

### Considering financial remedy

7.49 The caseworker should consider recommending financial redress if it is not possible to return the person affected to the position they would have been in if the complaint and injustice had not occurred.

- 7.50 If a financial payment is requested by the complainant to resolve their case, and the caseworker considers a remedy may be appropriate, they should consider what a suitable amount might be using our severity of injustice scale (our scale). **(Policy requirement)**
- 7.51 The caseworker should follow the detailed guidance set out in Annex P in ensuring they consider and apply the scale correctly. **(Policy requirement)**
- 7.52 All financial remedies should be awarded inside of the scale bands. In the exceptional circumstances where a caseworker considers a financial remedy should be awarded outside of the scale, (either above or below) they must clearly explain the reasons why on the case and seek approval from an Assistant Director. Following their approval, the details of the case should then be sent to ++Improvement for information. **(Policy requirements)**
- 7.53 The caseworker should ensure they clearly explain how they have reached the financial remedy they have proposed, including referencing the relevant section of our scale. **(Policy requirement)**
- 7.54 If the caseworker is unsure of the appropriate amount to recommend inside the scale bandings, they can consult the Typology of Injustice (TOI). If the TOI is used to support the decision to award a particular level of financial remedy, this should be recorded on the case. The TOI should not be used on its own to make a financial remedy decision. **(Policy requirements)**
- 7.55 The caseworker should ensure they are clear at provisional views stage that we have yet to make a decision on the case, and any recommendation we suggest is based on the information and evidence we have seen so far and may be subject to change. **(Policy requirement)**
- 7.56 Any provisional views or final report decisions to recommend a financial remedy at levels one to three<sup>53</sup> (up to £950) should be agreed by an Operations Manager. **(Policy requirement)**
- 7.57 Any provisional views or final report decisions to recommend a financial remedy at levels four to six (from £1000 upwards) should be approved by an Assistant Director. **(Policy requirement)**
- 7.58 In any case where we consider a level six remedy (from £10,000 upwards) may be appropriate, the Director for Operations and Quality and the Chief Executive should be informed. **(Policy requirement)**

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## Recording our final decision on Dynamics 365

- 7.59 A complaint component is a way of recording an area of complaint raised with us (for example nursing care) or named person on Dynamics 365. We use complaint components to record decisions on cases at investigation stage, and

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<sup>53</sup> Please note that at level one we will not usually award a financial remedy for non-financial loss.

they should be added to represent the main heads of a complaint raised with us.

7.60 Complaint components do not need to capture every single point of a complaint but should broadly represent the key areas we will want to record a decision about. A decision should be recorded for each complaint component added. An overall decision should also be recorded for each organisation we have investigated using the organisations tab of the Dynamics 365 record. **(Policy requirements)**

7.61 The decision recorded for a complaint component should only relate to the actions we have considered underneath it. Complaint components will be added by the caseworker, but they should be reviewed at the start and prior to closing the investigation to ensure they fully cover the complaint we have investigated. **(Policy requirements)**

7.62 The overall decision recorded about the organisation does not have to be a direct reflection of the complaint components underneath it **(Policy requirement)**. For example; if the investigation relates to four complaint components, three of which we have proposed provisionally to not uphold but are minor parts of the complaint, and the fourth we propose provisionally to uphold is the main area of complaint and concerns a serious injustice, then we can still provisionally uphold the complaint if appropriate.

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## Recording recommendations on Dynamics 365

7.63 If we consider a recommendation may be appropriate, having reached a provisional view, then this should be recorded under the relevant complaint component on the Dynamics 365 record. If we make a recommendation that covers more than one complaint component, then it should only be recorded against the main area of complaint investigated. **(Policy requirements)** For example; if we recommended an apology for both the clinical care and treatment received and complaint handling, this recommendation would be recorded against the complaint component for clinical care and treatment as the main aspect of the complaint only.

7.64 If a compliance plan needs to be added to the case then this should be recorded on the complaint component. **(Policy requirements)** This will then automatically create a compliance item on the case<sup>54</sup>.

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## Communicating and releasing information throughout the investigation

7.65 In accordance with our legislation<sup>55</sup> we can only release information we obtain if it is necessary to do so as part of our investigation or to help us explain our provisional views or final decision. **(Legal requirement)** However, this does not stop us from sharing more information about the investigation with those

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<sup>54</sup> For more information about recording compliance items please see paragraph 9.62 onwards.

<sup>55</sup> 1967 Act Section 11 and 1993 Act Section 15.

involved in it and keeping them regularly informed. We want those involved to be able to follow our progress and thought processes about a case. Any communication with the parties must be clearly and accurately documented and recorded on the electronic casefile. **(Policy requirement)**

7.66 This ongoing communication is designed to enable all parties involved to be able to follow our thought processes throughout the investigation, so that when we reach the stage where we share our provisional views, it should not come as a surprise to hear our initial view and the action that has been taken on the case.

7.67 In addition to the sharing of emerging evidence, and our initial view, we may also, in some cases, decide to share our provisional views or clinical advice in part at an early stage to try to resolve any disputed areas:

- If we obtain early and very clear clinical advice which indicates that there was service failure we could share that advice with the organisation, under a brief covering note, in order to flush out objections or arguments at an early stage or to get agreement to further work on the complaint.
- If we have reached an initial view that it appears there are indications of an unremedied injustice flowing from maladministration we could share the key arguments and supporting evidence with the organisation to see if a resolution is forthcoming.

7.68 There may be rare circumstances where we cannot share information from the organisation with the complainant because of confidentiality or other legal restrictions. In those situations, organisations are likely to tell us that the information should not be disclosed. However, this may not happen in every case and, if we are concerned about whether it is appropriate to share information with the complainant, we should contact the organisation to check.

## **Escalation**

7.69 If as part of our decision making process, we consider that there might be a wider systemic problem (outside of the individual complaint) either in relation to a particular issue or a particular organisation, the caseworker should escalate the case to their manager so that a decision can be made about what action to take.

## **When is an investigation upheld?**

7.70 Where we provisionally consider that an unremedied injustice arose in consequence of maladministration or service failure then a complaint will be upheld (fully or partly as applicable). A partly upheld case will normally result from a multi-strand complaint where we have only provisionally upheld some parts or a case where we found a lesser injustice than that claimed.

7.71 We will provisionally uphold (or partly uphold) complaints if we consider the injustice was remedied after the complaint was received by the Ombudsman but either before the start of, or during, an investigation. However, there may be some cases of this type where the organisation offers a full remedy and we do not go onto reach a provisional view:

- If the full remedy is offered immediately in reply to the proposal to investigate. In these cases, we may discontinue the investigation.
- The organisation offers a remedy during the investigation which is accepted by all parties and we close the case as a mediated outcome (the case is closed without reaching a view or making recommendations).

7.72 Where we have found that an injustice arose in consequence of maladministration or service failure but that it was fully remedied before the complaint was received by the Ombudsman then a complaint will not be upheld.

7.73 If our provisional view is that there was maladministration or service failure but that an injustice did not flow from it, then our provisional decision will be that the case is partly upheld. In some cases, we may reach a view that, even though we have identified potential failings, the organisation should review the complaint and consider how it might be resolved. For example, we may provisionally identify serious complaint handling issues which we consider should be improved by the organisation carrying out further work.

## **Recommendations**

7.74 Recommendations in a report are normally used to obtain a remedy for the identified injustice. Recommendations must be relevant to the injustice found: whether this is to the complainant concerned; to others who have been affected or to those who might be so affected in the future. The remedy is to put right the injustice resulting from maladministration. It is not compensation for the maladministration. We should not make recommendations for cases which we have not upheld.

7.75 The actions we take are important in helping to achieve compliance:

- Recommendations must be relevant to the injustice found.
- Recommendations are to put right injustice.
- We should not make recommendations in not upheld cases.
- Proposed recommendations being shared with the parties as part of the process for sharing our provisional views.
- The recommendations being understood by the parties.
- Considering fully any comments made on our provisional views.
- Ensuring that the organisation or individual being asked to comply with the recommendation understands and accepts:
  - the remedy we are asking them to provide;
  - what action we expect them to take to comply; and
  - the date by which they need to comply.
- Recommendations clearly recorded on the case management system.



7.76 All remedies must be SMART (specific, measurable, achievable and realistic, with a timescale) **(Policy requirement)**.

- Specific - We should be sure the recommendation we are making is clear and not too general in content. We should check it accomplishes the goal of remedying the complainant's injustice.
- Measurable - We should ensure the organisation can provide evidence the recommendation has been completed.
- Achievable/Realistic - We should ensure the recommendations we make are practical and take into consideration the resources and budget of the organisation.
- Timescale - We have no set timescale for recommendations to be completed in. We should therefore speak with the organisation to agree a suitable timeframe for a recommendation to be completed in.

### **Agreeing appropriate recommendations**

7.77 We should discuss the proposed or requested remedy with the complainant and manage their expectations if they are seeking a remedy that would be unachievable or disproportionate. **(Policy requirement)**

7.78 We should discuss with the organisation whether the recommendations we have proposed are achievable, and the timescales realistic. Agree suitable recommendations prior to issuing the provisional views. **(Policy requirement)**

7.79 On rare occasions an organisation may indicate they are unhappy with our decision or recommendations prior to the issuing of the provisional views. If this occurs, the caseworker should look to address any comments made, and explain to the organisation that they will have the opportunity to comment prior to us reaching a decision. **(Policy requirement)**

7.80 The caseworker should record the details of any concerns raised by the organisation on Dynamics 365 and escalate the case to an Assistant Director - Casework for review and advice. The caseworker should review the risk rating of the case in light of any concerns and decide if any further action needs to be taken prior to the issuing of the provisional views. **(Policy requirements)**

7.81 Following the above action, the caseworker should issue the provisional views as usual, and address the comments when they come in.

7.82 If following issue of the provisional views and final report the organisation continues to be unhappy with our decision or recommendations, the case should be escalated straight to the Assistant Director level of the non-compliance process.

