Written evidence submitted by the Local Government and Social Care Ombudsman [ASC 032]

About the Ombudsman

1. The Local Government and Social Care Ombudsman (LGSCO) investigates complaints about councils and some other authorities and organisations, including independent adult social care providers, in England. It is a free service. Our role is to investigate complaints in a fair and independent way – we do not take sides.

2. Our experience of dealing with situations where things have gone wrong puts us in a unique position to provide insight into what could be done to improve local public services. We welcome the opportunity to contribute to the call for evidence.

3. Due to the nature of our role, our response to this inquiry focuses on evidence from our complaints about how local authorities and social care providers are implementing charging for adult social care.

Executive Summary

4. Due to the limits of our jurisdiction, we are not able to comment on the suitability of levels or types of funding for social care. However, we do have information from our casework on how different funding streams are implemented.

5. In the last five years we have made decisions on 1999 adult social care cases where charging was the primary category. This is therefore not an insignificant area of investigation for us. The uphold rate for cases where we carried out a detailed investigation was 69% which is above our overall uphold rate of 62% in 2019-20 for all cases, but in line with the uphold rate for all adult social care complaints of 69%.

6. We consistently find local authorities are reporting a lack of sufficient funding. In our investigations we find that a lack of available or suitable funding can result in councils not providing care that is needed on the basis of what it costs, or inappropriately charging for care.

7. In addition to this, we also find persistent problems with the way in which councils and adult social care providers are implementing specific funding schemes or procedures, such as top up fees or so-called ‘deprivation of assets’.

8. While we recognise councils are under increasing financial pressure, it is important they are fulfilling their statutory requirements. We cannot make concessions for failures attributed to budget pressures; we must continue to judge authorities in line with relevant legislation, standards, guidance and their own policies.

9. While we can’t comment on the suitability of levels of funding, our evidence as set out below shows in particular areas there are consistent problems with councils not applying funding streams or rules in line with expectations or guidance. The result of some of these decisions can mean people are charged inappropriately for care or left without the care they need, causing ill health and emotional distress.

Decisions regarding care being informed by funding considerations

10. We see cases of local authorities justifying not providing care, or only providing care on a limited basis, because of cost. For example, some councils have a ‘usual cost

rate' that they will not go above for certain services regardless of the individual needs of the person. This is not in line with what is set out in statutory the guidance. In addition, we also sometimes see councils who charge a consistent rate regardless of the actual needs of the individual, as a means to cover the cost of care as a whole.

11. In our 2018 report about the pressures in local government *Under Pressure*[1], we identified that we have found councils at fault for raising eligibility thresholds to qualify for services, particularly in adult social care, as a means to save money. Instead of starting by assessing needs, developing a care plan and then meeting eligible needs, councils have made resource-led decisions, sometimes missing out the care plan or needs assessment stage altogether.

12. We have also found examples where councils have imposed targets or informal policies to restrict services. For example, in one case we found there was no formal policy but instead a direction to social work teams to only give a maximum of four weeks respite care.

13. Funding concerns are something that are raised consistently with us by local authorities when processing complaints. However, we are clear that concerns around funding are not an excuse for councils not to meet their requirements.

14. The local authority should be assessing the person who needs care and giving them an individual personal budget based on their needs and that is sufficient to meet their needs.

Example cases

Case Overview (16 015 946): We received a complaint against Wiltshire County Council from a woman who complained the Council has wrongly cut the respite care provided for her son and has wrongly asked her to pay towards the cost of her son's transport between home and day care.

During this investigation we found the council had introduced banding for certain types of disability to save money in its adult social care budgets. Once it decided the person's disability fell into a particular band, it meant the person's funding could not exceed a certain level.

Our investigation:

Mr and Mrs N have an adult son, Mr P, who has complex needs. He has severe learning difficulties and epilepsy. He has always lived at home with his parents.

Recently, Mr N has also become disabled. Mrs N acts as carer to both Mr N and Mr P. At her request, the Council pays her via direct payments to be Mr N's carer. Since leaving school, Mr P has attended a day care facility within the Council's area on week days. He has attended the same respite centre for many years. The Council has provided transport for him to day care. It also provides residential respite care. The family lived, until 2016, in a house about 10 miles from the day care centre.

