

From the Ombudsman Robert Behrens CBE

William Wragg MP
Chair, Public Administration and Constitutional Affairs Committee



Sent by email

12 April 2021

Dear William,

At our recent meeting, I gave notice of my intention to write to the Committee to provide details of the operational changes we are introducing in response to the impact of the COVID-19 pandemic on PHSO's service.

The coronavirus pandemic continues to have a profound impact on PHSO, the people who use our service and the organisations they complain about.

Productivity in our casework teams has been diminished significantly by sickness, caring responsibilities and resilience levels during multiple lockdowns. This has been compounded by continued difficulties in investigating complaints, with some organisations in the health sector experiencing their own challenges in responding to complaints and therefore asking us to delay our work or needing significant extensions to the deadlines we provide.

Although PHSO entered the pandemic in a position of relative strength, escalating pressures have led to the queue of unallocated cases standing at over 3,000. This is expected to continue to grow. A growing queue would lead to members of the public waiting an unreasonable length of time for their complaint to be considered. We have already taken a number of steps over the past two years to streamline our decision-making. However, notwithstanding these, without further action now to bring down the queue, all complainants, including those bringing serious failings to us, will be required to wait for excessive lengths of time.

I have considered carefully how to respond to this situation. Every complaint is important to the person who makes it, and every complaint may offer valuable learning for the organisation complained about, so this gives rise to difficult choices. I have, however, concluded that, in the present situation, PHSO's resources must be focused on those complaints which raise the more serious issues, where people may be facing the more significant injustices, and the potential for organisations to learn may be greatest. This approach to deciding which cases to progress to investigation is common among the Ombudsman community. For example, the Local Government and Social Care Ombudsman, as a matter of long-standing policy, only investigates cases that raise serious issues of injustice.

Given the current circumstances this is the appropriate way forward in relation to our health casework. It also means that NHS bodies will not be required to look into less serious issues that arose many months or, in some cases, years ago while they are dealing with the aftermath of the pandemic. To ask them to do so would not be reasonable for either complainants or NHS organisations, given the current crisis.

The intention is that this will allow PHSO to look at complaints more promptly than would otherwise be possible in the exceptional circumstances we are operating in. In practice, this will mean continuing to examine all complaints brought to PHSO. If a complaint can be resolved quickly, we will do so. But if it cannot, and the impact of the claimed injustice on the complainant is relatively limited, we will not consider that complaint any further.



To determine the impact of a failing, PHSO uses a Severity of Injustice scale, which I have included as an Annex to this letter. This change will apply to all complaints about the NHS in England where, if we were to uphold them, the likely impact would be at level 1 or 2 on the scale. It will apply to new complaints as well as those already lodged, but not yet allocated to a caseworker for consideration.

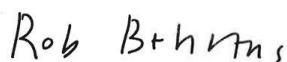
Making this change now will allow PHSO to focus on helping complainants who have faced the more serious failings and to ensure that those failings are addressed as quickly as possible. Complaints involving Government departments or agencies outside the health sector will be progressed as usual. We estimate there are around 900 complaints at level 1 and 2 in our queue and we are contacting all affected complainants to explain our decision. In the longer term, we expect to receive in the region of 2,500 further complaints at these levels, during 2021-22. We will review the impact of this change initially in the autumn and update the Committee at that point on the impact it has had.

In parallel with progressing casework, PHSO is committed to working with local complaint handling teams to improve the way complaints are dealt with on the front line. This is why we have worked with the NHS and patient representative groups to develop new [Complaint Standards](#), which we launched before Easter and plan to pilot with a number of NHS bodies over the next period. These Standards set out clear expectations for how complaints should be considered and resolved locally. Longer term, as the Standards are adopted more widely, our collective ambition is that many of the complaints currently brought to us will be resolved without the need for our intervention.

My office is committed to delivering a high quality and timely complaint-handling service to the public, underpinned by independence and transparency. The current context creates additional challenges which make it harder to deliver that commitment, and I believe that these changes are necessary if PHSO is to address the most serious issues raised in the complaints we see. In implementing this change, we will ensure that frontline NHS bodies, advocacy organisations and complainants are advised about how we are making decisions on what we are, and are not, progressing to investigation and the reasoning behind this.

I will of course keep you updated as the situation evolves. In the meantime, please do not hesitate to contact me should you welcome a further conversation.