### **Systemic remedy**

7.83 We may also make recommendations for systemic remedy: to prevent a recurrence of any failings we view have occurred. Generally, this should take the form of asking the body to propose their own solutions to the systemic

problems we have identified in our report. Usually we do not make specific systemic recommendations. Our general approach is that it is for the individual or organisation to decide how to achieve the required changes and improvements. Most often systemic remedy is in the form of an action plan which asks the individual or organisation to set out what they will do and by when to address the failings identified in the report. If we consider an action plan is an appropriate remedy, we should be as clear and specific as possible about the failing the action plan should address.

7.84 It may be appropriate to bring the need for a systemic remedy to the attention of the organisation at the stage we share our provisional views with the intention of opening a dialogue, which may also bring out the extent to which the body is aware of the problem and are taking/have taken steps to deal with it. It is not our role to direct the body as to the changes that they should make, although it is appropriate for us to guide the body if we consider that a specific form of remedy is merited.

#### **Payment of representatives' fees by organisations**

7.85 We can consider recommending an organisation reimburse a complainant for the cost of professional representation if appropriate to the individual circumstances of the case. We will only make such a recommendation though if the complainant was seeking the reimbursement of fees as part of the remedy to their complaint. **(Policy requirement)**

7.86 In deciding if such a recommendation is appropriate, we would need to see something specific about the circumstances of the case that indicate the complainant would have been disadvantaged had they not used professional representation. For example; the issue they were complaining about was so technical or complex that it would have been extremely difficult for the complainant to have pursued the case further without professional representation.

#### **Payment of representatives' fees by PHSO**

7.87 We are a free service to access, and do not generally consider legal, or other paid representation necessary in order to bring a complaint to us. We will therefore not usually reimburse a complainant for any legal or other costs they have occurred.

7.88 We will, in exceptional circumstances, consider reimbursement of fees, if it is through our own action or inaction that those costs have incurred. For example, a cost arises as a direct result of our poor service, or because the way our service is set up makes it inaccessible for someone to access.

7.89 Any decision to agree a payment of fees should be made in line with the Delegation Scheme.

#### **Where the aggrieved has died**

7.90 In cases where the aggrieved has died we must first consider whether to proceed with the investigation. We do not necessarily need a complainant in order to continue with the investigation once it has started. As such, there is no requirement to discontinue an investigation if a complainant dies. However, in those circumstances, a decision should be taken on whether or not to proceed.

7.91 For example, we may consider that there are learning points or wider public interest reasons for completing the investigation, although we would need to balance this against the fairness of completing a report upon which the complainant cannot comment. Some other points to consider are:

- Whether there are other families who might act as a representative.
- The existence of a personal representative or executor.
- The stage the investigation is at (for example, there may be more merit in completing a case that is at an advanced stage).

7.92 A decision on whether to proceed with the investigation following the death of the complainant should be discussed with an Assistant Director and the outcome of that discussion recorded on Dynamics 365.

7.93 In cases where the aggrieved has died we will not automatically recommend that any financial remedy (which would have been payable to the aggrieved if they were alive) be paid to their family or to their estate. These cases should be considered on their individual merits, but the following should be considered:

- In cases of actual financial loss, we can consider asking for payments that would have been due to the deceased to be made to their estate (for example, a special payment for loss of benefit that should have been paid while they were alive). However, we would need to be certain that any payment would have been payable to the deceased, were it not for the failings identified.
- We would normally only recommend compensation for non-financial loss for the family members of the deceased if they have suffered a specific injustice themselves (for example, emotional injustice as a result of witnessing the poor care given to their relative). We take this approach on the basis that, if someone has died, we cannot remedy the fact that they suffered distress or inconvenience.

## **Provisional avoidable death and avoidable serious harm**

What is avoidable death?

7.94 We consider an avoidable death to be when on the balance of probabilities, the person would have survived if the failings in care which we have identified had not happened.

What is avoidable serious harm?

7.95 We consider avoidable serious harm to be when on the balance of probabilities, the person would not have experienced whatever the serious impact was, for example, ongoing pain and disability or prolonged mental illness, had the service failure not occurred.

#### **Process**

7.96 caseworkers should speak with their Operations Manager once they receive clinical advice that suggests we may reach provisional views that an avoidable death or serious avoidable harm has occurred. Their Manager will then help determine any next steps to take, including whether to obtain further evidence, such as more clinical advice, or to proceed directly to compiling our provisional views.

7.97 An Operations Manager should sign out any provisional views suggesting these findings. An Assistant Director should also be given sight of the decision prior to release. **(Policy requirements)**

7.98 If it is established a case relates to an avoidable death at the end of an investigation, the details should be shared with the +Public affairs and insight mailbox.

## Section 8. Investigation: Communicating our provisional views

### Key principles

- 8.1 Our provisional views of the investigation should be shared with the complainant and the organisation complained about, simultaneously, for all investigations. There may be exceptions when we decide not to share in this way. In these cases, the reasons why our report has been shared differently must be documented clearly. **(Policy requirements)**
- 8.2 Our provisional views must be shared with any person specifically named in the complaint **(Policy requirement)**.
- 8.3 Our provisional views should be shared with the organisation complained about by contacting the person who we wrote to originally asking for comments on the proposal to investigate **(Policy requirement)**. In Parliamentary cases this will normally be the Permanent Secretary or Chief Executive of the organisation in jurisdiction. In Health cases this will normally be the Chief Executive of the organisation in jurisdiction. Our provisional views can be shared simultaneously with other parties within the organisation in jurisdiction as appropriate (for example, Agency Chief Executives (if the report was sent to the Permanent Secretary of a department), focal points or local complaint handlers).
- 8.4 At the point at which the caseworker sends our provisional views to the complainant and organisation, Milestone 5 (our provisional views issued to body and complainant') on Dynamics 365 should be recorded as completed **(Policy requirement)**.

### Named persons

- 8.5 Any individual or organisation who has been previously notified of the matters complained about and our investigation, normally at the 'proposal to investigate' stage, must be sent a copy of our provisional views and their comments sought. A named person can consist of a company or partnership.
- 8.6 For health complaints, if a complaint is made against a sole practitioner (who will have been recorded as a named person) then we share our provisional views directly with them. In all other cases (for example, if a Practice has more than one Practitioner) then our provisional views should be shared with both the organisation/provider and the named person.

### How to refer to a named person

- 8.7 We should not usually identify named persons when issuing our provisional views. However, where we are reporting on the actions of clinicians who have personal contracts (such as GPs with PMS contracts) they are the body complained about and their names are used on Dynamics 365 and in the report. However, someone employed by an NHS organisation (such as a surgeon or a nurse) is not complained about in this sense, even though their actions may be the focus of the complaint. Therefore, their names should not appear in the

‘complaint about’ section of the report. Instead we should refer to them by their professional title (such as Midwife or Registrar) or by an abbreviation (Mr B or Miss J).

### **Content of provisional views**

- 8.8 It is important that our reasons for reaching our provisional views are clear. The reason for sharing provisional views is that it allows complainants and organisations a chance to see the evidence and thinking at that stage in context and to really engage and comment on it. We must consider all comments made at that stage with an open mind and should take them into account. We must also be clear in both the content of the report and in the covering letter that that our view is provisional and is open to change. **(Policy requirements)**.
- 8.9 It is important to ensure that the complainant, organisation and named person (if applicable) are given an opportunity to comment and we should make it clear to all parties that we are open to changing our view. **(Policy requirement)**
- 8.10 Our provisional views should reference and explain how we have used the material evidence we received, requested, or acquired, from all parties to the complaint in reaching our decision.

### **Structure of provisional views**

- 8.11 To help achieve consistency in format, content and presentation, a standard template must be used as the basis for all provisional views and reports. Our House Style guide should also be followed. **(Policy requirements)**. A template is available in Dynamics 365.
- 8.12 The investigation report should be built around the key steps in the investigation process, which are set out in this [diagram](#).
- 8.13 We should ensure our reports are proportionate in length and detail to the complexity and risk rating of the complaint, the number of issues raised, and the severity of the injustice claimed. Our views may also be longer if a decision is finely balanced, or we need to explain conflicting information or evidence.
- 8.14 A version of the template is also available with additional guidance and checklist information about the content and structure.
- 8.15 Template covering letters are available in Dynamics 365.

### **Approving our provisional views**

- 8.16 Our provisional views should be approved in line with the levels set out in the Delegation Scheme<sup>56</sup> and the Supervision Model **(Policy requirement)**. The

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<sup>56</sup> The decision to approve a provisional views on a joint working case should be approved in line with our [joint working Delegation Scheme](#).

need for escalation of a case above those levels should be determined by the individual circumstances of the case.

### **Sharing our provisional views with clinicians**

- 8.17 Our senior caseworkers often deal with our more serious cases, which will regularly involve more complex clinical advice, or require consideration of multiple pieces of advice and how they interrelate.
- 8.18 A senior caseworker investigating a case where they have asked for clinical advice should therefore give any clinician who provided it the opportunity to comment on the provisional views prior to them being sent out. This should usually take place at the same time as the provisional view is issued to the complainant, organisation and any named persons. **(Policy requirement)**
- 8.19 If the original clinician is unavailable, the senior caseworker should seek the advice of a lead clinician. **(Policy requirement)**
- 8.20 Where advice has been provided by an internal advisor, the senior caseworker should arrange for the provisional view to be reviewed by submitting a Dynamics 365 advice request to the Clinical Advice Support Team. **(Policy requirement)**
- 8.21 Where advice has been provided by an external advisor the senior caseworker should arrange for the provisional view to be reviewed by contacting the advisor directly. **(Policy requirement)**
- 8.22 Where the provisional views exceed four pages the senior caseworker should highlight the relevant parts of the report that relate to the use of the advice. Where multiple advisors have been involved, the senior caseworker should ensure it is clear on the provisional views where specific advice has been used. **(Policy requirement).**
- 8.23 The clinician should consider the use of the advice within the context of the report and provide any feedback to the senior caseworker on how it has been used, and any suggested amendments. **(Policy requirement)**
- 8.24 Where clinical advice has been understood and used appropriately, the clinician should not look to direct the senior caseworker to change other aspects of their report. It is also not part of their review of the provisional views to propose a different decision. **(Policy requirements).**
- 8.25 If the clinical advisor has views on the complaint that fall outside of the scope of the investigation, they should discuss these with the senior caseworker. **(Policy requirement).**
- 8.26 Where a clinician considers that the explanation or use of their advice requires more work prior to issue, they should explain to the senior caseworker

what action is needed. The clinician should be given a further option to comment on the report once this is complete. **(Policy requirement)**.