In late 2015, Mr and Mrs N decided to move. Mrs N was very keen that Mr P should keep his existing care package at their new home. She believed based on her communications with the Council that this would be the case.

[1] LGSCO: Under pressure

The Council told Mrs N it had decided to cut Mr P's transport funding and to ask Mrs N to provide two journeys a week between home and day care. She could either pay the Council £30 a trip or provide the transport herself. The Council said it had also decided to cut respite care from 104 nights per year to 68 nights per year. The Council said it had calculated the new level using the MAT. Mrs N complained about these decisions.

In September 2016, the Council conducted a review of Mr P's needs. In the summary, it said, 'all support needs are being met – no change required…., 'Mrs N is happy to continue as Mr P's main carer and for him to reside in the family home (respite, day care and transport arrangements need to remain unchanged to continue to support)'. Mr P's eligibility for services remained unchanged. His wellbeing outcomes remained unchanged.

Mrs N said she needed the respite care to remain at its current level. She said she wanted to care for Mr P but could not do so without respite. The Council said it had carried out a fresh calculation of the family's respite care entitlement. It said it had applied the provisions set out in the MAT. It said Mrs N had been receiving a level of respite care above that which it gave in similar cases. It said the change would be introduced 'gradually' and would be fully in place by April 2017.

We found the Council was at fault for the way in which it reduced both the level of respite care and the transport provision.

The Council says the family is receiving care 'at the top level'. This approach does not accord with the Care Act which requires councils to assess and meet eligible needs. The Council cannot set maximum budget levels. The Act says eligible needs must be met, no matter what the cost. The Council says the indicative weekly budget set at the April 2015 review was wrongly recorded as £1000 - £2000 a week. It says it should have been £700 - £1000. This is immaterial. The only question is whether the Council is meeting eligible needs.

The Council has provided us with its bandings. It says Mr P's disability falls into a certain band and therefore his funding cannot exceed a certain level. Again, this approach does not accord with the Care Act. The Council may use bandings as a guide but, as the Care and Support Statutory Guidance states, such systems are unlikely to work in complex cases like Mr P's.

The Council's decision to ask the family to either fund or provide one day's transport per week appears to have been part of a general withdrawal of provision and a cost cutting exercise. It was not based on assessments of need and was therefore in breach of the requirements of the Care Act and was fault. In Mrs N's case, asking Mrs N to provide the transport would have resulted in Mr N's needs going unmet. Mrs N is his carer too. Asking Mrs N to provide one day's transport per week for Mr P would result in Mr N being left alone for six hours.

The MAT predates the Care Act. Its purpose is to ration available resources. The Care Act requires councils to meet eligible needs. It does not allow rationing for any reason. If a council cannot meet an eligible need, it must pay someone else to meet it. The MAT is, therefore, incompatible with the Care Act. The Council is at fault for continuing to use it. If the Council has used the MAT in other cases, this will also be fault.

Result: To remedy the injustice caused, the council has agreed to:

- Apologise to Mrs N;
- Restore the previous level of respite care pending a re-assessment compliant with the Care Act 2014;
- Confirm it will offer her 24 days respite care to be taken at a time of her choosing

in recognition of the respite care wrongly withdrawn;
- Pay Mrs N £747.50 in recognition of money she paid the Council for transport;
- Pay Mrs N £500 in recognition of distress and time and trouble;
- Review its policy and procedure on respite care to reflect the requirements of the Care Act 2014;
- Review other files for evidence of use of the Matrix Assessment Tool (MAT). It should write promptly to anyone similarly affected and review their cases;
- Review the files of anyone whose transport was cut to ensure these cuts were compliant with the Care Act;
- Inform the Ombudsman of the numbers of people involved and undertake to review all cases within a further three months;
- Ensure all staff receive training in the requirements of the Care Act and the relevant guidance; and
- Review all relevant documents to ensure they reflect the current law.