Yours sincerely,



Rob Behrens CBE
Ombudsman and Chair
Parliamentary and Health Service Ombudsman

Annex A: PHSO Severity of Injustice Scale

Severity levels by typology category

The following tables set out in more detail how the severity of injustice levels operate within each of the main Typology of Injustice categories (emotional, material, physiological and bereavement).

LEVEL 1 (Financial remedy not appropriate)

These will usually be injustices such as annoyance, frustration, worry or inconvenience, typically arising from a single (one-off) incidence of maladministration or service failure, where the effect on the individual is of short duration, and where there are no other adverse effects or ongoing wider impact. Assuming that there are no issues of vulnerability, that the person affected is an adult of reasonable physical and mental health, and there are no external factors to exacerbate the injustice, we would expect them to recover from the injustice very quickly once the direct impact of the poor service comes to an end. We would generally consider an apology to be an appropriate remedy for level 1 injustice.

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| Emotional | Distress, worry, annoyance and similar emotional impacts, injustice of the sort which a healthy adult would be expect to deal with on a regular basis, without external support, and which does not impact on the affected person's day to day functioning, or their ability to live a normal life; for a period of up to two weeks. One-off clinical or administrative failures causing minor worry or annoyance. |
| Material | Inconvenience or hardship lasting no more than a few days, for example one-off cancellation of appointments or hearings as long as these are rearranged within a reasonable time; short-term deprivation of money; small financial losses (compensated separately) or losses of opportunity; delays that have no material impact. Inconvenience that does not intrude on working time, for example having to bring a complaint to the Ombudsman. |
| Physiological | Short term minor pain (no more than 1-2 days), which can be managed by use of non-prescription medication and where the person affected can still function normally. |
| Bereavement ¹ | Level 1 injustice will only exceptionally be relevant in cases that involve bereavement. We will generally find that any injustice involving bereavement made worse by poor service merits compensation. Exceptionally this may be applicable for some cases |

¹ There are five TOI bereavement types: B1: Bereavement arising from avoidable death;
B2: Bereavement where survival chances were compromised or where there was a loss of opportunity to provide treatment that may have prevented or delayed death;
B3: Bereavement where the impact of death was exacerbated by poor standards of care or treatment, where there is no evidence that service failure was a contributory cause of the death;
B4: Bereavement where opportunity was lost to properly prepare for death or to be with the deceased at time of death; or where the deceased person's family were excluded from decisions about care and treatment;
B5: Bereavement exacerbated by poor complaint handling or by failure to provide explanations about the circumstances of a death.

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| | involving very minor handling or communication failings that had little impact on the person affected. |
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Case examples

- A GP failed to warn a complainant that they faced removal from their practice list, but we agreed with the practice that the relationship had broken down.
- An organisation failed to notify a complainant that a Judge had decided a hearing should not go ahead. The person affected only found out when they arrived in court.

LEVEL 2 (£100 - £450)

These are cases which will generally be similar to, but more serious than cases involving level 1 injustice, but where we consider that an apology on its own is not an adequate remedy. Typically, the injustice will arise from a relatively low impact failing, often resulting in a degree of distress, inconvenience or minor pain, but the duration of the injustice will tend to be longer than in cases with level 1 injustice. Alternatively, level 2 may involve single instances of more serious injustices where the impact was of short duration. We would expect the person affected to recover quickly once the poor service had ceased. Level 2 injustice will not usually have a significant lasting impact, or any effect on the complainant's ability to live a relatively normal life.

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| Emotional | Distress, worry, annoyance and similar injustice of the sort which a healthy adult would be expected to deal with on a regular basis, without external support, and which does not impact on the affected person's day to day functioning, or their ability to live a normal life, for a period from 1-2 weeks to about six months. We would reasonably expect any impact to diminish completely in the fullness of time. Shorter periods of more serious distress. |
| Material | Instances of poor complaint handling where there is a delay of more than a few weeks, up to around one year (or longer if we find that there was no substance to the complaint); Delay in determination of an overseas immigration application of up to a year; cases involving short periods of financial or other hardship up to a month; inconvenience which has more than a short-term or one off impact, for example when a failing by a GP practice meant the person affected now has to travel to a practice which is significantly further away; or where the person affected has to repeatedly chase the organisation to carry out an action; or which impacts on working time or requires the person affected to waste holiday time. |
| Physiological | Minor pain lasting from a few days to a month. Severe pain lasting for no more than a week. Loss of opportunity for a better clinical outcome in cases involving less serious illnesses or the outcomes of minor injuries. |
| Bereavement | B3 cases involving relatively minor failings which did not cause significant pain or suffering to the deceased, or distress to the person affected or other family members at the time. |

