

Interim Casework Policy and Guidance (CP&G)

Section 3: Case Assessment

Introduction [\[link\]](#)

Remit check [\[link\]](#)

Understanding the complaint [\[link\]](#)

Direct referral of health complaints [\[link\]](#)

Specific discretion [\[link\]](#)

Suitability of complainant [\[link\]](#)

Time limit [\[link\]](#)

Alternative legal remedy [\[link\]](#)

Is the complaint still premature? [\[link\]](#)

Value added cases [\[link\]](#)

Other reasons to decline [\[link\]](#)

Linked to lead cases [\[link\]](#)

Joint working cases [\[link\]](#)

Approving the decision [\[link\]](#)

Communicating the decision [\[link\]](#)

Customer survey [\[link\]](#)

Decisions signed by the Ombudsman [\[link\]](#)

Compliance [\[link\]](#)

Protective marking scheme [\[link\]](#)

Managing case files [\[link\]](#)

Introduction

1. This section looks at the main parts of case analysis which take place in the Case Assessment Team:

PROTECT

2. Cases are passed to the Case Assessment Team from Customer Services and will have been looked at to see if the complaint is in remit, properly made and whether, on the face of it, local resolution has been completed.
3. Our general approach to considering complaints is that we begin by looking at the response to the complaint that has already been provided in order to determine if a complainant has already received a reasonable response to their complaint. If we consider that a reasonable response has been provided, we explain why and take no further action. If we have concerns about the response, we consider how best to resolve those concerns, which might be by asking the body to take further action, or by taking further action ourselves.

Remit check

4. The Case Assessment Team will check to see if any other issues relevant to the Ombudsman's remit need to be considered before the case can be assessed further. This is most likely to relate to whether specific functions (rather than the individual or organisation) complained about are within remit. For example, is a complaint about a GP service that is not provided under an NHS contract, such as carrying out an Elderly Driver's medical examination?
5. The Case Assessment Team will request relevant papers from organisations. In health cases this will include information about relevant contractual elements.

Understanding the complaint

6. The Case Assessment Team will, if necessary, contact the complainant (or if appropriate, their representative) as part of their consideration in order to understand what is being complained about, the injustice claimed, the remedy sought (including if they are seeking financial remedy) and why they are unhappy with the organisation's reply to their complaint. This is also an opportunity to give information about how the case will be handled, to manage expectations (for example, if the complainant is seeking an unrealistic remedy) and to discuss any reasonable adjustments that might be needed.
7. Ideally this should be done by phone, but the complainant's communication preferences and availability may mean that email or letter contact needs to be used instead. If contact does not take place at this stage then the complainant (or their representative) will be contacted at the start of any case that is accepted for investigation.

Direct referral of health complaints

8. Health organisations (but not GPs, dentists etc.) can refer complaints to the Ombudsman and request that we investigate. These powers are set out in the Health Service Commissioners Act 1993 (Section 10). This provision was meant to cover exceptional cases 'where an authority wishes to ensure that justice is

PROTECT

seen to be done, or where it feels that it cannot properly investigate a complaint itself'.

9. In practice, these cases are few and far between and in most cases we expect the organisation complained about to have investigated and responded to a complaint in line with the NHS complaints regulations. However, we do need to be aware of the potential for referrals by health organisations and of how to consider them.

10. Points to consider:

- Direct referral complaints must have been made to the organisation in writing, by a suitable complainant and within one year from knowing about the issues complained about (though this can be put to one side by the Ombudsman if she considers it appropriate).
- Organisations wanting to make a direct referral to the Ombudsman must do so within 12 months of receiving the complaint. We have no discretion to waive that requirement.
- The Ombudsman has discretion to decide if a direct referral is properly made. If a direct referral request is received then we should consider whether it meets the criteria set out above (made in writing, suitable complainant and in-time). Any request for a direct referral must be treated as an enquiry and a decision made on whether or not to accept it for investigation. If it is unclear whether the organisation is making a direct referral (as opposed to, for example, contacting us for general advice) then we should ask them.
- Organisations should not see direct referrals as a way of passing complaints to the Ombudsman that they do not want to deal with. The types of cases which might be accepted as direct referrals include:
 - Where relations have seriously broken down between the organisation and the complainant to the extent that progress on the complaint is no longer possible.
 - Where the subject matter of the complaint is so serious (and possibly so widespread within the organisation) that it does not feel able to investigate it properly.
- We would expect the organisation, at the point at which they refer it to us, to say clearly that they are asking us to investigate the complaint and to explain why they are unable to consider the complaint, or complete their consideration.
- We normally see direct referrals as an **alternative** to the organisation investigating the complaint themselves. That is because if the organisation has already investigated then the complainant can simply be signposted to the Ombudsman to make their complaint directly. However, the law does

