



advice and support for older age

**Independent
Age**



Reviewing the case: The right to appeal in adult social care



A photograph showing a caregiver in a light blue uniform and glasses standing on a balcony, smiling and assisting an elderly woman with white hair who is seated in a wheelchair. The woman is also smiling. They are positioned in front of a white-framed glass door and window. The scene is brightly lit, suggesting a sunny day. The caregiver has a name tag and a stethoscope around her neck. The wheelchair is a standard four-wheeled model with a white handrail.

Independent Age – The older people's charity

Independent Age wants to make the UK a better place to grow old for everyone. What we do is very simple and effective. We understand the issues faced in later life, we campaign for change, and we provide support people can rely on – from clear and simple information guides to a network of volunteers helping us to beat loneliness and isolation across the UK.

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Executive summary

Decisions about the care people receive through their local authority can have a huge impact on quality of life for older people. The right to be able to challenge these decisions is a fundamental one, and all the more important when we consider the current context. We know that access to local authority funded care has been declining. In 2018, there were 1.8 million requests for adult social care. From this, 1.3 million requests (71%) were from people aged 65 and over and a quarter of these (25%) resulted in no service being provided.¹ Budget pressures for councils are also well documented with only 35% of adult social care directors saying they felt fully confident that their budgets will be sufficient to meet all of their statutory duties in the most recent ADASS survey.² In this challenging environment for local authorities, it is essential that there are clear, consistent processes in place to allow people to challenge decisions about access to care that will affect their wellbeing in such significant ways.

While the Government itself acknowledged the importance of a robust appeals system for social care and consulted on this in 2015, the issue has – like many other aspects of social care – made no further progress in recent years. Councils have the ability to introduce an appeals process if they so wish, and this is demonstrated by its inclusion in the Care Act 2014. However, this is not a statutory duty, with most instead using the existing statutory complaints system which can be a slow process taking many months to complete.

New research for this report has confirmed that as few as one in five councils have put in place a separate appeals process. Furthermore, the high volume of social care complaints received by the Local Government and Social Care Ombudsman (and high proportions of these complaints being upheld) provides a strong indication that problems are not being dealt with effectively by local authority complaints processes.

In this report, we argue that there are clear advantages to a statutory appeals process for adult social care, including:

- A more accessible, less intimidating option for those receiving care and support.
- A more open, efficient approach for local authorities.
- A fairer, more impartial overall process through the introduction of an independent reviewer role.

1 Adult Social Care Activity and Finance Report, England – 2017-18 [PAS], NHS Digital, (October 2018)

2 ADASS Budget Survey 2019, Directors of adult social services ADASS (2019)

Our recommendations

We are calling on the Government to introduce a statutory appeals process for social care that has a number of key features. Independent Age is clear that any statutory process should:

- **Be distinct from complaints**, with its own separate timelines and process. Some local authorities told us there could be confusion between complaints and appeals, so the two must be carefully explained and distinguished in any future legislation.
- **Include clear provision for the role of an independent reviewer.** To protect against potential conflict of interest, this should be a senior individual within the adult social care team who did not have a role in conducting the original assessment(s) and/or decision(s) related to the appeal in question.
- Stipulate that during an appeals process, the individual's **current level of care is upheld** and maintained until the case has been resolved.
- **Be clearly explained to individuals** receiving care so that they know access to an appeals process is something they are entitled to. The option to appeal should be made clear at multiple stages – when a person first receives a decision about their eligibility and/or funding, and following any changes or reviews to their care package. Clear information should be given about what an appeal is and how to start the process.
- **Have assigned timescales**, which individuals are kept informed of at all stages. Any delays must also be communicated clearly.
- **Include requirements for local authorities to collect data** in a consistent way, so that patterns can be identified and lessons learned.
- **Be adequately resourced** so that it can be properly staffed and administered. Local authorities have previously expressed concerns about the resource implications of a statutory appeals system. There will need to be adequate funding to enable this system to be introduced.

We recognise that the Government's previous consultation is now considerably out of date and so we are also calling on the Government to run this consultation again to enable key stakeholders to have opportunity to give their views.

In our view it is unacceptable that the Government has taken no action on an appeals process for adult social care since 2015. In the social care policy agenda, inaction and delays have unfortunately become the norm for successive governments. The right to challenge decisions about care and support is fundamental and the system to do this must be fair and consistent across all local authorities. We urge the Government to act now on this crucial aspect of our social care system.

1 What are appeals and what has happened to date on this issue?

In recent years, our social care policy work at Independent Age has rightly focused on making the argument for sustainable funding reform. This is necessary if we are to solve the ongoing funding crisis that is having such a detrimental impact on many older people. However, alongside the funding challenges, there are also important issues around the systems and processes that people interact with when receiving adult social care from local authorities. One such area is the process by which individuals can challenge decisions made about their care and support. This report uses new evidence to establish the current situation in local authorities and to set out our argument for the introduction of a statutory appeals process for social care.

Background and consultation

After the Care Bill had received Royal Assent and the Care Act 2014 progressed through Parliament, it was acknowledged in consultations and debates that there was a lack of a formalised appeals structure within the adult social care and support system.³

Under the Coalition Government, the Department of Health held a consultation⁴ on the proposed regulations that would specify an appeals system. The consultation ran from 4 February 2015 to 30 March 2015. However, unlike the proposed funding reforms that were considered in the same consultation document, no draft regulations were published.