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| | B4 cases involving minor failures in communication which caused a small degree of distress or worry against a background of bereavement (or serious illness if the failures preceded the patient's death). B5 cases involving delays of up to six months in responding to a complaint, or provision of a response which does not resolve the complaint. |
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Case examples

- Prisoner placed on reduced privileges due to prison error.
- A GP administered injections to a complainant in their feet rather than their arm. This did not make their condition worse but did delay them in being treated appropriately.

LEVEL 3 (£500 - £950)

This would include cases where the injustice would have a moderate impact (for example, in terms of distress, worry, inconvenience) but has lasted for significant period of time. It may also involve cases where a higher impact injustice has been suffered for a short period. The failings may impact to some extent on the affected person's ability to live a relatively normal life, for example due to stress, impaired sleep, or high levels of inconvenience or uncertainty. However, once the situation has ceased, the person affected would be expected to recover quickly.

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| Emotional | Distress, upset or worry lasting 6-12 months. Significant distress (that is, distress which results in a degree of functional impairment ²) lasting from a few weeks to three months (or shorter periods where the symptoms are greater). Single traumatic or highly distressing experiences where there was no other significant adverse impact. Significant embarrassment or humiliation. |
| Material | Very poor complaint handling, e.g., delays of over a year; or with delays of over six months combined with qualitative failures such as provision of incorrect or incomplete responses. Delay of over a year in overseas immigration cases resulting in material uncertainty. Financial or other hardship lasting three to six months. |
| Physiological | Minor pain lasting up to about three months; severe pain up to a month. Losses of opportunity for a better clinical outcome in cases not involving terminal, life threatening or seriously debilitating illness. |

² Significant distress will usually involve one or more of the following:

- Clinical stress - i.e. consulting a doctor for stress that was not there previously
- Sleeplessness or irritability
- Poor performance at work
- Increased drug use/alcohol consumption

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| Bereavement | <p>B2 cases where we accept that it was unlikely that the patient would have survived, but where a remote chance of survival was lost. (Most B2 injustices will be at least level 4).</p> <p>B3 cases where there were failures in care which caused moderate distress or discomfort to the patient, and/or which added to the family's bereavement after the patient's death.</p> <p>B4 cases where poor communications with the patient's family resulted in significant worry or distress.</p> <p>B5 cases with very poor complaint handling.</p> |
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Case examples

- An organisations' mishandling of a third-party debt order meant the complainant missed the opportunity to pursue the debt.
- Delays by a hospital in making appropriate referrals and performing tests meant the affected person's bladder cancer was diagnosed five months after the appropriate target. This did not affect the outcome of the person affected but caused significant anxiety.

LEVEL 4 (£1,000 - £2,950)

This level includes cases that have a significant and/or lasting impact on the person affected, such that it affects their ability to live a relatively normal life to some extent. Generally the injustice will go beyond 'ordinary' distress or inconvenience, except in cases where it is very prolonged; the injustice will often be such that, even after the poor service ends, the failure could be expected to have some lasting impact on the person affected. The matter may 'take over' the affected person's life to some extent.

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| Emotional | Distress lasting over 12 months. Significant distress, lasting over three months, or which is ongoing. Less serious trauma cases. |
| Material | This would include financial or other significant hardship or other adverse impact on quality of life, lasting in excess of six months. Including delays in handling overseas immigration or other applications in excess of two years; exceptionally poor complaint handling extending over several years, or involving repeated dishonest or disingenuous responses which deliberately seek to evade responsibility ³ . |
| Physiological | Minor ⁴ pain (P1) lasting for three months to a year; severe pain (P2) for one to three months. Loss of opportunity for better clinical outcome in cases of moderately serious illness where there is no reduction in life expectancy. |
| Bereavement | B2 cases where there was a small but tangible possibility that the person affected would have survived, which was compromised. |

³ Only the very worst complaint handling cases will result in a level 4 injustice; financial remedy will usually be towards the lower end of the range.

⁴ Minor pain may eventually cease to be 'minor' if it continues for an extended period.