Case Overview (19 006 248): Lincolnshire County Council was charging a fixed rate for short term residential care which was not in line with statutory guidance

Our investigation: When investigating another complaint against this Council (our reference 17 009 926) about charging for adult social care, we noted the Council was charging a fixed rate for short-term residential care without carrying out a financial assessment.

This policy applied from 2012. The policy said people could have a full financial assessment if they wished.

We considered there may be fault in the Council's policy causing injustice to members of the public and decided to investigate in accordance with our powers under section 26D of the Local Government Act 1974.

We consider there was fault in the Council's policy on flat-rate charges for short- term residential care.

Our reasons are:
• Care and Support Statutory Guidance emphasises the overarching principle of affordability. We do not consider the fixed charge takes account of this principle;
• In the context of light-touch assessments, paragraphs 8.22 and 8.24 of the Care and Support Statutory Guidance envisage consideration by the Council of some evidence of the person's finances, including their income and limited assessment by the Council of affordability for the individual. We accept that this assessment would be short of a full financial assessment with all the paperwork which that would entail. But the practice of ascertaining a person's capital and not looking at their income at all, falls short of the expectations of the Care and Support Statutory Guidance;
• The Council can depart from statutory guidance if it has cogent reasons. The Council has not given us any information about this and so we conclude it had no cogent reasons when it implemented the policy;
• Councils have some discretion around charging people for short-term residential care. They can choose not to charge at all or can charge people as if they are receiving non-residential care. And they can depart from Care and Support Statutory Guidance with cogent reasons. None of these approaches applied to the 2012 charging policy; and
• We do not consider the discretion around charging for short-term residential care was intended to have the effect that people may pay more than if they had a full financial assessment.

Result: We recommend the Council: • reimburses those people it has already identified as having overcharged based on the figures it already has available; and • estimates the remaining cases (for people who are still alive) on the basis of financial information currently available to the Council. If this is not possible, offers those people a retrospective financial assessment and calculates any refunds due for those who respond to the Council's offer.

Deprivation of assets

15. One of the common concerns we see around the implementation of funding streams in our complaints are decisions regarding so called 'deprivation of assets'. 'Deprivation of assets' occurs where an individual deliberately deprives themselves of, or reduces, their assets (e.g., by transferring ownership of their home) in order to reduce the amount they must pay for their care. If the council decides this has happened, they can treat the person as if they still possess the asset and charge them accordingly. In order to make this decision the council must be able to evidence that a deliberate deprivation took place, and we would expect all local authorities to be able to fully evidence their decision-making process.

16. However, we often see cases of decisions regarding deprivation of assets not being evidenced, or the process for making a decision not being followed properly. For example, the value of a house being taken into account even when the home is occupied. In addition, we sometimes find that councils can take a particularly 'hard line' on deprivation of assets. For example, a person with dementia may have decided to dispose of an asset many years before they will be in receipt of care. However, the council when it comes to do a financial assessment, may still treat this as a deliberate depravation, as the person had a diagnosis which would make care likely in the future.

17. In addition, the statutory guidance on deprivation of assets is unclear, and consequently we see inconsistencies in the way it is applied.

Example cases

Case overview (19 010 267): We received a complaint regarding East Sussex County Council. The complainant came to us on behalf of herself, her husband and her father. The complainant bought a property with her husband and her father. She complains the Council should have applied a discretionary property disregard with regards to her father's one third share of their property.
Our investigation: Mr X entered residential care temporarily in 2018. However, the Council did not explain that, if Mr X would stay in the home permanently, he would not meet the criteria for a "mandatory property disregard". As such, the Council would include the value of his share of the property in his financial assessment. This would mean his capital would become significantly more than £23,250, which meant he would have to pay for the entire cost of his permanent residential care. Following a care review, the Council concluded on 11 February 2019 that Mr X would need to stay in a care home permanently. This meant that, unless the Council would agree to apply a "discretionary property disregard", Mr X would have to pay for the full cost

of his care going forward (£900/week).