The consultation document noted that the appeals system was at an earlier stage of development than the rest of the issues covered by consultation, including the proposed care cap. It sought views on the need for this new system to be implemented. From this, the Government took action by amending the Care Act 2014 under Part 1: Care and Support to allow Local Authorities to implement an appeals system if they wished. However, this section of the Act was never brought into law.⁵

Consultation responses

Plans to introduce a statutory appeals system have been delayed several times and no Government response to the consultation has been published to date. Some key responses from organisations in favour of the proposal to introduce a statutory appeals system in 2015 included:

- The **Disability Law Service** welcomed the proposal to put in place an appeal system for adult social care. Their response noted that they are contacted every day by severely disabled people and their representatives to report failures by local authorities to adhere to their statutory duties under the current legislative framework. Through their investigations they frequently found that changes to provision have been unlawful, for example, by reducing care packages below the legal minimum that the person in question should receive under the law.⁶
- **Carers UK** agreed that there is a need to introduce a new appeals system because the existing complaints provision for care and support is inadequate and does not effectively allow for people to challenge key care and support decisions. They commented that it is vital that councils learn from the outcome of appeals and regard them as an opportunity to improve practice in social care.⁷

³ The Care Act 2014: Consultation on draft regulations and guidance for implementation of Part 1 of the Act in 2015/16, Department of Health (June 2014)

⁴ The Care Act 2014: Consultation on draft regulations and guidance to implement the cap on care costs and policy proposals for a new appeals system for care and support, Department of Health (February 2015).

⁵ Care Act 2014

⁶ Consultation response, Disability Law Service (March 2015).

⁷ Consultation response, Carers UK, (March 2015)

In our consultation response in 2015, we supported the views set out by the Law Commission that the current complaints system does not offer an appropriate framework to tackle the expected increase in people who might want to challenge decisions made under the Care Act 2014. We highlighted that this reform has been long overdue and that local authorities have had to manage challenges through a system that is not specifically set up to deal with issues of fairness or sufficiency.⁸

In a written parliamentary answer given in March 2016, the Government said that it “plans to introduce the appeals system for adult social care in April 2020”. However, there have been no further developments on this to date.”⁹

The current system

At present, the main mechanism for formally challenging a care and support decision is to use the council’s statutory complaints procedure¹⁰. If a person, or person acting on their behalf, is not satisfied with the outcome of the complaint or the council have not provided a response, within a “reasonable time”¹¹, they have the right to take their case to the Local Government and Social Care Ombudsman (LGSCO). The LGSCO can make the decision to review the case, however, they have discretion whether to take on a case or not, and have fairly strict criteria¹² which may result in the complaint not being accepted. There is also the option of taking legal action, usually Judicial Review, but this can be incredibly expensive without legal aid. Due to budget cuts, the number of people qualifying for legal aid has fallen dramatically.¹³

What happens when you make a request for social care?

When a person asks for their care needs to be considered by social services, the local authority completes a care needs assessment if the individual appears to be in need of support. The assessor uses national eligibility criteria to determine whether the person qualifies for care and support. The assessment must be person-centred and holistic.

The local authority must ensure eligible needs are met and make recommendations, taking account of the assessed person’s views and wishes. They must also set out a personal budget figure, which must be adequate to meet the assessed needs. This must be written in a care and support plan and the local authority may conduct a financial assessment to work out how much the person might need to pay towards their care.¹⁴

“Care and support decisions have a large impact on people’s quality of life. It is therefore important that where people feel an incorrect decision may have been made in relation to their care and support they have an effective means to have the decision reviewed.”

Department of Health and Social Care

8 Consultation response, Independent Age (March 2015)

9 Social care: Announcements delaying the introduction of funding reforms (including the cap) (England), House of Commons Library (February 2018)

10 The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009, Statutory Instruments 2009 No. 309, (Feb 2009)

11 (Up to 12 weeks) How to complain about adult social care and support, Local Government & Social Care Ombudsman, (March 2017)

12 Staff guidance: Assessment code, Local Government & Social Care Ombudsman

13 Enforcing human rights, Tenth Report of session 2017-19, House of Commons, House of Lords: Joint committee on Human Rights (July 2018)

14 www.independentage.org/information/support-care/assessing-your-needs

The proposed appeals system

A three stage approach

A new appeals process would enable local authorities to quickly and fairly resolve disputes people may raise about aspects of social care such as eligibility, funding and care packages. It would also include provision for the case to be reviewed by an impartial, independent third party. It would sit alongside the complaints procedure with the option of going to the LGSCO as a next step if the issue is not settled. The appeals process has been designed with the aim of resolving disputes in a less costly and time consuming manner compared with legal routes of challenging decisions.

A three stage process has been proposed for appeals:¹⁵

- In the early resolution stage, the local authority is to facilitate an open and constructive dialogue with the individual to attempt to resolve the issue early on at a local level.
- The next stage is an independent review whereby the local authority appoints an independent reviewer to look at the original decision and make their recommendations.
- The final stage is the local authority's decision which is made in consideration of the independent reviewer's recommendations.

A reasonably broad range of areas were proposed to be in scope for the appeals system¹⁶
These included:

- **Assessment:** The local authority's decision as to the format of the needs or carer's assessment.
- **Eligibility:** A decision by the local authority as to whether the person's needs are eligible for care and support or whether a carer's needs are eligible for support.
- **Care planning:** The needs that the local authority is going to meet and how it is going to meet them.
- **Direct payments:** Decisions by the local authority for direct payments to the person or nominated/authorised person.
- **Personal budgets:** The amount that the local authority deems is appropriate to meet eligible needs.
- **Deferred payment agreements:** Decisions about how much local authorities allow people to defer.
- **Independent advocacy support:** Decisions by the local authority as to whether a person should have an independent advocate.