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| | <p>B3 cases where the affected person's suffering was prolonged or where the failures in care were particularly serious, causing significant distress to the person's family.</p> <p>B4 cases where poor communication had a significant impact on the surviving family's last memories of the person affected.</p> <p>B5 cases where the complaint handling was particularly poor, impacting on the family's ability to find closure.</p> |
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Case examples

- The actions of an organisation led to a defendant who threatened a family being acquitted. We could not say the outcome would have been different but the uncertainty of not knowing was an injustice in itself.
- A terminally ill man's final days were not properly planned and were more distressing than they should have been. A lack of proper nutrition, hydration and clinical input meant he was not given the best chance of surviving for longer.

LEVEL 5 (£3,000 - £9,950)

Typically, these will have a marked and lasting detrimental effect on the person affected and their ability to live a relatively normal life. Recovery will take significant amounts of time. Level 5 injustices will not usually include cases where the primary injustice is emotional, except where this has been particularly traumatic or is prolonged and ongoing. Most cases will also involve significant material or health injustices or bereavement.

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| Emotional | More serious trauma cases. Cases with extended severe distress/worry, lasting over several years, or which is ongoing and where there is no prospect of relief in the near term. |
| Material | <p>Prolonged financial hardship lasting several years (for example long-term child support cases).</p> <p>Significant and long-term negative impact on the affected person's quality of life, for example permanent loss of mobility or independence.</p> <p>Loss of significant financial opportunities or life chances, for example the loss of opportunity to go to university, or to develop a career, where we cannot say on balance that these opportunities would have been taken up.</p> |
| Physiological | Cases involving long-term pain or illness. Minor pain lasting for an extended period (over a year) or which is ongoing and there is no prospect of relief in the near term. Severe pain lasting more than three months. Permanent minor disability. Cases where major surgery could have been avoided or was unnecessary; cases where the affected person's prognosis or life expectancy is worsened. |
| Bereavement | B2 cases where there was a missed fair ⁵ chance of survival or where we consider that poor service was a significant |

⁵ These will be cases where the chance of survival was approaching 50% but where we still cannot find on balance of probabilities that death was avoidable.

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| | <p>contributory factor in the death, or where there was only a small chance of survival but where the patient's suffering was extended.</p> <p>B3: Unlikely to be applicable except where there was exceptional suffering and distress.</p> <p>B4 and B5: Unlikely to be applicable where these are the primary injustice.</p> |
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Case examples

- Mishandling of an asylum application left the person affected without access to public funds or associated benefits for an extended period causing financial worries and distress.
- Incomplete investigations prior to hip surgery, inadequate consent and record keeping led to the complainant experiencing the pain discomfort and distress of a hip replacement that was unneeded.

LEVEL 6 (£10,000 or more)

These are the most serious cases seen by the Ombudsman involving devastating or irreversible injustice, such that the person affected will be affected permanently, or where recovery is likely to take several years, or where a reduced quality of life has been endured for a considerable period. Typical examples include avoidable death and injuries resulting in permanent disability or disfigurement.

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| Emotional | Very severe trauma (which may be accompanied by mental ill health or mental/social disability); severe distress over an extended period (generally several years) |
| Material | Hardship, over an extended period (5 years or more); significant and sustained deterioration in quality of life (e.g. unwanted pregnancy and birth); loss of a major life chance which we can say on balance of probabilities would have happened e.g. the chance to attend university, start a new life in a different country, or pursue a chosen career. ⁶ |
| Physiological | Long-lasting, untreatable pain; very serious injury; loss of or damage to a significant aspect of the body; permanent major disability; seriously curtailed life expectancy; loss of opportunity to prevent illness becoming terminal and where death is expected in the near future. |
| Bereavement | <p>B1: All avoidable deaths.</p> <p>B2: Deaths which were not avoidable but where there was a loss of a fair chance of survival which is exacerbated by other factors; for example, extensive suffering.</p> <p>B3: Unlikely to be applicable.</p> <p>B4 and B5: Unlikely to be applicable where these are the primary injustice.</p> |

⁶ Note the distinction between situations in which we can say on balance that these outcomes would have transpired (level 6), and those where we can only say that there was a loss of opportunity (level 4/5).

Case examples

- Three planning appeal decisions in one case were mishandled and subsequently quashed, leading to the person affected being unable to properly plan and run their business for a substantial period of time.
- The person affected died of sepsis due to a failure of a hospital to carry out appropriate and thorough investigations of their symptoms. It is highly probable the person would have survived had treatment been prescribed quicker.