PROTECT

not say that a direct referral can only be made if the organisation has not investigated. In exceptional circumstances we might accept a direct referral even if the Trust has already investigated it.

11. There is no requirement for the organisation to obtain the consent of the complainant before referring the matter to us. However, it is helpful if organisations can do this, because one of the first steps in our work on a complaint would be to find out if the complainant wants the Ombudsman to consider their complaint. If a direct referral is received then it should be escalated to line management for advice on how to deal with the case.

Specific discretion

12. The law places specific requirements on complaints that the Ombudsman is able to consider. These are referred to as 'specific discretion' and these questions must be considered before we take a decision on whether to investigate a complaint.

Suitability of complainant

13. The law limits the people or organisations who can complain to the Ombudsman¹. Whether a complainant is eligible to complain is looked at by Customer Services. Whether a complainant is suitable to complain is considered by the Case Assessment Team. Further information on what the law says about suitability is available in a Legal Team Briefing note [\[link\]](#).
14. **Is the complainant the aggrieved?** The law says that the person affected (the aggrieved) must make the complaint themselves unless they can't act for themselves. If the complainant is the aggrieved then they are suitable. If the aggrieved is incapable of bringing the complaint themselves, then they can have someone to bring the complaint on their behalf ² (in those circumstances we record the person bringing the complaint as the complainant.)
15. The complainant may choose to have someone represent them for the purposes of the complaint (for example, a friend or lawyer) but, in those circumstances, the aggrieved is still recorded as the complainant and the person acting for them is recorded as the representative.
16. We need to have consent if they want a representative - but this could be taken verbally over the phone from the complainant. (We will also have to think about whether the representative is suitable - see below).
17. **Does the complainant have capacity?** If we get a complaint made on behalf of someone said to be unable to complain, we have to check this as we start with

¹ 1967 Act, section 6; 1993 Act, sections 8, 9 and 10

² 1967 Act, section 6(2); 1993 Act, section 9(3)

PROTECT

the assumption that someone does have capacity³. Sometimes the information the complainant gives us themselves is enough for us to be satisfied that the aggrieved does not have capacity. But we may need to make some further enquiries. We can do this by contacting the aggrieved directly or possibly contacting someone who might be able to tell us about whether they would be able to complain (for example, GP or social worker.)

18. In cases where a parent or guardian brings the complaint we still need to think about whether the child may be able to understand enough to bring the complaint themselves and have the parent/guardian as their representative. There is no age of consent and each case needs to be considered depending on the type of case and the age/maturity of the child.

19. **Is the complainant suitable?** If we are satisfied that the aggrieved person cannot complain for themselves, we have to check whether the complainant is suitable. Considerations include:

- Is there any conflict of interest?
- Is there any evidence to suggest that the aggrieved person wouldn't want the complainant to have access to confidential information about them?
- Is there any suggestion that the complainant is not acting in the aggrieved's best interest?

20. The same considerations apply when you are deciding whether someone is a suitable representative.

Time limit

21. **How old is the complaint?** We must identify whether the complaint is in or out of time. The law limits the time which complainants have to raise a complaint⁴. For health complaints the aggrieved must refer the complaint to us within one year from the day the aggrieved first became aware that they had a reason to complain. For parliamentary complaints the aggrieved must refer the matter to an MP within 12 months from the day the aggrieved first became aware that they had a reason to complain. More information is available in a Legal Team briefing note [link].