Realistic time scales

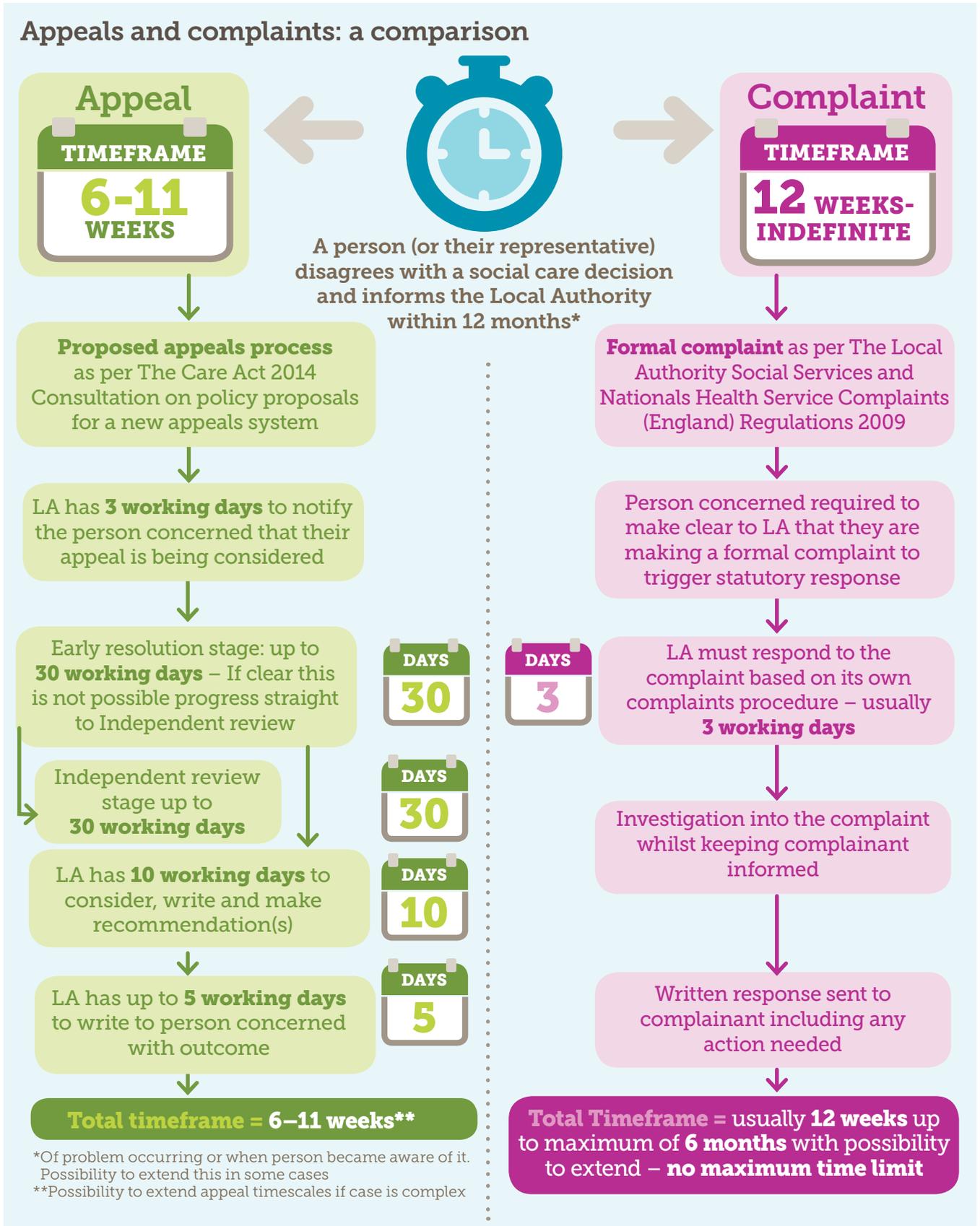
A person, or their representative, would have twelve months to lodge an appeal from when the decision was made or when they first became aware of the issue. As with formal complaints, local authorities have the power to use their discretion to consider appeals beyond this limit. The first two stages can take approximately up to thirty working days each, with cases fast-tracked to stage two if it is clear that early resolution is not possible. However, in some situations these time limits may not be possible and the timeframe can be extended to allow for delays relating to ill health or complexity of the case, for example, if time is taken to gather all relevant paperwork and evidence.

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15 The Care Act 2014: Consultation on draft regulations and guidance to implement the cap on care costs and policy proposals for a new appeals system for care and support, Department of Health, (Feb 2015)

16 The Care Act 2014: Consultation on draft regulations and guidance to implement the cap on care costs and policy proposals for a new appeals system for care and support, Department of Health, (Feb 2015)

Comparison chart

The flowchart below compares the two processes involved in a complaint and in the proposed appeals system. It is clear that there is a real difference in the time it takes to resolve a disagreement under the two systems. Although mandatory components are set out in legislation, the complaints process can be ambiguous and leave too much room for interpretation. By contrast, the appeals system is far more defined, transparent and user friendly.