8.33 If there are any concerns about the further work required, the case should be escalated to the senior caseworker's manager, and a lead clinician to identify if this is a systemic issue where support can be provided. **(Policy requirement)**.

## How to share our provisional views

### Contacting the parties

8.34 We should ensure that the parties to the complaint have the opportunity to discuss the provisional views with the caseworker and that we take all necessary steps to assist with obtaining full comments on our report as quickly as possible.

8.35 We should give two weeks from the date the report is sent out, to respond for both the organisation and complainant, in all cases. Indicate clearly in the covering letter or email what the deadline is for comment and what we will do if we don't hear back from them.

8.36 We should make sure we give all parties to the complaint the opportunity to see the material evidence we have relied on in reaching a provisional view of the case. **(Policy requirement)**

8.37 If we have not already identified any reasonable adjustments that the parties may need, we should use this opportunity to check whether any of the parties require us to make any adjustments in order for them to comment on our provisional views. These should then be included in the accessibility section of the complainant's records on Dynamics 365.

8.38 The following process should be followed:

- The caseworker should inform the parties when the issuing of our provisional views is imminent and check whether there is anything that may prevent them from responding within the time frame. Ideally, the day our provisional views is sent out caseworkers should contact all parties to inform them it is coming, explain the period for comments and offer to discuss our provisional views over the phone with the parties at an agreed time **(Policy requirement)**. The caseworker should also encourage either party to respond earlier, if they want to, or to submit their comments ahead of any arranged telephone conversation.
- If the parties wish to discuss our provisional views over the phone, the caseworker should call at the agreed time to discuss our provisional views and comments.
- Having contacted the parties, we can then consider the comments or allow more time if appropriate.



8.45 There will be exceptional cases, depending on the organisation complained about, the complainant or the actual complaint where a different approach may be required. This will need to be considered on a case by case basis. Where a different approach does need to be taken, the caseworker should ensure that the rationale for this is accurately recorded **(Policy requirement)**.

8.46 Although rare to do so, confidential or sensitive sections of our provisional views could be shared with the organisation before provisional views stage with the explanation that we are planning to share this information with the complainant. We may then either obtain their agreement to keeping these sections in the provisional views or redact them (in order to still be able to share our provisional views simultaneously).

8.47 In some cases, it may be inappropriate to share the entire provisional views with every person involved. In these circumstances, the relevant portions should be sent to the individuals concerned. For example, if our provisional views criticises both a GP and a hospital consultant and it is not necessary for them to see the entire document to understand our findings and recommendations relating to them as individuals. In those circumstances we should consider excluding the criticism of the other individual from the provisional views being shared with each named person, until they have both had an opportunity to comment and/or provide further evidence.

#### Sharing not upheld provisional views with organisations

8.48 We do not have to share not upheld provisional views with organisations if we have reached a specific agreement with them that they do not want to be notified of our provisional views in these cases. However, we should have written confirmation from the organisation of this agreement which should be referenced on Dynamics 365 on all relevant cases. The organisation should also have been reminded of this at the proposal to investigate stage and given the opportunity to say if they did want to see the provisional views in the particular case (see paragraph 3.34). **(Policy requirements)**.

#### Sharing sequentially

8.49 Provisional views should be shared simultaneously in all cases: this includes cases where there is a suggestion that we may be critical about the organisation or named individual and may decide to propose remedies. Only in exceptional circumstances should we share sequentially, with the reasons for any such decision agreed with a line manager and accurately recorded.

#### Sharing with third parties

8.50 If third parties have provided information or been referred to in other evidence that we are going to include in our provisional views (for example, other family members, Social Services employees, banks or building societies) then we must consider if it is necessary to check with them that we have the facts correct. We would probably only share the relevant sections of any

report. The caseworker should contact the complainant first if they are going to contact someone known to them.

#### Advocates/Representatives

8.59 Provisional view can also be shared with advocates or other representatives, providing we have appropriate authorisation from the complainant for them to act on their behalf.

#### Granting an extension and failure to respond

8.60 We expect parties to the investigation to respond to our provisional views within a reasonable timescale and to contact us promptly if they are unable to meet the deadline.

8.61 We should only grant an extension to the deadline for comments if there are valid reasons to do so, otherwise no extension should be given. Reasons for an extension should be accurately recorded. Valid reasons could include if a complainant has been away from home or unwell or if we are satisfied that an organisation is making genuine efforts to respond fully. We should also carefully consider whether we need to make any reasonable adjustments for a complainant which may include giving them longer than two weeks to comment on our provisional views, depending on, for example, their disability.

8.62 We should also take into account when the extension was requested (for example, if we are notified quickly of any delay, rather than a 'last minute' request). If no comments are received, and we have been through the communication steps set out above, then we should proceed with finalising the report.

8.63 We should not issue a final report on the day that responses are due to be received back. Wait at least until the following day and check to see if correspondence has been received. In those circumstances, where no comments are received, we will proceed to the next stage without them.

8.64 On the rare occasion where we are unable to contact the complainant before our provisional views are sent out and we do not receive any communication from them during the period for comments, then the matter should be escalated to a manager to discuss how to proceed. We should not just go ahead and issue the final report without first discussing the case with a manager.

8.65 At the point at which the caseworker has received comments from both the complainant and organisation, Milestone 6 on Dynamics 365 ('Receipt of provisional views comments') should be recorded as completed (**Policy requirement**).

#### Information requests and material evidence

8.59 We define material evidence as 'the evidence we have considered that we have either relied upon or has influenced our assessment/investigation'.

8.60 The caseworker should regularly review and update the material evidence section through-out their consideration of a case. (Policy requirement)

8.61 The caseworker should note all information which influenced our provisional views, not just that which supports our report. This evidence should be described in our analysis and reports and also be identified on the Decision Form. **(Policy requirement)**. Where it is practical we should also identify on the Decision Form the evidence we have seen but not relied on. However, it may not be proportionate to do this on cases where there are a very large number of documents for example.

8.62 If a request is received for information from either the complainant, or organisation, this should always be sent to the information rights team for review and response. **(Policy requirement)**

### Considering the response

8.63 The caseworker must consider the comments received following the sharing of our provisional views and decide what impact those comments have.

8.64 If a complainant or organisation in jurisdiction disagrees with elements of our provisional views then we reflect those when we issue the final report (in a covering letter if necessary), especially if our final report takes a position consistent with our provisional views. We need to accurately record that we have considered the comments and carried out a proportionate analysis of the view we have taken on them:

- This note should contain enough information so that anyone coming new to the case could understand the view we took on the comments made on our provisional views and why.
- It is not enough to say simply that the comments have been considered and there is no basis to change our provisional views. We must show all parties have had the opportunity to have their comments considered.
- The note must acknowledge (even if only in summary form) the key points made in response to our provisional views and any related analysis (that is, why we decided to make changes or not).
- In some cases, the complainant may simply restate their complaint. If that happens and they have not provided any new evidence, new facts nor highlighted any inaccuracies or omissions then the analysis should say so clearly and give that as the reason for not changing our provisional views.

8.65 Analysis of the comments should usually be recorded on the Decision Form, but can be recorded separately if preferred, especially if the case is particularly complicated. The key point is that the analysis is clearly and accurately recorded on the case **(Policy requirement)**. This may mean recording it directly in our provisional views of the case or in a separate document. This will depend on individual working styles.

8.66 Generally, we should not treat a complainant's challenge or unhappiness with our provisional views of a case as a complaint about us or as a reason for reallocating the case. The key reason for sharing our provisional views is to give the parties to the complaint the opportunity to comment on our provisional views of a case. However, if the caseworker is uncertain about whether comments in response to our provisional views of a case should be treated as a complaint then they should speak to their manager in the first instance and seek advice from the Review and Feedback Team if necessary.

8.67 If we are challenged on the clinical advice we have received, then we can decide, if appropriate, to ask another suitably qualified clinician to peer review the original advice. If the caseworker is unsure if peer review is suitable for their case, then they should discuss this with their line manager or one of our lead clinicians.

### **Feedback on our provisional views**

8.68 We should fully review and consider any comments on our provisional views from all parties before we make a decision on a case and issue our final report. This consideration should be recorded on Dynamics 365 and explain how we have taken these comments into account.

8.69 If the organisation's response indicates they are unhappy with our provisional views, and are seeking amendments or changes, the caseworker should discuss these with their Operations Manager. This discussion should include deciding whether any further work is required on the case prior to us making a final decision. For example, deciding if we need clinical or legal advice.

8.70 If it is decided following any further work that minor amendments to our provisional views are required, then these changes can be made without the report needing to be reissued. This would include amending basic errors or providing points of clarification.

8.71 If significant changes are required, we should consider whether our provisional views need to be reissued after these are made. **(Policy requirement)** This could include circumstances where we are changing our view, or where we have new evidence or advice it is important to get comments on prior to us making a decision.

8.72 If we have experienced significant challenge to our provisional views, but we do not propose to change them, we should explain this to the party raising the challenge and explain why. **(Policy requirement)**

8.73 If following any further clarification, we are still facing challenge, then before issuing our final report we should; **(Policy requirements)**

- Record any further action we propose to take. This should include a consideration of how much further time we should expend on trying to resolve the issue, before and after case closure.