It took until 5 March 2019 before the Council completed its "capital depletion assessment" that showed Mr C's capital had reduced to £23,250 by 22 November 2018. This meant the Council would contribute towards the cost of his temporary respite care stay at the home from that date onwards.

The Council officers completed a report for one of its managers, and submitted this on 21 March 2019. The purpose of the report was to provide the manager with the information needed to make a decision if Mr X's property meets the criteria for a discretionary disregard. Although this contained relevant information about what the Council should consider, it did not include a key question that needs to be considered: namely: did Mr and Mrs C move in with Mr X (and sold their own house) for the purpose of providing care. As such, there is no evidence to conclude this important issue was included by the manager at this specific time.

The Council's records state that Mrs C told the Council on 25 March 2019 that the market value of the entire property would be between £400,000 - £450,000. Mrs C agreed that Mr X's one third share would be worth more than £23,250.

Mr X's savings were now well under £23,250. Mrs C also wanted it noted that they sold their property to care and support for her father.

The Council told Mr and Mrs C in a letter dated 14 May 2019, that it would not apply a discretionary property disregard. The Council said it considered: the care Mr and Mrs C provided and their ability to rehouse themselves (if they were at risk of homelessness). However, it said it would apply the usual 12 weeks property disregard, which would mean that Mr X would only have to start paying the full cost of his care after 2 May 2019. Mr and Mrs C responded by saying they would appeal the Council's decision.

The Council updated the care home on 23 May 2019. The care home said that if the Council would stop funding the placement on 2 May 2019, the home would have to give notice to Mr X, because he and his family were struggling to pay any further bills. Following this, the Council asked Mrs C by email to explain why Mr X did not have any funds left, as he still had £23,250 in 22 November 2019 and has only been asked to pay a contribution since then from his income (pension). The Council also asked why Mr X was not paying his assessed contribution.

Mr and Mrs C were unhappy and appealed the Council's decision about property disregards in June 2019.

We found that the Council failed to explain, when Mr X went into temporary residential respite care, how this would be paid for. This uncertainty resulted in distress to Mr and Mrs C.

The discretionary disregard report form does not include a key question, namely: what was the reason they moved in together with Mr X? Did they move in with Mr X (and sell their own house) for the purpose of providing care? As such, there is no evidence to conclude the Council included this important consideration as part of its decision, at the time. Even in its appeal response, and its initial response to the Ombudsman, the Council failed to mention that one of the key arguments made by Mr and Mrs C was that they bought the house together to care for Mr X. As such, it was important to note that Mr and Mrs C therefore claimed that their situation was similar to an example mentioned in the

Guidance.

The Ombudsman therefore found fault with the way the Council communicated, the delay in completing a financial assessment and the manner in which it considered the discretionary property disregard.

Result: We recommend that the Council should:

- Apologise to Mr and Mrs C for the faults and delays referred to above and the distress this has caused them. It should also pay them £300 to remedy this.
- Review the discretionary disregard report form to ensure it captures all the key information, and answers all the key questions, that the Council needs to consider when making a decision about discretionary property disregards.

- The Council should remind its adult social care and finance staff of the importance to ensure that clients receive enough information and advice, as early as possible, to ensure that a client is able to understand any contributions they may, or will be, asked to make so they can make an informed decision.

Case Overview (19 020 372): We received a complaint regarding Cornwall Council. Mr X complained about the Council's decision to treat his late mother as having deliberately deprived herself of capital to avoid care charges, resulting in the family having to pay for her care.

Our investigation: Mr X's mother, Mrs Y, had dementia and lived in a care home from January 2014 where she funded her own care.

There was a disagreement between the council and the family regarding the amount of capital Mrs Y owned. The family claimed that Mrs Y's assets had fallen below £23,250, so she should be eligible for council funding

The council disputed this as it decided to take into account a number of assets. These included:

- A car bought in 2016 to take her on home visits and to hospital appointments
- Gifts which have been given to the family
- Cash withdrawn
- The cost of a reclining chair
- The cost of a funeral plan

The Council claimed these expenses amounted to a deliberate depravation of assets. The family claimed that these were necessities and that the money had been given to the family throughout the mother's life.