2 Our evidence about the current state of play

We wanted to find out how many local authorities had taken the decision to implement an appeals process within their adult social care structures. This was of particular interest as we know this is not currently a legal requirement. We also wanted to find out how many appeals had been requested, upheld, and the timeframes set for resolution. To achieve this we sent a Freedom of Information (FOI) request to all local authorities with responsibility for adult social care in England in March 2019. Of the 152 local authorities we wrote to, 145 responded to our initial request, giving a strong 95% response rate.

Key findings

Very few local authorities have introduced an appeals process since the consultation in 2015

As of April 2019, just 1 in 5 (19%) of all the local authorities that responded to our FOI have an appeals process in place which combines the best practice set out in The Care Act 2014 and sits alongside their complaints procedure. Those who have integrated an appeals process into their adult social care system are spread throughout the country, with no particular geographical pattern.

This means that 4 in 5 (81%) of local authorities in England who responded do not have an appeals process, and it appears that in the majority of cases they rely solely on their complaints procedure.¹⁷ If unresolved, cases can then be escalated to the Local Government and Social Care Ombudsman or legal routes for redress.

“ If people are concerned about their assessment or care and support plan they can raise the issue under the complaints process if they are not satisfied with the response provided to any issues they raise with the assessor. ”

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A Local Authority based in South West England

We find it encouraging that, although small at present, a proportion of local authorities have devised an appeals process. As we know, there are no official regulations mandating they have a system in place and this is explored later in our findings.

“ The Appeals process is a local process. It operates within the context of our Care Act responsibilities and makes reference to

- a) Resolving issues informally wherever possible, and**
- b) Distinguishing between appeals and complaints, making reference to the Adult Social Care Complaints procedure. ”**

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A Local Authority based in North West England

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¹⁷ Figures reflect the local authorities who responded to our FOI request

Guidance was drawn from a variety of sources, and time limits differ greatly

Those who told us that they did have an appeals process referred to various forms of guidance in order to design their policy. These included:

- The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009.
- Social Care Institute for Excellence (SCIE) information on The Care Act 2014.
- The Care Act 2014 and Care and Support Statutory Guidance.
- Department of Health care and Support (Charging and Assessment Resources) regulations 2014.
- Local and internal knowledge of services and sharing best practice with other local authorities.
- In co-production with service users.

“ The process has been informed by best practice amongst other Local Authorities rather than any national guidance or legislation, however our final procedure is moulded by our internal knowledge of services and understanding of how to achieve the best outcomes for our service users. ”

A Local Authority in South East England

The time limits set for appeals ranged significantly from 10 to 40 days, with the majority being 20 to 30 days, which is in keeping with the proposals in the original consultation.

Although it is promising that there is an appetite to bring in an appeals process, it is essential that if it becomes mandatory, there is clear guidance available to local authorities to ensure a consistent approach. This will avoid the current situation, where local authorities are searching for direction from a number of sources, some using policies which are several years old to help define their process.

Local authorities are not collecting data about appeals consistently

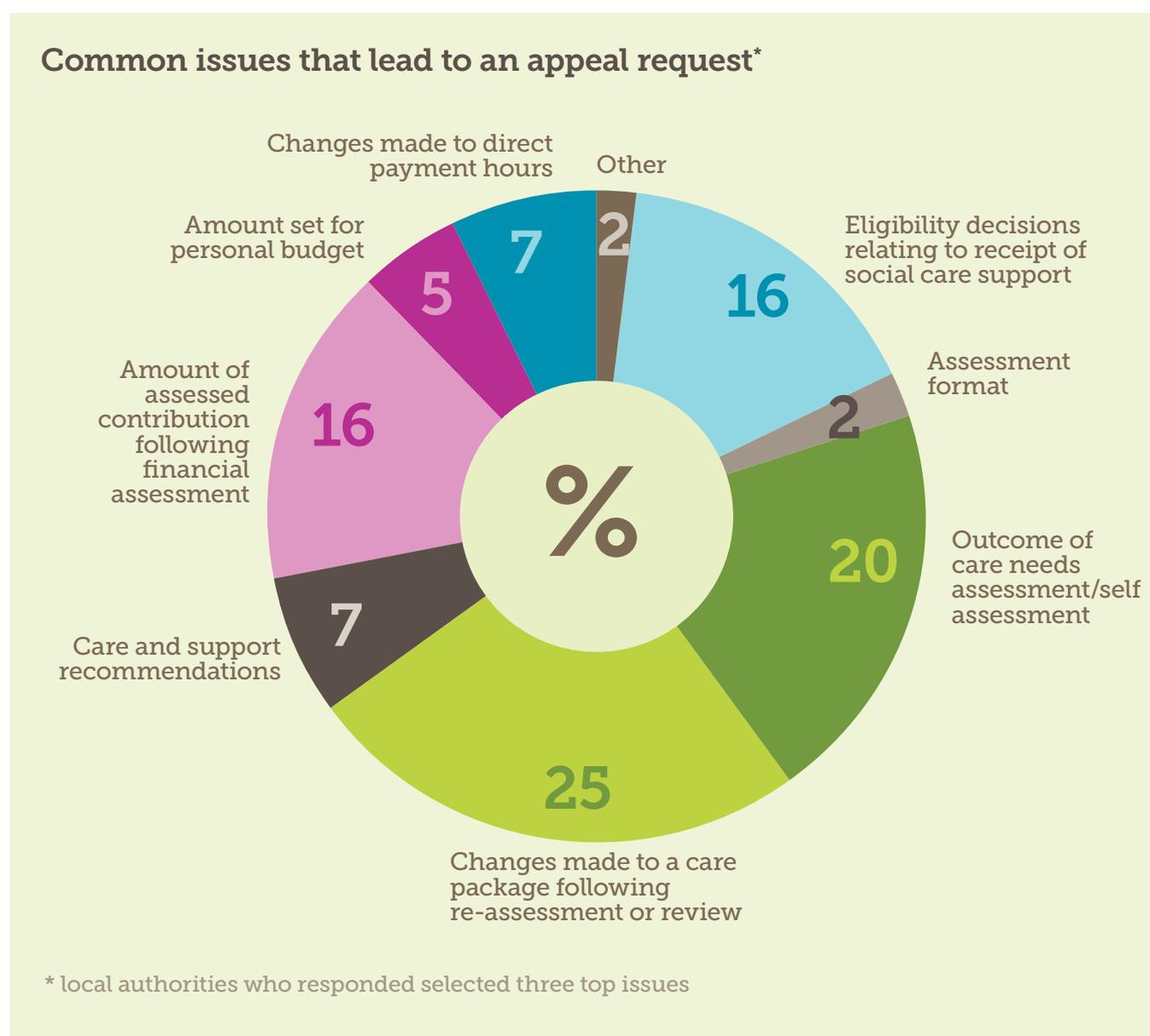
Many local authorities were not able to answer questions about the numbers of individuals who had appealed or whether these appeals were upheld. They either did not respond to this question or explained that it would take too long, or cost too much to extrapolate. Of those who did respond to this question, there was variation ranging from over 40 to less than 10 requests for appeals according to their most recent complete year of data. Poor data here highlights another issue for any statutory process: data collection about appeals should be done in a consistent way so that we can understand what is happening at a local level.