- Review the current risk rating of the case and consider what might occur if we close the case as not complied with. If the case becomes high risk, ensure it is handled in line with our high risk escalation process<sup>57</sup>.
- Escalate the case for discussion at Assistant Director level, ideally at their weekly meeting.
- Share details of the case with the Executive Director of Strategy and Operations for oversight.

8.51 Following completion of the above actions, and any further work required, we can issue our final report.

### **Serious clinical fault**

8.74 Where we are considering taking a view that there has been serious clinical fault we may receive challenge from organisations that such findings are out of our remit. Our position is that we are entitled to do this and to form a view about what action is required to remedy the injustice arising from the maladministration or service failure we have identified. Any challenge to our jurisdiction should be escalated immediately for advice, including involving the Legal Team where necessary.

### **Sharing evidence obtained after provisional views are shared**

8.75 Following receipt of comments on our provisional views, we may decide to obtain further evidence or request further expert advice in order to address the comments received. In cases where the new evidence/advice is not material, does not disclose any new issues and we do not intend to rely on it, we do not have to disclose this further information to the parties to the complaint.

### **Sharing further provisional views**

8.76 If we propose to change our provisional views following consideration of comments and/or further evidence, then the Operations Manager should arrange for a review and reissue of our provisional views. Significant changes could include changes to our initial view, or the types or levels of financial remedy we were considering making. Decisions to reshare should be taken on the individual circumstances of the case and discussed with line management in the first instance.

### **Risk assessment**

8.77 Review the case risk rating (in line with the risk section in [section 10](#)) when our provisional views are shared. **(Policy requirement)** Please remember that risk assessment should include consideration of any conflicts of interest (both of the casework staff and of senior staff)

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<sup>57</sup> LINK TO RISK GUIDANCE

8.78 If a case is deemed high risk as a result of this review, then it should be considered in line with the high risk case escalation process as detailed in [section 10](#). **(Policy requirement)** This does not include cases that are high risk because of a risk to complainant, stakeholders and third parties (for example when the complainant threatens harm to themselves or others).

#### Complex and significant investigation requirements

8.79 In complex and significant cases, we should share our agreed provisional views (or relevant sections) with any clinician who has provided advice to ensure that we have reflected their advice properly.

## Section 9. Detailed investigation: Communicating the final decision

### The final report - What the law says

9.1 In parliamentary cases we must issue the final report to the referring MP, the 'principal officer' of the organisation complained about, to any person specifically complained about and (in Victims' Code cases only) to the complainant **(Legal requirement)**<sup>58</sup>. We send a separate copy of the final report to the complainant in all other cases as well **(Policy requirement)**, but this is not a legal requirement.

9.2 In health cases we must issue the final report to a list of people which changes depending upon the section under which the investigation has been conducted. However, in all cases a report must be sent to the complainant, the person or organisation specifically complained about, any other person specifically complained about and any MP who assisted in the making of the complaint **(Legal requirement)**<sup>59</sup>. We also have the power to share a health report with any other person we think appropriate. Such decisions will be taken on a case by case basis.

### Naming clinical advisers and named persons

9.3 We will not usually name clinical advisers. This includes our provisional views, final investigation reports and decisions not to investigate.

9.4 We do not usually provide the names of named persons in our casework. Instead we should refer to them by their professional title (such as Midwife or Registrar) or by an abbreviation (Mr B or Miss J).

9.5 Requests for the names of individual clinicians or a named person should be treated as requests under information law and sent to the Information Rights team for review and a decision about whether to release.

9.6 Any investigation report that refers to clinical advice must explain that the clinical advice is only one part of the evidence that has been considered in reaching our decision (all investigation reports should include reference to the material evidence we have relied upon). **(Policy requirement)**

### Approving final reports

9.7 Final investigation reports should be approved in line with the levels set out in the Delegation Scheme<sup>60</sup> and the Supervision Model. **(Policy requirement)** The need for escalation of a case above those levels should be determined by the individual circumstances of the case.

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<sup>58</sup> 1967 Act, section 10(1)-(3)

<sup>59</sup> 1993 Act, section 14(1)-(2)

<sup>60</sup> The decision to approve a final report on a joint working case should be approved in line with our [joint working Delegation Scheme](#)

9.8A member of staff approving a final report should only do so having seen our provisional views supported by any necessary separate analysis (for example, analysis of comments on our provisional views).

### **Compliance reminders**

9.9The caseworker should update the compliance screen to add dates for when we should issue reminders to organisations. These reminders can be completed by telephone, email or letter. A reminder should be set for halfway through the date for the first recommendation. **(Policy requirements)**

9.10 A second reminder date should be set if the recommendation date is over one month in duration, and there is more than ten days between the first and second reminder dates. This should be set for ten days prior to the deadline for our last recommendation. **(Policy requirements)**

9.11 We should only send one reminder even if a case has multiple recommendations and timescales. In these instances, we should send one reminder at the halfway point of the earliest deadline. **(Policy requirement)**

9.12 If the case reaches the first reminder date without compliance being received, the caseworker should issue the reminder letter. The second reminder should then be sent if that date is reached. **(Policy requirement)**

9.13 Any reminders should be sent using the organisations agreed communication preferences and added to the Dynamics 365 record. **(Policy requirement)**

### **Process for issuing reports**

9.14 The final investigation report should be issued simultaneously to all the parties to the complaint **(Policy requirement)**. Reports will be sent to all parties under a covering letter.

9.15 Templates for the final covering letters are available on Dynamics 365.

9.16 In all cases where the complainant has been represented by an advocate or other professional representative we should (providing we have written authorisation from the complainant for the representative to act on their behalf or to receive copies of all correspondence) also send them a copy of the final report. The parties to the complaint should be sent a hard copy of the signed report.

Additional requirements: parliamentary cases

9.17 The signed report is sent to **(Legal requirements)**:

- The referring MP.<sup>61</sup>
- The complainant.

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<sup>61</sup> 1967 Act, section 10 (1)



- The Permanent Secretary/Chief Executive of the organisation in jurisdiction<sup>62</sup> (It is also our policy to copy the report to any focal point or complaints lead with whom we had been dealing during the investigation).
- Any person specifically complained about.<sup>63</sup>

9.18 A signed copy of the final report should also be retained on the physical case file. **(Policy requirement)**

Additional requirements: health cases

9.19 The signed report is sent to **(Legal requirements)**:

- Any MP involved.<sup>64</sup>
- The complainant.<sup>65</sup>
- The organisation complained about.<sup>66</sup> (Addressing the report to the person to whom we addressed the original letter seeking comments on the proposed investigation: normally a Chief Executive but copying to other parties as appropriate). In family health service provider cases we should write direct to that organisation (for example, a GP practice). Where an independent provider is to be investigated, we should write to the Chief Executive (or equivalent) of the provider.
- The relevant commissioning organisation (where the law requires us to do so or there is another specific reason to do so).
  - We are required by law to send reports to CCGs and to NHS England when they have commissioned the service complained about from an independent provider or a family health service provider. The law does not require us to do so when a CCG or NHS England have commissioned the service from a health body (for example, a Trust).
  - Reports sent to commissioners should be an anonymised version of the final report (which does not identify the complainant or, generally, any other individual).
  - In a case which involves multiple CCGs we can consider identifying the single most appropriate CCG to share the report with (for example, the 'home' CCG where the patient lives).
- Any person specifically complained about.<sup>67</sup> (Note: if a complaint is made against a family health service provider who is a sole practitioner then we should send only one copy of the report, but, in the covering letter, should explain that this meets the statutory requirement to notify both the provider and the 'person specifically named in the complaint'. In all other cases, (for example, where a Practice has more than one Practitioner) the final report should be

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<sup>62</sup> 1967 Act, section 10 (2)

<sup>63</sup> *ibid*

<sup>64</sup> 1993 Act, section 14(1)- (2)

<sup>65</sup> *ibid*

<sup>66</sup> *ibid*

<sup>67</sup> *ibid*

sent to both the organisation/provider and the person specifically named in the complaint.)

9.20 Supporting guidance sets out the recipients of health reports in a table.

9.21 A signed copy of the final report should also be retained on the case file.  
**(Policy requirement)**

9.22 We have a power<sup>68</sup> to share the report with other people we consider appropriate. Such decisions will be taken on a case by case basis. Where we do share a report with another party we need to consider whether any personal data in the report needs to be redacted from it in order to comply with the requirements of the Data Protection Act **(Legal requirement)**. A common redaction would be to anonymise the report so that the complainant cannot be identified. If the caseworker is unsure about how to proceed in dealing with such issues then they should discuss with their line manager and, where necessary, seek further advice from the FOI/DP team.

Adding dates to final reports

9.23 The caseworker should ensure that the final report itself contains the date it is issued to the parties. **(Policy requirement)**

Sending reports to a doctor's appraiser in complaints about named doctors

9.24 Where we uphold or partly uphold a complaint against a named doctor we should send the final report to that doctor's appraiser **(Policy requirement)**. The purpose of sending the report to the appraiser is to make them aware of the finding about the doctor so that they can consider it as part of their ongoing appraisal of the doctor and as part of the revalidation process.

9.25 Our normal approach is to send an anonymised report in these circumstances, unless there is good reason not to do so. If we decide not to do so then the reasons should be recorded on Dynamics 365. Reasons for not sending a report could include:

- Where the overall complaint has been upheld or partly upheld, but the service failures lie with another individual (or organisation).
- If the doctor has retired since the events complained about and/or has been removed from the General Medical Council's List of Registered Medical Practitioners.

9.26 In most circumstance, we will be sending reports to the doctor's appraiser using our powers under Section 14 of the Health Service Commissioners Act 1993. Although in some cases, the appraiser may be a recipient of a report or other information if we are making a disclosure in the interests of the health and safety of patients.

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<sup>68</sup> ibid

9.27 A final report should be sent to an appraiser under a brief covering letter.

## NHS Improvement

9.28 From 1 April 2016, NHS Improvement was created as an umbrella organisation for overseeing foundation trusts and NHS trusts, as well as independent providers that provide NHS-funded care. Monitor and the Trust Development Authority (TDA) now fall under NHS Improvement.