22. **Why was there a delay?** If the complaint was made outside of the time limit then we can still use our discretion to look at it. If a case is out of time then it is our policy to consider the following points before deciding whether to put the time limit to one side:

- Complainant's reasons for delay (could include ill health of the complainant or close family or not being aware of the Ombudsman, especially if not told by the organisation complained about).

³ It should be remembered that people may be incapable in some areas (e.g. financial matters) but capable in others (e.g. ability to understand and bring a complaint).

⁴ Section 6(3), 1967 Act; section 9(4) 1993 Act

PROTECT

- Time taken for organisation to respond to complaint.
- Scale of injustice - if the case raises clinical issues you may need clinical advice to help you reach a decision.
- Wider public interest.
- Any other relevant factor.

23. **Previously premature cases.** Where a complaint is referred back to the Ombudsman having been closed before as premature, it needs a fresh consideration of the time limit. We will take into account whether the complainant was informed about our time limits - if we didn't warn them (as we should) it is more likely that we will put the time limit to one side.

24. **Part in time and part out of time?** In some cases different elements may be in or out of time. For example, where new issues form part of a complaint following an earlier premature decision (such as concerns about the intervening complaint handling by the organisation complained about) we may need to make separate judgments about the application of the time bar to those new issues and to the original substance of the complaint. Alternatively, the substance of a complaint could be out of time, but distinct concerns about complaint handling or about a second tier handler could be in time. It is important to look at each of these elements carefully and to take a view on whether they are separate complaints for the purposes of the time limit.

25. **Too old?** Even if a complaint is in time, we still may consider it impractical to investigate very distant events, especially when there is a lack of contemporary evidence. A decision not to investigate one of those cases would be dealt with under general discretion as 'cannot reasonably achieve more'.

Alternative legal remedy

26. The law says that the Ombudsman cannot investigate if there is or was a legal remedy (which includes established methods of challenging for example, right of appeal to a benefit tribunal or court) that the aggrieved should pursue or should have pursued, unless it is (or was) not reasonable for them to do so⁵. More information is available in the Legal Team briefing notes on alternative legal remedy [link] and time limits for legal claims [link].

27. Our policy is that if the aggrieved has resorted to a court or tribunal that did or could have provided the full remedy sought the complaint is out of our remit. If the aggrieved has not had a full legal remedy (which includes not taking legal action) we must consider two questions:

- Is or was there an alternative legal remedy?
- Is it/was it reasonable for the aggrieved to use it? Reasons why it may be unreasonable to expect them to use it include:
 - Cost (would cost more to take legal action than they would get in compensation).
 - Time.

⁵ 1967 Act, section 5(2); 1993 Act, section 4

PROTECT

- Whether the legal route would give them the outcome/remedy they want (if it can't give them the whole outcome we would usually say it's not reasonable to expect them to take some parts to court and for us to look at other parts if we can potentially provide all the remedy ourselves). In addition, if we can clearly see a potential claim in negligence then we should consider bringing that to the attention of the complainant, regardless of what they have said they want to achieve.

Is the complaint still premature?

28. Customer Services will have looked at whether a complaint has completed local resolution and cases will be passed to the Case Assessment Team because, on the face of it, the organisation has given a final response to all the complaints. However, in some cases it will become clear, when we look at a case in more detail, that there is more work that the organisation could do locally. In such cases a decision needs to be taken on whether a complaint should be referred back to the organisation complained about. You should consider the following when deciding whether to decline the case as premature (on the basis that the organisation should do more work locally) or whether to consider it for investigation:

- **Are there compelling reasons why we need further work by the organisation?** It may be that there are a lot of issues which have no response or a very poor response from the organisation. Or the outstanding issues are serious and/or are the main focus of the complaint. Or the explanations needed to answer these questions can only be provided by the organisation itself and are not available to us to via clinical advice or the records we hold.
- **Age of the complaint.** Generally, the older the complaint and the longer it has already spent at local level, the less reasonable it will be to send the case back for further work. Consider whether it is reasonable to ask the organisation to do more? For example is evidence available and will witnesses be reliable so long after the event? Consider whether we would be hindered in any future consideration of a case because of our own time limits and whether this would be a good reason for us considering the case now.
- **Confidence in the organisation providing resolution/good outcome.** Are you confident that the organisation has a good chance at providing the resolution/outcome the complainant is seeking? Have we already sent the case back for further work before and why would sending it back this time be different? Think about the outcome that would resolve the complaint and what effort has already been made at local level. What is the quality of actions already taken or previous complaints handling? What is the relationship between complainant and organisation like?