Insights from local authorities that have implemented an appeals process

After the initial FOI we followed-up with those local authorities who told us they had implemented an appeals process. We wanted to find out more about their local systems and understand the circumstances when it is used. 24 out of 27 (89%) local authorities responded to this second phase.

Common issues that lead to an appeal request

Unsurprisingly, the majority of appeals have been requested in relation to decisions about eligibility, changes to care packages and outcomes of care needs assessments. This strengthens the case for an appeals process that has early resolution at its core. This should reduce the risk of service users' lives being put on hold for an indeterminate amount of time in ways that we know can lead to physical, psychological and financial hardship.



Maintaining service provision during an appeal is a priority in the majority of cases

The Care Act 2014 and the 2015 consultation do not mention whether a person's care and support provision should be maintained at the level it was prior to re-assessment until the appeals process comes to an end.

However, we have found that in 16 of the 24 local authorities that have an appeals process, pending the outcome of an appeal, the individual's care is maintained at the level it was prior to any decision to reduce, deny or end services¹⁸. By contrast, this is not set in stone in the current complaints system with 2006 Department of Health guidelines advising that, "If the complaint is about a proposed change to a care plan, a placement or a service, the decision may need to be deferred (frozen) until the complaint is considered. However, care should be taken if deferring a decision is likely to have a significant effect upon the mental or physical wellbeing of an individual."¹⁹ Our FOI found that even when this decision is made on a case by case basis, local authorities will, in most cases, honour the previous care package until the appeal has been completed. We think this is a key principle to extend to any statutory appeals process.

When speaking about whether they maintain prior care levels during an appeal,

“In most cases yes, but if we have completed a second assessment and the person chooses to ask for a review of the second recommendation we may not. It is on a case by case basis.”

A Local Authority based in Greater London

Appeals process are difficult to cost and staff allocation is embedded into an existing system in the majority of areas

Unfortunately, the local authorities with an appeals process were not able to provide us with a cost estimate of maintaining their appeals process because that information was difficult to extract. For example, it may be built into the complaints process or treated as part of the general staff workload and paid out of the staffing budget. Allocation of staff was varied, ranging from one full time role covering both appeals and complaints, not being allocated a specific amount of time per day/week and being part of multiple job roles working across various teams. These findings demonstrate that a clear plan for resourcing would be key to any statutory appeals process.

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¹⁸ Data refers to the number of local authorities who responded to our FOI request.

¹⁹ Learning from Complaints: Social Services Complaints Procedure for Adults, Department of Health, 6.5 Deferring (Freezing) Decisions (July 2006)

3 Why do we need a statutory appeals process?

Here we set out the key reasons why we think the absence of a statutory appeals process is problematic.

There's strong evidence the current complaints system is not working

Currently, if an older person is unhappy with the decision made about their care and support, they will often need to make a complaint to their local authority. However, the complaints system is not always best placed to resolve these disputes. This is evidenced by the number of complaints received and upheld by the Local Government and Social Care Ombudsman (LGSCO) about assessments and care planning and charging.²⁰

The LGSCO's 2018 annual review of adult social care complaints²¹ documented that complaints and enquiries relating to adult social care have increased by a staggering 169% over an eight year period. The review also indicated that social care assessments and care planning are among "the biggest areas of complaint". The report noted that the number of complaints suggests "problems with the whole system and policies", rather than "one-off mistakes". In 2018/19, 60% of complaints about assessments and care planning were upheld, and 73% of complaints about charging. This is higher than the average 'upheld' rate for social care complaints (66%), and the average uphold rate (58%) for all complaints investigated by the Ombudsman.²²

The high volume of social care complaints received by the Ombudsman and high proportions of complaints being upheld suggests that problems are not being dealt with effectively at the complaints stage by local authorities. There have also been strikingly few cases brought to Judicial Review since the introduction of the Care Act 2014. This has denied the legal system the usual means of further clarifying meaning of the statute via case decisions.