9.29 NHS Improvement is not a legal entity and, therefore, not an organisation directly in our jurisdiction. Monitor and the TDA are still separate organisations with separate legal entities and are still in our jurisdiction. We should refer to Monitor and the TDA by their umbrella name - NHS Improvement.

## Health reports with a systemic remedy

9.30 In those health investigation cases where we have made a recommendation for a systemic remedy (that is, the organisation should take action to prevent a recurrence), we should tell the organisation (when we write to them with the final report) that they need to send a copy of the investigation report to the relevant regulator.

9.31 If we have recommended that the organisation sets out their actions to prevent recurrence (this is usually in the form of an action plan) then we should tell the organisation to send a copy of our final report to the regulator at the same time as they send them details of their actions. The wording we should use when telling organisations is: *'At the point at which you [the organisation] are ready to send your action plan to [the regulator], you should also include a copy of our final report, sent to you on [date]. When sending our final report and action plan to [the regulator], you should bear in mind your own Data Protection Responsibilities. We suggest you anonymise our final report'*.

9.32 The relevant regulators are:

- Care Quality Commission (CQC) (for Family Health Service Providers, Foundation and Non-Foundation Trusts and Independent Providers)
- NHS Improvement:
  - Monitor (if the NHS organisation is a foundation trust).
  - NHS TDA (if the NHS organisation is a non-foundation trust).

9.33 When telling organisation's to send reports and action plans to the CQC we should tell the organisations to send final reports and action plans to [safeguarding@cqc.org.uk](mailto:safeguarding@cqc.org.uk) . Those contacting NHS Improvement should use: [enquiries@england.nhs.uk](mailto:enquiries@england.nhs.uk).

## Closing the investigation

9.34 When closing the investigation, we should record the outcome of the investigation on Dynamics 365 and then record whether the complaint was

fully, partly or not upheld. A full list of investigation closure codes is available on Dynamics 365.

- 9.35 Where we have found that an unremedied injustice arose in consequence of maladministration or service failure then a complaint will be upheld (fully or partly as applicable). **(Policy requirement)** A decision about whether one of these cases is fully or partly upheld should be based on the circumstances of the case.
- 9.36 We will uphold (or partly uphold) complaints if our final report finds that the injustice was remedied after the complaint was received by us but either before the start of, or during, an investigation. **(Policy requirement)**
- 9.37 Where we have found that an injustice arose in consequence of maladministration or service failure but that it was fully remedied before the complaint was received by the Ombudsman then a complaint will not be upheld. **(Policy requirement)**
- 9.38 If we find that there was maladministration or service failure but that an injustice did not flow from it, then the complaint will be partly upheld. In some cases, we may decide that, even though we have identified potential failings, the organisation should review the complaint and consider how it might be resolved. **(Policy requirement)**. Similarly, we may decide that for cases where we have found service failure or maladministration but no (or no unremedied) injustice, it is still appropriate to make recommendations to avoid a recurrence.
- 9.39 If the complaint has not been upheld then the case can be closed on the day the final report is issued. If we have not upheld the complaint then we cannot normally make any recommendations. Once the final report is issued the case should be closed. **(Policy requirement)**
- 9.40 Supporting guidance includes further information on approaching recommendations and the steps to consider if we are not upholding a complaint but want to raise a concern about something we have found during our investigation.
- 9.41 Any recommendations contained in the final report will need to be recorded on Dynamics 365 as being in compliance. It is a requirement to add at least one compliance item to Dynamics 365 on any fully or partly upheld complaint **(Policy requirement)**. Once relevant compliance items have been added then the partly/fully upheld case can be closed on the day the final report is issued.
- 9.42 The information recorded on Dynamics365 about remedies and compliance is published online. The information you record must therefore be accurate and be:
- Clear: you should record remedies in plain English, so they are clear and easy to understand

- Specific: the remedies recorded should refer to the specific failing(s) and injustice(s) we found in our investigation. The information recorded should speak for itself, and be unambiguous
- Anonymous: We should not include any party to a complaint's name in our provisional views or reports.

## **Milestones**

9.43 At the point at which the caseworker sends the final report to the complainant and organisation, milestone 7 on Dynamics 365 ('Final report issued') should be recorded as completed. **(Policy requirement).**

## **DPA/FOI requests**

9.44 DPA and FOI requests must be responded to in a specific way and in accordance with strict timeframes. If we are asked for information about a case under FOI or DPA and we are not able to release that information under FOI or DPA, we may still be able to release the information or some of it under our own legislation. In that case, we still need to provide the person requesting the information with an official response in accordance with the relevant timeframes under FOI or DPA, even if that response is simply to say that we are not able to release the information under FOI or DPA, but we will be able to release some/all of it under our own Acts. **(Legal requirements)**

## **Cases where legal action is suggested**

9.45 Any correspondence received which suggests that legal action is or may be taken, should be sent to the Legal Team along with details of the case within 24 hours of receipt.

9.46 It may not be immediately obvious that the correspondence relates to legal action, however some wording to look out for is:

- 'Judicial review.'
- 'Pre-action threat.'
- 'Pre-action protocol.'
- 'Letter before action.'
- 'Letter before claim.'
- 'Claim' or 'small claim.'
- Reference to 'legal proceedings' 'seeking 'damages' and/or asking for responses 'within 14 days' (this last example does not necessarily always indicate someone is looking to take legal action but under the pre-action protocol we are obliged to respond to legal threats within 14 days generally - sometimes 21 days).
- References to defendant/claimants.
- Additionally, if someone has suggested we have acted 'unlawfully', 'irrationally' or 'unfairly' those could be grounds for JR.

## **Statements on cases over 12 months old**

9.47 The Health Service Commissioner for England (Complaint Handling) Act requires us (since 26 May 2015) to send a statement of reasons to any person whose investigation has not been concluded within 12 months of receipt. We have decided to issue statements of reasons on all cases (not just investigations) that go over 12 months. This includes parliamentary cases as well as health. The default position is that all cases require a statement once open with PHSO for 12 months.

9.48 When a case is approaching 11 months old since case creation (unless certain that it will be concluded before the 12 months anniversary), the following action should be taken:

- Identify the key factors that have contributed to the age of the case.

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Create a document on Dynamics 365 highlighting any reasons you consider are relevant in why the case has become old. For example:

- The length of time it took for the case to be allocated
- The complexity of the case
- Any issues or delays we have experienced with the organisation, complainant or aggrieved
- Any issues or delays we have experienced in dealing with third parties for example; getting evidence from an organisation we are not investigating
- The need for specialised clinical advice and a delay in being able to find a suitable person to provide it.

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- Draft a letter to the complainant containing a statement which explains why the case has not yet been closed, and the actions being taken to progress it. Follow the format in the template letters available and entitle the history item: '**12 month statement of reasons**' so that they are easily identifiable. Examples of suggested wordings are available.

Telephone the complainant to let them know why they will be receiving this letter.

- The letter should be sent out by the caseworker or, if escalated, the senior member of staff responsible for the most recent communication on the case. The letter should be sent out shortly before or on the 12 month anniversary (and no later than one working day after). The letter should be sent to the complainant and any MP involved.
- If a statement is not issued by a case's 12 month anniversary, then it should be sent as soon as possible after that date. If a case is closed at over 12 months old, without a statement having been sent, then one should be issued as soon as possible.
- (NB: In future, cases 're-opened' following a Review will have a new case reference, and a new 12 month period will begin.)

## Compliance

### Actions taken during an investigation

9.49 The compliance process takes place after an investigation is completed (final investigation report issued). However, a case cannot be considered closed until any recommendations we have made have been complied with. This is because the injustice has not been remedied until we are assured the organisation has done what we asked it to.

9.50 If by the start of the compliance process the organisation is already refusing to comply with our recommendations, the status of the compliance item should be set to 'refusal to comply' on Dynamics. The case should be escalated straight away to the Assistant Director stage of the process. **(Policy requirements)**

### Compliance process - main roles and responsibilities

9.51 The following staff will normally be involved in the compliance process:

- **caseworkers** - Overall responsibility for ensuring compliance takes place, communicating with the parties to the case. Assess whether compliance has been achieved and communicate the outcomes of completed compliance to the parties. Responsible for accurate and descriptive input of compliance plans on the Case Management System.
- **Operations Managers** - Are responsible for reviewing the quality of our decisions and recommendations prior to the case going through our escalation process. They become involved in individual cases as the first step in escalation if the caseworker has been unable to secure compliance.
- **Quality team**- Are responsible for auditing casework and recommendations, comparing and reporting findings against our quality standards and service charter commitments.

The following staff may become involved if an organisation does not comply with our recommendations:

- **The Senior and Executive Leadership Teams** - Become involved in individual compliance cases as part of the escalation process. For example, where compliance is delayed, or an organisation refuses to comply.

### Compliance process

9.52 Our compliance process starts as soon as we issue a final report to an organisation and ask them to take action in a specified time period as a result of our findings.

9.53 The caseworker has overall responsibility for all aspects of compliance on a case. This includes following up on compliance, reviewing evidence sent to

show that compliance has been achieved, and escalating the case as appropriate. For cases that are supervised under the Supervision Model, the responsibility for adherence is shared by the Operations Manager. **(Policy requirements)**

9.54 The caseworker should ensure the complainant is kept informed of any key events throughout the compliance process. This includes making them aware of any extensions to timescales we have when we consider compliance has been achieved, and any action we take as a result of non-compliance.

9.55 All action we take on a case in relation to compliance should be recorded on Dynamics 365. This includes ensuring the status of compliance items are kept up to date.

### **Deciding if an organisation has complied**

9.56 We ask organisations to provide evidence that they have complied with our recommendations in our final reports. There is no specific type of evidence we should ask for, and this could be in the form of a copy of an apology letter, an action plan highlighting how systemic changes will be made, or confirmation that a financial payment has been made.