Mrs Y died on 7 November, less than a month before the Council expected to start funding her care. Before that, her family paid money into her bank account so she could continue to pay her care home fees as she had no capital left.

The Council was at fault for: failing to apply the proper tests for deprivation of capital; for seeking to restrict Mrs Y's personal spending to £30.65 a week when she was funding her own care; and for failing to take proper account of the Office of the Public Guardian's guidance on the scope for gifting. The Council needs to reconsider its decision on the extent to which Mrs Y deprived herself of capital.

Result: We recommend the council:

within six weeks:

- reconsiders its decision on the extent to which Mrs Y deprived herself of capital, taking account of the fact she was not required to restrict her personal expenditure to £30.65 a week while she was funding her own care and the OPG guidance which allows for gifting;
- considers whether it should have been funding Mrs Y's care before she died and, if so, refund money to her estate;
- pays Mr X £250 for the time and trouble he has been put to in pursuing the complaint.

within eight weeks:

- takes action to ensure officers deal with decisions on deprivation of capital properly in future.

Top up fees

18. We know from our casework that top up fees continue to be an area in which local authorities are often falling short of their requirements. Top up fees occur in a situation where someone in receipt of council funding chooses a care home which costs more than the council will fund, and therefore there needs to be an arrangement for a 'top up fee' to cover the difference.

19. When there is a top-up agreement in place, the council remains responsible for the full cost of the placement to the provider. This is to ensure that if the person stops paying the top up, the placement is not at risk. If this happens, the council will cover the full cost until it either recovers any outstanding top-up fees, or it finds an alternative placement which is affordable within the resident's personal budget. The council must carry out a risk assessment for the resident before an alternative placement can be arranged.

20. For people to make the most informed choice, it is crucial they get the right information at the right time. But we see cases where councils provide either confusing or incorrect information; do not offer potential residents and their families a genuine choice of affordable care home; or do not have an affordable option at all.

21. In 2015 we released a Focus Report *Counting the cost of care: the council's role in informing public choices about care homes*.[2] This Focus Report looks at the complaints we had received about top up fees. Although the cases in this Focus Report mostly relate to before the Care Act in April 2015, the issues raised are still relevant. Key changes from the Act include the introduction of national eligibility criteria, a right to independent advocacy and helping people to access independent financial advice.

22. Some of the common issues we identified in this report, which we still see today in our cases, are:

    - **The wrong information being given**: Sometimes councils give people wrong or misleading information which means they choose a home they might not otherwise have selected. Councils should give people written information about choosing a care home before they start looking for one, explaining the financial implications of moving

[2] LGSCO: Focus reports

to a care home and including information about top-ups and deferred payment agreements.

- **Lack of choice**: People often complain about a lack of choice, or that the only choices available to them are ones which cost more than the funding provided by the council. When there is an assessed need the council has a duty to provide an affordable placement within the person's personal budget. This should always be communicated to the person affected alongside any other options which require a top up so they have a proper choice. If there are no affordable placements available, the council has a duty to offer the person affected a place without requiring a top-up. Under the Care Act councils must have affordable placements available.

- **Councils abdicating responsibility for providing top ups:** Some councils fail to contract with care homes to pay the full chargeable rate, leaving the home to collect the resident's contribution and the top-up payments. Some councils routinely leave care homes to enter into top-up agreements with residents or third parties. Top-up agreements must be made between the council and the person paying the top-up fee.

- **Care providers charging top-ups 'behind the council's back'**: Complaints show that some care providers will charge a top-up, despite having agreed with the council to accept a placement at an affordable rate. When the council is responsible for funding a residential placement, the contract for funding is between the council and the care provider. There should be no need for the provider to raise any additional fees (i.e., top ups), with the resident. We hold councils responsible for such failings when it enters into an agreement to care for someone.