Older people are negatively affected by long drawn out complaints processes

Making a complaint about social care can be a difficult time for an older person and their family. But this is made worse if it takes a significant time to reach a resolution. While local authorities are required to respond to a complaint within six months (unless agreed otherwise),²³ this does not always happen. In the case study below, it took three years from the original financial assessment to the LGSCO reaching a resolution.

We hear frequently on our Helpline from older people, and their families, about the significant impact an ongoing case like this can have on their lives – physically, psychologically and financially. This is especially the case when the older person has had their care and support package reduced, potentially leaving them with unmet care needs.

Some older people experience significant long-term consequences due to the uncertainty about the future of their care and support. We know that some older people have been threatened with eviction from their care home because the council has failed in their duties under the Care Act 2014²⁴ or seen their health and wellbeing decline due to a lack of care provision.²⁵

20 Review of Adult Social Care Complaints 2018-2019, Local Government & Social care Ombudsman, (Sept 2019)

21 Review of Adult Social Care Complaints 2017-2018, Local Government & Social Care Ombudsman (November 2018)

22 Review of local government complaints 2018-19, Local Government & Social Care Ombudsman, (July 2019)

23 The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009, Statutory Instruments 2009 No. 309, (Feb 2009)

24 Report by the Local Government and Social care Ombudsman, reference number: 16 003 268, Local Government & Social Care Ombudsman, (Nov 2017)

25 Unmet Needs: Improper Social Care Assessments for Older People in England, Human Rights Watch, (Jan 2019)

LGSCO Case Study: Complaint made after a financial assessment²⁶

This case from the LGSCO illustrates how long it can take for older people and their families to reach resolution following a complaint.

Mrs Y had a stroke and was hospitalised. Unfortunately as she was unable to return home her daughter, Mrs X, arranged for her to stay in a care home. Mrs Y's home was sold to pay for her care home fees.

In January 2015, after eight years in the care home, Mrs Y's funds had depleted to below £23,000. This meant the local authority could have a duty to pay towards the cost of her care and support. Mrs X approached the local authority, who arranged a care needs assessment. The local authority agreed that Mrs Y should remain in the care home and they started paying the care home fees pending the financial assessment.

During the financial assessment, the local authority incorrectly viewed money she had previously gifted as a deliberate deprivation of assets and treated her as still possessing the capital.²⁷

The council stopped paying towards the care home fees. They asked her to reimburse the council with the contributions they had made to her care between January and April 2015. The family helped to settle this invoice.

However, Mrs Y's monthly income did not cover the cost of the care home fees and she was unable to pay the full amount. The care home issued Mrs Y with an invoice for the outstanding payment, and said they would take further action if it was not paid.

Mrs X made a complaint to the council on behalf of her mother and eventually brought the case to the LGSCO. In 2018, the LGSCO's decision was to uphold the complaint as the council had failed to complete an accurate assessment of her finances. The LGSCO told the council to complete another financial assessment and to look at reducing or settling Mrs Y's debt with the care home to prevent her being evicted.

Others have lost valuable people involved in their care, for example, those employing personal assistants where the lack of certainty around funding may mean they cannot guarantee future employment. Where this relationship has been built up over many years, the loss is particularly significant.²⁸ A drawn out complaints process can cause real disruption to an older person's life.

The language of 'complaints' may deter people from contesting a decision about their care

From calls to our Helpline, we know many older people are not comfortable with the idea of complaining. Many do not feel it is an appropriate response to wanting decisions made about their care and support to be reviewed. The term 'complaint' can have very negative connotations. It suggests that the individual wants to express unhappiness about the service they have received, rather than simply ask for a decision to be looked at again – something they should be entitled to.

There is a large body of evidence which shows that many people do not complain about public services, including social care. Research has shown that only one in three people who are unhappy with a public service will go on to make a formal complaint.²⁹

26 Report 16 006 552 North Yorkshire County Council, Local Government and Social Care Ombudsman (January 2018)

27 Deprivation of assets is when a council believes that an individual has deliberately tried to get rid of their assets in order to put themselves in a better position for the financial assessment for care and support.

28 Unmet Needs: Improper Social Care Assessments for Older People in England, Human Rights Watch, (Jan 2019)

29 What do people think about complaining, Parliamentary and Health Service Ombudsman (June, 2015)

Citizens Advice has explored the reasons why many people do not make a formal complaint about public services.³⁰ Older people say they do not always feel confident enough and feel worried they would be treated differently by the public body involved. This is especially the case for those who are on a lower income or who are reliant on the service. A formal, visible appeals right could empower people to challenge decisions and services they would otherwise accept even though they are dissatisfied with them.

The right to challenge is all the more important in a context of budget pressures

It is well documented that adult social care faces significant pressures. In the 2019 ADASS Budget Survey, only 35% of adult social care directors said they felt fully confident that their budgets will be sufficient to meet all of their statutory duties. When asked to think about later years, this fell below 5%.³¹

We also know that access to local authority funded care has been declining. In 2018, there were 1.8 million requests for adult social care. From this, 1.3 million requests (71%) were from people aged 65 and over and a quarter of these (25%) resulted in no service being provided.³²

While we do not doubt that local authorities want to provide the best care that they can for the older people in their communities, we know that the pressures on them to control costs are very high at present. The incentives are arguably present for local authorities to approve care packages that do not adequately reflect individuals' needs. In this environment, it is essential that there is opportunity for individuals to be able to challenge decisions that will affect their wellbeing in such significant ways.