9.57 The caseworker should use their discretion in deciding if an organisation has complied. For example, considering whether an apology seems sincere or an action plan is likely to provide the outcomes required.

### **When evidence has been received**

9.58 Once evidence has been received (from the organisation/individual), the caseworker should consider whether compliance has been achieved. We should record our acceptance or disagreement of this evidence on Dynamics 365.

### **If we consider compliance has been achieved**

9.59 If the caseworker is satisfied that compliance has been achieved, then this should be communicated to the complainant and the relevant organisation to explain that our action on the case is complete. Communication can be made by letter, email or phone; however, if the parties request confirmation by letter we should adhere to their request. A template is available on Dynamics 365.

9.60 However, the caseworker communicates with the parties, they should ensure that there is an accurate record on Dynamics 365 explaining that we have communicated completion of compliance to the parties and how. For telephone calls, we should accurately note the detail of the conversation.

9.61 The caseworker should ensure that the compliance record on Dynamics 365 is updated to show the item has been 'complied' with. The compliance item and case can then be closed.



If we consider compliance has not been achieved or require further information

- 9.62 If the caseworker is not satisfied that compliance has been achieved, this should be communicated to the organisation within a reasonable timeframe. The caseworker should explain what evidence would be sufficient and discuss whether further time is required for this to be provided. **(Policy requirements)**
- 9.63 If the organisation agrees to provide this information, a note should be made on the compliance record with any new date. The original date must not be changed. The status of the compliance item should be set to 'further work required'. **(Policy requirements)**
- 9.64 On the new target date, the caseworker should contact the organisation to chase any outstanding compliance. If evidence is then received, this should be considered in line with the section above. If the organisation needs further time the caseworker should reach an agreement on the new compliance date, and record this on Dynamics 365. **(Policy requirements)**
- 9.65 If the organisation is not willing to provide any further evidence or undertake any further work, the caseworker should pursue compliance through the non-compliance process. **(Policy requirement)**
- 9.66 The caseworker should ensure the complainant is kept up to date about any delays in compliance being achieved, or if a case requires consideration through the non-compliance process. **(Policy requirement)**

**When evidence has not been received**

- 9.67 If the organisation has not complied by the target date then the caseworker is responsible for following compliance up with the organisation and finding out when they will respond. **(Policy requirement)**
- 9.68 The initial default contact method is by phone, but it may be necessary to follow up by email. Our default contact point should be the focal point, liaison point, complaints department or equivalent (that is, the contact we have used during the investigation for enquiries etc.) rather than the head of the organisation. In the two-week period following the expiry of the target date, we should make at least three attempts to contact the organisation: two failed phone contacts should be followed by at least one email contact. **(Policy requirements)**
- 9.69 If an organisation responds with a proposal for an alternative target date then we should consider if it is reasonable. We can agree a single extension of up to 4 weeks, if the organisation says they need more time to comply and should then monitor compliance against the revised date. We should not alter the original remedy target date on the system. **(Policy requirements)**
- 9.70 If the date is not considered reasonable then the case should continue to be monitored and progressed through the escalation process. Where we agree a

change in target date we should inform the complainant of the revised date and the reason for the change. **(Policy requirements)**

- 9.71 If, at any point we agree an amended target date and the organisation fails to meet it, the case should continue to be escalated through the process. Agreeing an amended date does not send the case back to the start of the process.

### **Reviewing the quality of our recommendations**

- 9.72 Prior to the start of the non-compliance process the caseworker should ensure an independent review of their recommendations has taken place, if it hasn't been already. This will usually be through the review and feedback process, although dependent on the case the legal team may also need to be involved.

- 9.73 Following these checks the relevant team will decide whether any further action needs to take place prior to the non-compliance process starting. Any further action on the case should be recorded on Dynamics 365.

- 9.74 If it is decided a review of the case needs to take place, any compliance item should be recorded as 'on hold' until a decision has been made.

### **When the complainant does not cooperate or respond**

- 9.75 Where we are satisfied that the organisation has made reasonable attempts to comply, but the complainant is not cooperating we should contact the complainant (ideally by phone) to find out why and to ensure they understand what is required of them. We should explain that the remedy cannot be secured unless they cooperate and ask them to do so by a specific date. (That date should be set, depending on the circumstances of the case - for example, what action is required, and the information given by the complainant in response to this contact.) Details of that contact (if made by phone) should be confirmed in writing. We should explain that we may close compliance action without the remedy being secured, if they do not cooperate or provide an explanation of why they are unable to.
- 9.76 If the complainant does not cooperate by the date given, then we should contact them and give a final date by which they either need to cooperate or to explain why they are unable to do so, or we will consider closing compliance action without the remedy being secured and without further warning.
- 9.77 In circumstances where we are unable to contact the complainant (that is, we get no response from them), we should attempt contact using different methods (for example, phone and letter/email) and also contact any representative.
- 9.78 If the complainant does not cooperate and no explanation or contact to request a review is received by the date set, then the case should be passed to an Operations Assistant Director for them to approve the closure of compliance.

The referral to the Assistant Director should summarise the action taken so far and the reasons for the proposed closure.

9.79 If the Assistant Director agrees the proposal then we should close compliance action as 'complied with - but complainant refused', write to inform the complainant that we have done so and say that we will take no further action to secure the remedy.

9.80 We should also write to the organisation saying that we are satisfied that they have taken reasonable steps to attempt to comply and that we will take no further action.

9.81 If the complainant provides an explanation we will consider that on its merits and decide whether to allow more time. However, we may need to ensure the complainant understands that we are unable to change the terms of a recommendation.

9.82 If a review is requested and is unsuccessful we should give the complainant a final date for them to cooperate and then follow the process as set out above.

### **Non-compliance process**

9.83 Our non-compliance process explains the steps we will take as an organisation to ensure we achieve compliance with our recommendations. It should be applied in the following circumstances;

- When an organisation fails to comply within the time provided and attempts to agree a reasonable extension have failed, or deadlines are repeatedly not met.
- When an organisation fails to comply satisfactorily with our recommendations within a reasonable timeframe, or they refuse to undertake further work.
- When an organisation has told us they do not agree with our decision or recommendations. (Escalate to Assistant Director level)

9.84 While each stage of the process requires escalation to a more senior person within the organisation, the caseworker retains overall responsibility for taking action on the complaint. **(Policy requirement)**

9.85 The risk rating of the case should be reviewed periodically as the case goes through the escalation process. If the case becomes high risk the caseworker must inform the Assistant Director for the senior caseworker and complex teams. **(Policy requirements)**

### **Escalation stage 1: Operations Manager**

9.86 If the organisation fails to comply (or to provide a reasonable timescale for a reply) within 4 weeks of the original (or, where appropriate, revised) target date then the case should be escalated to the Operations Manager. The

caseworker should update the status of the compliance item to escalated and enter the details of the person escalated to.

- 9.87 The Operations Manager should contact the organisation in order to agree what the organisation will do (and by when) to comply with the outstanding recommendations. The default contact method is by telephone, but it may be necessary to follow up by email. Our default contact point should be the focal point, liaison point, complaints department or equivalent (that is, the contact we have used during the investigation for enquiries etc.) rather than the head of the organisation.
- 9.88 Any written or email contact with the organisation at this stage should also be copied to the head of the organisation, or relevant senior staff member (for example, Medical Director or Director of Nursing) so that they are aware of the case.

#### Escalation stage 2: Assistant Director

- 9.89 If the organisation fails to comply (or to provide a reasonable timescale for complying) within 8 weeks of the original (or, where appropriate, revised) target date then the Operations Manager should escalate the case to the Assistant Director. The caseworker should update the status of the compliance item to escalated to Senior Leadership Team and enter the name of the relevant person.
- 9.90 If an organisation has told us they do not accept our recommendation(s), or are clearly challenging or refusing to comply, the caseworker should change the compliance status of that item to 'open - recommendation not accepted by organisation'.
- 9.91 The Assistant Director should contact the organisation in order to agree what the organisation will do (and by when) to comply with the outstanding recommendations. The default contact method is telephone, but it may be necessary to follow up by email. The default contact point should be the relevant senior person at the organisation.
- 9.92 If the organisation continues to fail to comply (or to provide a reasonable timescale for complying) within 12 weeks of the original (or, where appropriate, revised) target date then the Assistant Director should review the case, and consider what action to take next. They should speak to the staff involved, if necessary.

#### Escalation stage 3: Executive Team

- 9.93 Further action on the case should be decided based upon the specific circumstances of the case. The Assistant Director should set out a proposal for the next steps and pass the case onto either of the Deputy Ombudsmen or to

the Ombudsman directly. The Assistant Director's review of the case and proposal should involve consideration about whether it is appropriate to lay a special report before Parliament.<sup>69</sup>

**9.94** If at this stage we have not yet involved our Legal Team we should look to do so prior to taking any further action. **(Policy requirement)**

**9.95** The Deputy Ombudsman or the Ombudsman should determine the next steps and send a letter to the Organisation/s detailing specific action we now intend to take. Other options for further action could include:

- Involving a regulator (for example, Care Quality Commission)<sup>70</sup>.
- Involving a professional body (for example, General Medical Council).
- Involving a commissioning body (for example, NHS England).
- Involving a parent department (for example, in cases involving executive agencies of Parliamentary jurisdiction organisations)

#### When to close compliance

**9.96** Compliance items should only normally be closed when we are satisfied that the organisation has provided, or taken all reasonable steps to provide, the remedy. Decisions to close compliance action, exceptionally, where compliance has not been achieved must be taken at Director level or above.