PROTECT

- **Complainant's circumstances.** Consider the personal circumstances of the complainant. It is reasonable to expect them to go back to local level? Do they see the value in further work by the organisation? Have they given any reason why it would not be reasonable to close the case as premature (for example, illness, number of chances already given)? Although closing the case as premature is the Office's decision, it is better to have the complainant's agreement.

29. If all of the questions above had been considered, any decision to ask the organisation to carry out further work should be robust.

30. When a case is declined as premature at this stage on the basis that further work is required, we must make the following points clear in our contact with both the organisation and the complainant:

- What the organisation is going to do and who will be responsible.
- The agreed timescale for the work.
- That we will be monitoring compliance.
- We should also tell the complainant that they should return to us promptly if they are unhappy with the outcome of the further work.

Value added cases

31. Where a complaint is premature, but it is clear that the complainant needs assistance other than signposting through the complaints procedure, we should always consider whether we can add value to the outcome for the complainant. This is particularly appropriate where the complainant may be vulnerable, the issues complained about could be resolved quickly and easily by the organisation, or where we need to contact the organisation to establish the stage the complaint has reached.

32. In these cases we are acting as a conduit between the organisation and complainant to try and achieve a speedy and appropriate response to the complaint. These cases will involve the organisation taking some action to move on the particular issue or complaint. For example, getting an enquiry replied to, progressing a delayed payment or arranging an appointment.

Other reasons to decline

33. In a small number of cases we may decide to decline the complaint for other reasons rather than investigating.

Other dispute resolution forum appropriate

PROTECT

34. Some complaints could be considered by both us and another complaint handler. We usually only expect one organisation to investigate (following agreement with the other) and sometimes the other organisation may be more appropriate. Examples include:

- Complaints about access to medical records where both the Health Service Ombudsman and the Information Commissioner have jurisdiction.
- Victims' Code complaints which could be considered by the Parliamentary Ombudsman and the Independent Police Complaints Commission.
- Mental Health Act detention cases where both the Health Service Ombudsman and the Care Quality Commission may have jurisdiction.
- Professional regulators such as the Nursing and Midwifery Council, General Medical Council and General Dental Council.

Other discretionary reason to decline

35. Even if all the answers to the questions we have considered indicate that we could investigate, we can still use the Ombudsman's discretion to decline to do so for a number of reasons. For example:

- A complaint is under consideration by another organisation such as the Coroner's Court. We may want to wait until the Coroner has finished their consideration.
- Part of the complaint is ready for us to investigate but it's too closely linked to another complaint which is still being considered by the relevant organisation. We can decline because the all the issues need to be considered at the same time.
- A complainant does not co-operate with our consideration of their complaint (for example, refusing to accept the proposed scope of the investigation or attempting to place restrictions on the proposed investigation).

Linked to lead cases

36. In some types of complaint, especially where a large number of people have been affected by the same error and seek a similar remedy, the Ombudsman might choose to investigate a small number of 'lead' complaints that exemplify the issues complained about. Those enquiries not being treated as 'lead' cases will be declined as 'linked to lead' but with the details of the complaint retained to allow us to take action, as necessary, to contact the complainant once the lead enquiry or investigation is completed. If an enquiry is subsequently made to us about a matter already covered by a 'lead' investigation, then we will also close the enquiry as being linked to the lead investigation and retain the details of the complaint with the other linked cases.

Joint working cases

PROTECT

37. If a complaint contains elements that may require us to consider joint working (for example, with the Local Government Ombudsman) then it will normally be passed directly from customer services to an investigation team to carry out the case assessment, rather than to the Case Assessment Team. If a case is only identified as having joint working elements in the Case Assessment Team then they will forward it to an investigation team.