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³⁰ Learning from mistakes, Citizens Advice, (Feb 2016)

³¹ ADASS Budget Survey 2019, Directors of adult social services ADASS (2019)

³² Adult Social Care Activity and Finance Report, England – 2017-18 [PAS], NHS Digital, (October 2018)

Robert and Mary, West Midlands

In this case, the focus on early resolution contained in the proposed appeals process could have seen the situation resolved more quickly and with significantly less anxiety for Mary and her family.

Mary, who had dementia, lived in a care home which was funded by NHS Continuing Health Care for two years. In December 2017, Mary's NHS CHC funding was withdrawn and she was referred to the local authority's adult social care team. Robert, Mary's son-in-law, was handling the arrangements of Mary's care as she did not have mental capacity. In April 2018, a social worker arranged to meet with Mary and Robert.

On the day, the meeting started between the social worker and Mary before Robert had arrived. The social worker did not complete a care needs assessment or read Mary's notes, but when he arrived, Robert was told he would need to move Mary to a new care home. Robert said he did not want to move Mary because he felt this would cause her significant distress. After a discussion with the care home manager, the social worker decided that Mary needed a new assessment of her care needs.

Before the reassessment, Robert was told he would need to pay a top-up fee if he wanted Mary to continue to stay at the care home. Robert and his wife could not afford the proposed top-up fees and he was told the alternative would be to move Mary to a different care home. After speaking with the social worker, Robert was led to believe, incorrectly, that the top-up would come out of Mary's pension and signed the paper work.

Unfortunately, this meant Robert was now liable to pay the top-up fees.

However, once Robert understood he received incorrect advice, he lodged a formal complaint to the local authority in May 2018. Robert wasn't given any information about the complaints process or provided with any indication of how long it would take to be resolved. During this time, Robert visited a care home suggested by the local authority but it was completely unsuitable for Mary's needs.

A 'best interests' meeting was held in September 2018 to review Mary's case. Almost four months after putting in his official complaint, the local authority agreed that Mary's needs required her to stay at the current care home and they decided that the top-up fee was no longer required. Sadly, not long after this resolution, Mary passed away in November 2018.

Robert told us that the process was frightening because he couldn't afford to pay the top-up fees and felt a lot of pressure to ensure that Mary remained at the same care home. He explained, **"all I was interested in was sorting out the best for Mary"** but trying to resolve the situation had turned into **"a full-time job"**. When we asked Robert what would have made the process easier he said: **"if we could have all sat around the table and had a conversation that would have been a start. I was happy to meet them at anytime, anywhere."**

4 The change we want to see: our recommendations

Decisions about care and support can enable older people to be independent and live life on their own terms, so it is essential to get these right. From the evidence we have gathered and our conversations with older people, we think the current complaints system is not best placed to review decisions made about care and support. The complaints process is lengthy, complicated and does not encourage older people to challenge decisions made about their care and support.

Older people should have the statutory right to appeal decisions made about their care. The Government already acknowledged in 2014 the need for 'effective means to have the decision reviewed'³³. This can be achieved by introducing a statutory appeals system.

The benefits of an appeals system

Through our conversations with local authorities that have already implemented an appeals system, we heard about some of the key benefits that they perceived from putting this in place.

A more accessible, less intimidating option for those receiving care and support

“ Appeals are empowering, straightforward and offer the customer a way of challenging a decision without making a complaint. Making a complaint can be a complicated and intimidating process. Appeals are a more accessible option for airing concerns and provide a common sense approach to understanding how decisions are reached. ”

Kirklees Council

A local authority we spoke to explained that some of their service users did not want to make a formal complaint about social care, as they didn't want to be seen to be complaining and worried about the repercussions:

“ Social care can sometimes be the only human contact an individual gets. Therefore, if a person is unhappy with an aspect of their care and support, it can put them off making a complaint as they don't want to upset anyone or be seen as being a bother. Appeals are considered as a next step in a person's care journey if they wish to raise an issue – so it's hopefully a more comfortable option for them. ”

Kirklees Council

³³ Factsheet 13: Appeals Policy Proposals, Care Act factsheets, Department of Health & Social Care

A more open, efficient approach for local authorities

The appeals process gives local authorities the opportunity to speak to the older person to fully understand why they want to appeal. It also gives the local authority the chance to correct any mistakes or misunderstandings which may have happened during the assessment.

“Our appeals process provides a simple way for you to request a review of the decision(s) and to receive a quick response.”

West Sussex County Council

The appeals system can provide local authorities with a practical solution to handling requests from adults, including older people, who are unhappy about decisions made about their care and support. It can give them the opportunity to have an open conversation with the person involved so that the issue can be resolved more swiftly. Appeals could encourage a more person-centred approach, and result in service users feeling listened to and satisfied that the right steps have been taken.

“An appeal is a request for us to revisit our assessment/review or a proposed package of support. It is a way for you to highlight areas that you feel may leave some of your eligible needs unmet or might put you at risk.”