#### Adding a compliance item on Dynamics 365

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**9.97** A compliance outcome should be created on the Dynamics 365 record. The appropriate remedy type should be added along with a target date of when we expect the action to be completed by. If we are recommending financial redress then the amount should be recorded. **(Policy requirement)**

**9.98** A description should also be added providing further detail about the action we are asking the organisation to take or an explanation to where this information can be found on the Dynamics 365 record. **(Policy requirement)**

**9.99** Once compliance has been completed the remedies and compliance record should be closed. The compliance comments section should be used to record any difficulties we have had securing compliance or explain where this information is available on the Dynamics 365 record. **(Policy requirement)**

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#### Risk assessment

**9.100** Any case which enters the compliance escalation process should have its risk rating reviewed, and revised as necessary (in line with the risk section in [section 10](#)). This should be kept under review until compliance action is completed. Responsibility for the risk assessment lies with the member of staff

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<sup>69</sup> 1967 Act, Section 10(3); 1993 Act, Section 14(3)

<sup>70</sup> Please see our disclosure policies for information on how to disclose information to other organisations.

who is overseeing that part of the escalation process (caseworker, Operations Manager, Assistant Director or Director).

- 9.101 If a case is deemed high risk as a result of this review, then it should be considered in line with the high risk case escalation process as detailed in [section 10](#). **(Policy requirement)** This does not include cases that are high risk because of a risk to complainant, stakeholders and third parties (for example when the complainant threatens harm to themselves or others).

#### Legal considerations

- 9.102 The need to seek advice from the Legal Team should be taken on a case by case basis. However, in line our normal approach, any correspondence received which suggests that legal action is, or may be, taken should be sent to the Legal Team within 24 hours of receipt.

#### Dealing with complaints from MPs

- 9.103 If we receive course of business correspondence from an MP or their casework staff (for example a request for an update on the case), this should be dealt with by the caseworker who is handling the case, or if unallocated, the last caseworker to handle the case. **(Policy requirement)**
- 9.104 If the MP or their casework staff send in a complaint about us or express dissatisfaction about us to other casework staff, then this should be handled in line with our Review and Feedback guidance. **(Policy requirement)**

## Section 10: Assessing risk and escalating cases

### Assessing risk

- 10.1 We use risk to refer to factors that in isolation or combined mean that a case should be managed and, in particular, supervised, differently. We use the term to cover the probability, threat of damage, or any other negative occurrence that is caused by external or internal vulnerabilities or influences that may be avoided or monitored through mitigation.
- 10.2 We assess risk because it enables us to carry out better quality casework that is handled appropriately dependent on the circumstances of the particular case. This includes having a case escalation process in place to allow us to identify cases the Ombudsman and Deputy Ombudsman should be made aware of, either for their oversight or for decision making.
- 10.3 We need to identify, analyse and manage risk continuously throughout the life of a case, in order to understand, control, avoid, remove, reduce or accept risk so we can carry out our casework effectively. Our risk process is dynamic and the rating level on a case can move between low, medium and high as we become aware of new risks, or the risk is removed.
- 10.4 Case risk should be managed by the individual allocated ownership of the case with whatever level of supervision or upward reporting is necessary as a result of the risk assessment.
- 10.5 The types of risks we should consider include the time the investigation is taking, the involvement of a potentially litigious body or person in jurisdiction, the profile of the case, the seriousness of the allegations and cases where our capacity to investigate is in doubt. Our casework risk categories are located in our [Casework Risk Assessment Tool](#) in detail, and some examples are provided at the end of this document.
- 10.6 We may from time to time decide that a particular group of cases, or a specific organisation, need to have a higher risk rating apply, for a temporary period of time. This could be for numerous reasons, for example the external profile of the case.
- 10.7 The process outlined below sets out our standard approach in undertaking an assessment of risk. There will be circumstances though when we decide a case should be a higher or lower level of risk for another reason. The process for considering this is detailed below.

### What risks should we be capturing?

- 10.8 When considering risk we are looking at events or actions that are happening now, but are going to continue or worsen in the future or that are likely to happen in the future. For example, legal action currently being taken against us, or the possibility a person will come to harm based on their current circumstances.

10.9 When considering what risks may occur in the future we will only include those applicable to the circumstances of the particular case. For example, if a complainant has a worsening health condition, such as arthritis, but this does not relate to their complaint, we would not add it as a risk.

10.10 We do not generally need to record risks that have already happened and should only reference past events as a risk if they are likely to have a future impact. **(Policy requirement)** For example, if a complainant has a complaint about our service upheld and brings a further complaint to us, there is already a risk they will be dissatisfied with our service.

10.11 If a risk we are attempting to mitigate occurs during our consideration of a case we should review the risk rating and decide whether it needs to change or is still applicable. **(Policy requirement)** For example, if there is a risk someone may lose their home as a result of an ongoing complaint, and this happens, we may decide we no longer need to record this as a risk. Of course, there may be a new risk as a consequence.

When to assess risk

10.12 The caseworker should ensure they proactively manage and monitor risk through-out the lifetime of the case. A risk assessment should be undertaken whenever a new potential risk is identified. **(Policy requirement)**

10.13 A formal risk assessment is also required at four points in the casework process. **(Policy requirement):**

When we propose to investigate/decline to investigate (can we/should we

- look into your case)
- When we confirm the investigation (under investigation)
- When we share our provisional views
- When we decide to do further work following a complaint about our service or decision

10.14 The caseworker should ensure they accurately record all considerations of risk, and any proposed mitigations, on Dynamics 365. This includes the Intake Caseworker ticking that a risk assessment is required when passing a case for assessment and the caseworker ensuring that both a risk impact and likelihood rating are added to ensure an overall risk rating is generated. **(Policy requirements)**

10.15 Regardless of the risk type, the following questions must be considered when completing a risk assessment. **(policy requirement):**

- Is there a risk? (If so describe the risk in a short statement)
- What is the likelihood of the risk? (unlikely, possible or highly likely)
- What is the potential impact? (minor, moderate or critical)
- Do a number of risks taken together have a cumulative effect?



- How can we mitigate the risk?
- What do you expect the risk rating to be having taken mitigating action?
- What action do we take if the risk we have described happens?

#### Is there a risk?

- 10.16 There is no universal agreed list of what a risk has to look like, and the caseworker should consider whether an event or action constitutes a potential risk on a case by case basis. **(Policy requirement)**
- 10.17 We have five specific risk categories a caseworker should consider when deciding on a cases overall risk rating. **(Policy requirement)** Our [Casework Risk Assessment Tool](#) provides examples of what would usually constitute a minor, moderate or critical risk impact.
- 10.18 In most instances we will only consider a risk needs to be recorded if it directly links to the complaint made, the injustice claimed or outcome sought by the complainant. For example, distress and pain which the complainant says is a result of the surgery complained about going wrong, rather than ongoing issues as a result of an unrelated health condition.
- 10.19 We do not need to seek evidence a risk exists before considering it in our assessment, and can take account of information given to us by a complainant or organisation if reasonable to do so. For example, if a complainant tells us they are likely to lose their house if they do not receive monies owed, we do not need them to prove this.
- 10.20 The tool does not cover every category of risk which may be applicable, and the caseworker should take into account the specific circumstances of the case before deciding on an overall rating. **(Policy requirement)**

#### Recording risk

- 10.21 We should record a risk whenever one is identified, even when we know in advance this can be fully mitigated. **(Policy requirement)** This is to ensure we can demonstrate we have considered the impact of the risk and have a transparent plan in place to how we will deal with it.
- 10.22 If no risk is identified, a risk assessment should be recorded as low. The caseworker should write a brief summary explaining the reasons for the low rating. **(Policy requirements)** For example, stating there is no indication or evidence at this stage that a risk is present.
- 10.23 We should record any information we receive or discover that may not identify a risk at present, but will help us monitor whether one will develop in the future. **(Policy requirement)** For example, a complainant tells us they have a history of suicide attempts, but there is no suggestion that our action on their case could be a contributing factor. In this instance we may consider the case risk rating to be low, but want to record this information in the risk section of our Decision Form and on Dynamics 365.

- 10.24 We may decide a case requires a higher risk rating for a limited period of time until we are sure an appropriate mitigation is in place. For example, following a change in approach to a type of case we may consider it requires a higher risk rating until we are sure those cases are being dealt with correctly.

What is the likelihood of the risk, and potential impact?

- 10.25 When assessing risk we should consider the severity of the risk (minor, moderate or critical) against the likelihood of the risk occurring (unlikely, likely or highly likely). **(Policy requirement)**
- 10.26 We should use our risk matrix to assist in determining an overall risk rating for the case of low, medium or high before and after mitigation takes place. We should use the post-mitigation rating when recording an overall level of risk on our Decision Form and on Dynamics 365, but should ensure the pre-mitigation rating is still referenced. **(Policy requirements)**

Is the case low or medium risk?

- 10.27 If following application of our risk matrix a case comes out as medium risk, the caseworker should consider further, in discussion with their manager if appropriate, whether the case requires a medium risk rating or can be graded low instead based on any other external factors. **(Policy requirement)**
- 10.28 The caseworker should consider if any external factors are applicable that may raise or lower the impact and likelihood of a risk occurring outside of the examples provided within the Casework Assessment Tool. **(Policy requirement)** For example, whether the allegations are serious, if the complainant is vulnerable, or if an advocate or other representative is available.
- 10.29 If a case relates to more than one category of risk we should record multiple risk ratings<sup>[1]</sup>. The overall rating for the case should usually be recorded as the highest level identified after mitigation takes place. **(Policy requirements)**

What if the rating doesn't seem right?