- **Introducing top ups**: In some of the cases we see, care homes have increased their charges without the council increasing what it will pay the home. In other cases, councils have reduced what they will pay a care home even though the care home has not reduced its charges. In both situations this results in someone having to pay a top up fee to cover the difference without there being an agreement to do so. Councils cannot ask someone to pay a top up unless an assessment of need shows the resident can be moved and an affordable alternative placement has been offered.

- **Assessing finances before assessing needs.** Sometimes councils calculate a person's personal budget before they have assessed their social care needs. This is wrong.

Example cases

Case overview (16 002 186): We received a complaint about Dudley Metropolitan Borough Council, from a family who claimed they were given no alternative but to pay a 'third party top up fee' to help pay for their mother's care.
Our investigation: The mother, who had vascular dementia, moved into a care home in February 2015. It was arranged by Dudley and Walsall Mental Health Partnership Trust, on behalf of the council. The cost of the placement was £408.83 a week, including the top up. The family explained in March they could only afford to pay £50 a week. The council agreed to pay the remainder of the top up, which was £61.

In November 2015 the family realised they could no longer afford the weekly fee and asked for the council's help. The mother's needs were reassessed, but there was no record of any consideration of the affordability of the £50 weekly top up fee.

Social services told the family the council would not pay the rest of the top up fee, but would support the family if they wanted to consider moving their mother.

The family complained to the council. The council did not uphold the complaint, saying if they could not afford the £50 top up, then the council would move the woman to a cheaper placement. The family complained to us.

The Ombudsman investigation found the trust, acting on behalf of the council, had not acted in line with statutory guidance when arranging the mother's care. There was no evidence any alternative placement was made available for which the mother would not need a top up. The trust could provide no evidence of any approaches made to any other care homes.

The investigation also found fault with the trust as it could not provide evidence of any information it gave to the family about top ups. Additionally, it did not enter into a written top up agreement with the family and failed to check on the continued affordability.

Result: In this case, to remedy the injustice caused to the family, Dudley Metropolitan Borough Council has agreed to apologise and refund the £4,628 top up payments the family has paid. It will also reassess the mother's needs before making any changes to her care plan.

The investigation into the trust's practices reveal evidence of systemic fault which may have resulted in similar injustices to other people in the area. Because of this, the council has also agreed to review all those in council-funded residential care managed within the trust's mental health services and who pay top ups to see if any refunds are due to them. It will also review its procedures.

Case overview (16 003 268): We received a complaint against Lincolnshire County Council regarding top up fees for care homes.

Our investigation: Our investigation found a family was not told about the possibilities available to them when their father was placed in a care home as an emergency. They were left with no option but to pay a 'top up' fee, when the council should have offered them the choice of a home which did not require the additional amount. When they struggled to pay the fees, their father was threatened with eviction.

The father, who has dementia and physical disabilities, had already been assessed as eligible for council funding when he was placed by the council in emergency residential accommodation.

The council should have offered the family the option of placing the father in a home which did not require them to pay an amount on top of what the council was already paying for his care.

The Ombudsman's investigation found because the family was not given this option, the

council should have paid the full amount.

When the father went into arrears with his account because his family could not afford to pay, the care home threatened to evict him. Instead of realising its mistake and taking over the payments, the council put the burden on the man's daughter to find another care home.

The Ombudsman's investigation found the council was responsible for overseeing the administration of the 'top up' fee. Even if the family had been obliged to pay the fee, the council had not offered them the option of paying direct to the council, rather than to the care home.

During the investigation, the Ombudsman also found the council had unclear information about care home fees on its website.

Result: In this case, the council should acknowledge its faults and apologise to the family.

It should also reimburse the top up fee of £65 and pay them £300 to reflect their distress and a further £300 for the time and trouble of bringing the complaint.

The Ombudsman has the power to make recommendations to improve a council's processes for the wider public. In this case the council should now review its procedures and top up fee contract to ensure people are offered the option to pay the top up fee directly to the council.

It should also review its existing top up agreements to bring them in line with the Care Act.

23. We hope this evidence and information will be of use to the inquiry and would welcome an opportunity to elaborate on any of the points in our submission if that would assist.

Yours sincerely,

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

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