Adult Social Care and Health, East Sussex County Council

The focus on early resolutions also means cases can be dealt with more swiftly than if they were being handled by the complaints system. This can reduce the number of people who need to seek legal advice, as the appeals system provides greater scope in handling and resolving disputes. Legal action can have significant costs for both the local authority and claimant.³⁴

An opportunity for independent review

Under the appeals process, the individual would have the opportunity for their case to be reviewed by an independent reviewer. The Independent Reviewer's role is an inquisitorial one between the person making the appeal and the local authority.

The involvement of a third party would provide an important “check and balance”³⁵ whereby someone not previously involved in the case would consider the local authority's reason(s) for making their original decision. When making its final decision at the end of the appeal process, the local authority must consider the independent third party's recommendations.

“We will have someone look at the decision with fresh eyes, looking at all the relevant information and make an informed, impartial decision.”

Kirklees Council

34 Social Care Funding Reform Impact Assessment, IA no: 9531, Department of Health, (Feb 2015)

35 The Care Act 2014: Consultation on draft regulations and guidance to implement the cap on care costs and policy proposals for a new appeals system for care and support, Department of Health, (Feb 2015)

We agree with the proposals contained in the 2015 consultation that the independent reviewer should be someone that:

1. Has no conflict of interest in reviewing the appeal, i.e. have no relationship with the person(s) who have made decisions relating to the appeal
2. Acts with impartiality and integrity when carrying out a review of an appeal
3. Has sufficient knowledge of the Care Act 2014 and care and support
4. Is able to review and appraise matters and facts relating to an appeal to draw up recommendations³⁶

However, we believe that these specifications must be tightened, leaving no room for interpretation that might adversely affect the process for the individual involved in the appeal. Although we feel it is acceptable and practical that the reviewer can be an employee within the same local authority, it is imperative that they are still independent. As such, the conflict of interest point above should be expanded to include person(s) not involved in conducting the original assessment(s) and/or decision making related to the appeal in question. The term 'sufficient knowledge' in relation to the Care Act 2014 is not strong enough – this should stipulate that 'extensive knowledge of the Care Act 2014 and care and support as well as applying their principles in practice' is required. We also feel strongly that the independent reviewer role should be filled by a senior member of the adult social care workforce. This is to ensure a minimal level of experience in dealing with potentially complex matters and the ability and authority to overturn the original decision.

This would represent a significant step forward and could draw parallels with the NHS Continuing Healthcare (NHS CHC) Framework. This includes a local resolution stage as part of its review process where staff not involved in the original decision review decisions on NHS CHC eligibility.³⁷ Within the current social care complaints legislation³⁸ there is no mention that an independent third party must be a part of any stage of the complaints process. Although we cannot say definitively that a proportion of local authorities are not putting this into practice within local policy, it is concerning that the same people involved in the original decision are potentially involved in considering that same person's complaint case.

Opportunities for future learning

The data collected from an appeals system could help local authorities to understand the reasons why people are unhappy with the decisions made about their care. If a statutory process included requirements for consistent reporting of appeals data, this would provide important opportunities for learning from mistakes and identifying recurring issues in assessment and eligibility decisions.

“ I feel strongly that a good process for appeals can result in more collaborative and effective relationships. We've certainly seen evidence of it here. ”

Community Relations Manager, Adult Social Care and Health at East Sussex County Council

36 The Care Act 2014: Consultation on draft regulations and guidance to implement the cap on care costs and policy proposals for a new appeals system for care and support, Department of Health, (Feb 2015) 15.24

37 National Framework for NHS Continuing Healthcare and NHS-funded Nursing Care, October 2018 (revised), Department of Health & Social Care, (March 2018)

38 The Local Authority Social Services and National Health Service Complaints (England) Regulations 2009, Statutory Instruments 2009 No. 309, (Feb 2009)

Our recommendations

We are calling on the Government to introduce a statutory appeals process for social care that has a number of key features. Independent Age is clear that any mandated process should:

- **Be distinct from complaints**, with its own separate timelines and process. Some local authorities told us there could be confusion between complaints and appeals, so the two must be carefully explained and distinguished in any future legislation.
- **Include clear provision for the role of an independent reviewer**. To protect against potential conflict of interest, this should be a senior individual within the adult social care team who did not have a role conducting the original assessment(s) and/or decision(s) related to the appeal in question.
- Stipulate that during an appeals process, the individual's **current level of care is upheld** and maintained until the case has been resolved.
- **Be clearly explained to individuals** receiving care so that they know access to an appeals process is something they are entitled to. The option to appeal should be made clear at multiple stages – when a person first receives a decision about their eligibility and following any changes or reviews to their care package. Clear information should be given about what an appeal is and how to start the process.
- **Have assigned timescales**, which individuals are kept informed of at all stages. Any delays must also be communicated clearly.
- **Include requirements for local authorities to collect data** in a consistent way, so that patterns can be identified and lessons learned.
- **Be adequately resourced** so that it can be properly staffed and administered. Local authorities have previously expressed concerns about the resource implications of a mandated appeals system. There will need to be adequate funding to enable this system to be introduced.

We recognise that the previous consultation from 2015 is now out of date and so we are also calling on the Government to re-launch this consultation to enable key stakeholders to give their views.

In our view it is unacceptable that the Government has taken no action on an appeals process for adult social care since 2015. In the social care policy agenda, inaction and delays have unfortunately become the norm for successive Governments. The right to challenge decisions about care and support is fundamental and the system to do this must be fair and consistent across all local authorities. We urge the Government to act now on this crucial aspect of our adult social care system.

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