Approving the decision

38. The decision to decline an enquiry for investigation at the case assessment stage should be approved in line with the Delegation Scheme [link]. The majority of cases will be approved by the Case Assessment Team Manager and Case Assessment Team caseworkers, with the need for escalation beyond those levels determined by the circumstances of the case. Unless otherwise stated it is not a requirement for the member of staff approving the decision to also physically sign out the decision.
39. A member of staff approving a decision should only do so having seen the draft decision letter(s) supported by any necessary separate analysis (for example, the Assessment Form).

Communicating the decision

40. In parliamentary cases the decision letter should be addressed to the complainant with a copy sent to the referring MP⁶ under a brief covering letter.
41. In health cases the decision letter should be addressed directly to the complainant (and a copy sent under a brief covering letter to any MP involved)⁷.
42. If there is a separate aggrieved party who is not the complainant then we should consider on a case-by-case basis whether a separate copy of the decision letter should also be sent to them.
43. 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.)

Customer survey

44. Any decision letter declining a case for investigation at the case assessment stage (with the exception of withdrawn cases) should remind the complainant about the possibility of being contacted as part of the customer survey and of

⁶ Section 10(1), 1967 Act.

⁷ Section 14(2), 1993 Act.

PROTECT

the possibility of opting out of the survey. (Complainants will have received information about the customer survey as part of the initial acknowledgment of their complaint). The following wording should be used (this can be added as a footnote or under the signature block as necessary):

- We use an external research company to find out what our customers think. If you would prefer us not to pass your contact details on to them please call 0300 061 4222 or email us at customersurvey@ombudsman.org.uk

45. The only circumstances in which this wording should not be used is if the case has been noted as 'not to be contacted for research' (this will be indicated on the '*case closure*' screen on Visualfiles). Please note that this functionality is intended to be used when the complainant expresses a desire not to be contacted for research. It should only be used in other exceptional circumstances following agreement with line management (for example, if a complainant has specifically asked not to be contacted by telephone or where relevant restrictions have been put in place under the unreasonable behaviour policy. Any case where this functionality has been used should have reasons noted in the free text field under the 'not to be contacted for research' button on the '*case closure*' screen.

Decisions signed by the Ombudsman

46. Decisions to decline complaints on cases referred by the Speaker of the House of Commons, the Chairman and members of the Public Administration Select Committee, the Chairman of the Health Select Committee, the Chairman of the Public Accounts Committee and the three main party leaders **must** be signed by the Ombudsman or Chief Operating Officer.
47. The file, with appropriate final drafts for the Ombudsman's signature, should be referred via the relevant Director to the Ombudsman's Casework Team.
48. In parliamentary cases, where a covering letter is required for the MP's copy of the final decision letter, it should be signed by the Ombudsman as well. Please include an appropriate draft covering letter when submitting the case.
49. Any queries regarding cases to be signed by the Ombudsman should be directed to the Ombudsman's Casework Team.

Compliance

50. Where an enquiry is closed as '*premature*' '*further work required by body*' Visualfiles should be noted with details of a compliance plan in respect of the action agreed by the organisation. In such cases, the decision letter to the complainant should explain what action we will take to secure compliance. At the point of case closure you should also write to the organisation (this can be by email) to confirm the specific action we are expecting them to take and the timescale for compliance. We take a risk-based approach to monitoring and

PROTECT

securing compliance which will vary depending on the organisation involved. Please refer to the specific compliance guidance for more information [\[link\]](#).

Protective marking scheme

- 51. Our protective marking scheme means that all case-related information (except for published and anonymised material) is treated as 'restricted'. This covers both physical and electronic case documents and sets specific requirements for their handling, storage and communication. This includes how we send information in hard copy and electronically.
- 52. Casework staff must refer to the protective marking scheme [\[link\]](#) information on Ombudsnet for guidance.

Managing case files

- 53. Casework records (whether electronic or hard copy) must be managed in line with the Case File Management guide [\[link\]](#).