- 10.30 If in applying the risk matrix the caseworker feels the correct rating has not been generated for any reason, they should review the rating again and ensure they have covered all of the risk categories in their consideration. **(Policy requirement)**
- 10.31 If following this reconsideration the risk rating remains the same, and the caseworker still thinks it should be higher or lower, they should discuss the case with their manager. If their manager agrees the risk rating should be raised or lowered on the case, and an appropriate explanation to why should be recorded on the Decision Form and Dynamics 365. **(Policy requirements)**

**Our risk matrix**

Risk and mitigation plan				
Description of risk/s <i>(to be updated during the lifetime of the case)</i>		Impact		
		Likelihood		
Risk matrix				
Impact	3 - Critical	Medium	High	High
		or Low		
	2 - Moderate	Low	Medium	High
			or Low	
	1 - Minor	Low	Low	Medium
				or Low
		1 - Unlikely	2 - Likely	3 - Highly likely
	Likelihood			

#### What if the case is high risk?

- 10.32 If the caseworker identifies a high risk case, this must be discussed with their manager as soon as possible. If the manager agrees with the risk rating then a mitigation plan should be completed and sent to an Assistant Director for review. **(policy requirements)**
- 10.33 If a case is high risk our escalation and allocation process will apply. Please see section 1.62 for details. **(Policy requirement)**
- 10.34 If a case is escalated for oversight by the Ombudsman or their deputies, the rating cannot be changed without their agreement. **(Policy requirement)**
- 10.35 The caseworker should also consider who else may need to be made aware of the case (and involved in mitigation planning). For instance colleagues in External Affairs (our Public Affairs staff, the press team or our Liaison Managers). **(Policy requirement)**
- 10.36 If there is an immediate risk, particularly to the welfare of individuals<sup>[2]</sup>, it must be considered quickly and a decision taken on what action to take. **(policy requirement)**

#### Do a number of risks taken together have a cumulative effect?

- 10.37 If we identify several risks on a case, we should consider whether combined they should lead to a higher risk rating being applied. **(Policy requirement)** For example, if we identify four different categories of risk on a case and grade them all at medium, we should consider if overall the case should be rated high risk.

10.38 There are no specific criteria to when a rating should be raised for this reason, and the caseworker should consider this on a case by case basis **(Policy requirement)**. We should consider the following though in reaching a view.

- While there may be several categories of risk identified, do they all stem from one specific issue? If so, and it is likely we will only need to have one mitigation plan in place; we will not usually need to raise the rating.
- Are the issues completely unlinked and therefore risk needs to be managed over several areas? This may cause us to raise the risk rating.
- When considered all together, is the possible impact of the risk or the possibility of it occurring higher? This may be a reason to raise the risk rating.

#### How can we mitigate the risk?

10.39 A case assessed as being either high or medium risk must have a mitigation plan. **(Policy requirement)**. Potential action to mitigate risk will significantly vary from case to case (and a discussion with colleagues or a manager might help to clarify your thinking), however action in risk mitigation plans should aim to achieve one of these four outcomes:

- Remove (Our action can prevent the risk from occurring)
- Avoid (By doing something different we can greatly reduce the likelihood of the risk occurring)
- Reduce (Our action cannot fully prevent the risk from occurring but can reduce the impact or the likelihood that it will.)
- Accept (Nothing can be done to mitigate the likelihood or impact of the risk)

10.40 Some suggestions to how we may mitigate specific categories of risk are available at the end of this document.

#### What do you expect the risk rating to be having taken mitigating action?

10.41 The caseworker should explain in the relevant section of the risk assessment record on Dynamics 365 if the mitigation action suggested has lowered the risk rating on the case. **(Policy requirement)**

10.42 If the risk rating has been lowered, the case can be progressed in line with the new rating. For example, if the case was medium risk and is now low then some caseworkers may require less supervision under our model.

10.43 Taking a mitigating action may not always lower the risk impact or likelihood. We should still take any action identified though if it is proportionate to the case and supports either the parties to the complaint or our staff in handling or managing the risk. **(Policy requirement)**

#### What should we do if the risk rating changes during the case?

10.44 If a new risk arises, or a previously identified area of risk is no longer of concern, we should review the risk rating on the case. We should also record

details of the new assessment, including any changes to the risk level on the Decision Form and on Dynamics 365. **(Policy requirements)**

- 10.45 If the risk level changes we must consider whether the case requires reallocation based on our case categorisation process<sup>[3]</sup>, or whether additional supervision is now required based on our Supervision Model. **(Policy requirement)**

What action do we take if the risk we have described happens?

- 10.46 It is understood that despite all possible mitigation, a risk may still occur. This section of the risk assessment form on Dynamics 365 should therefore be used to explain what should happen if it does. This could include details of who should be contacted to help manage the risk, for example through our disclosure policies.

### **Categories of risk and how we may mitigate them**

#### People (including the threat of harm to self or others)

- 10.47 This category covers the physiological or psychological harm that an individual is either currently experiencing which is likely to continue or get worse or that they may experience in the future. This includes complainants who are or become terminally ill.
- 10.48 The type of mitigation we put in place in these instances will depend on the circumstances of the case. If a complainant is terminally ill we should consider prioritising their case for allocation.
- 10.49 This category would also cover risks where a person involved in a case has threatened harm to themselves or others. In these instances there would not need to be a link between the complaint raised and any action threatened in order for this to be recorded as a risk.
- 10.50 If a person threatens to harm themselves or others we should consider making a disclosure to a suitable person. **(Policy requirement)** Sometimes a threat may relate directly to our proposed action on a case, for example, a suggestion someone may harm themselves if we do not uphold their case. In these circumstances we may decide to mitigate the risk by making a suitable person aware before sharing our decision such as an advocate.

#### Financial risk (including loss or misuse of information)

- 10.51 This category covers the financial loss a complainant is already experiencing which is likely to continue or get worse. For example, someone being unable to work leading to mounting financial issues. It also covers financial losses that may happen in the future. For example, a charging order not being lifted meaning a house will have to be sold in the future.

10.52 We may find it difficult to mitigate a current or future financial loss for a complainant prior to deciding if we will uphold the complaint or make formal recommendations. In some circumstances, especially if the complainant is vulnerable, it may be possible and appropriate to contact an organisation for their assistance. For example, asking them to extend a deadline for payment until our decision has been concluded, or if we decide not to uphold a complaint, asking if they would consider putting a payment plan into place to pay back any monies owed.

10.53 This category also covers the loss or misuse of information. In these instances we do not need to consider the likelihood this will happen, and will generally only record a risk if information actually does go missing or is misused. All information breaches should be reported to our Information Security Manager. **(Policy requirement)**

10.54 The mitigation in these circumstances will usually be to ensure any information shared incorrectly is destroyed or retrieved as soon as possible, and we prevent it being shared more widely. In these instances we may also wish to consider if there is a separate future risk to our reputation in this information being shared. A mitigation plan for this may be discussing what has happened with the complainant or the Information Commissioner as soon as possible.

#### Reputation/Political (including media coverage)

10.55 This category is wide-ranging and covers any threat that could be a risk to our reputation, for example, a campaign through either a pressure group or national newspaper. It also includes any involvement of an Member of Parliament (MP) in a complaint.

10.56 The mitigation for this category would be entirely dependent on the specifics of the risk and the individual case. It is likely with this category though that we may need to mitigate both a current and potential future risk. For example, a local media campaign may be a current risk, but the fact the campaign may get picked up by the national media could be a future one.

#### Our Service

10.57 The service category covers any risk associated with a complaint about our service or where we have previously received a complaint about our service, regardless of the action we then took.

10.58 In order to determine the risk rating for this category the caseworker should review any cases the complainant has brought to us previously and confirm whether they have made a complaint to us, and if so what the outcome was. **(Policy requirement)**

10.59 Any complaint about us that cannot be resolved through the management line should be escalated to the Review and Feedback Team in line with their processes. **(Policy requirement)**

## Legal

10.60 Our legal risk category generally refers to the threat or undertaking of legal action against us. It also includes the use of legislation as a standard in our casework and any complaint raised with us by a legal representative.

10.61 Any serious threat of legal challenge, pre-action protocol or claim such as judicial review must be referred to the Legal Team as soon as received.  
**(Policy requirement)**

## **High risk escalation process**

10.62 We have specific processes for handling cases considered to be high risk under this policy to ensure they are given the relevant level of senior level oversight. These cases will always be allocated to a Senior Caseworker if the risk is identified early on.

10.63 When it is agreed a case is high risk after mitigation, the caseworker should ask for it to be assigned to either the Ombudsman, or one of their deputies, for oversight. **(Policy requirement)**

10.64 The most high-profile cases (in particular those who involve systemic issues or a high degree of complexity) are allocated to the Ombudsman. As their capacity is reached, cases are allocated to their deputies.

10.65 The caseworker will continue to be responsible for progression of the case, with support from their manager, and the relevant Assistant Director - Casework as appropriate. The Assistant Director - Casework for Senior Caseworkers retains overall responsibility for high-risk cases.

10.66 Cases are assigned via the high risk [multi-disciplinary](#) case assurance meeting, and a [template](#) should be completed, and submitted to the Assistant Director - Casework for Senior Caseworkers for inclusion and allocation.  
**(Policy requirements)**

10.67 Decisions on allocation must include consideration of any declared conflicts of interest. **(Policy requirement)** This is likely to include not allocating a case to the Director of Legal and Professional Services in their deputy Ombudsman capacity if legal advice is a key factor in the case decision.

10.68 The level of involvement by the Ombudsman or their deputies will depend on the circumstances of the individual case, but the caseworker and their manager should seek their involvement on any strategically important issues, and in the planning of any investigations. **(Policy requirement)** Caseworkers can arrange planning meetings with the senior decision maker through the executive office using the template above, and the briefing they prepare.

- 10.69 As part of the oversight process the caseworker may need to meet with the Ombudsman or their deputies. For such meetings they should be accompanied by their manager, or Assistant Director. The caseworker is responsible for making a record of the meeting and seeking approval of these notes afterwards. **(Policy requirements)**
- 10.70 Where the Ombudsman or his deputies make a casework decision (such as a decision to decline to investigate or a decision to approve a final report) that decision will be recorded on the cover note to the briefing paper and stored on Dynamics 365. **(Policy requirement)**
- 10.71 Any approval received of the meeting notes, or of a decision, must show the decision maker has read, considered, and approved the contents. This approval must then be stored on Dynamics 365. **(Policy requirements)** Evidence of approval or consideration can be by way of a saved email trail if saved to the case.
- 10.72 The caseworker should send monthly updates ahead of each high-risk case assurance meeting until the senior decision maker agrees otherwise, or work on the case is complete. **(Policy requirement)**