

BIRMINGHAM CITY COUNCIL

PUBLIC REPORT

Report to: AUDIT COMMITTEE

Report of: Director of the Adults and Social Care Directorate

Date of Meeting:

Subject: Ombudsman Public Interest Report concerning a complaint about the Top up fee arrangement complaint

Wards Affected: All

1. Purpose of Report

- a) In December 2006, the Audit Committee endorsed a framework for informing and involving Members of the Council when the Local Government and Social Care Ombudsman issues a report.
- b) The aim of this report is to inform members about the Ombudsman's report, issued on 10 November 2022, regarding a care home top up fee arrangement complaint.
- c) As the Ombudsman has found fault causing injustice and have made recommendations to remedy the injustice caused, it should be considered by this Committee on behalf of the City Council.

2. Recommendations

That the Audit Committee notes the Director of Adults and Social Care's response to the Local Government and Social Care Ombudsman's recommendations.

3. Background Information

- 3.1 A copy of the Local Government and Social Care Ombudsman's report dated 2 September 2022 is appended to this report. All Ombudsman reports are anonymous, so, whilst the events described are real, the names of those involved are not included.
- 3.2 The essence of the complaint:
- Mrs X complained the Council failed to properly explain or advise her about the need for top up fees for her mother, Mrs Y's care home, and has wrongly required her to pay these fees since her mother moved to the care home in 2007. Mrs X says this has placed her family under unnecessary financial strain for many years.

4. The Key Events

- 4.1 In 2007 Mrs Y was discharged from hospital to a nursing home, Care Home 1. Mrs X says the Council chose and arranged the placement at Care Home 1 and that she was required to pay a top up fee. She says the Council did not give her any information about top up fees or why she was required to pay one. Mrs X assumed that all care home placements involved a top up fee. The Council does not have any records of the arrangements for this placement in 2007.
- 4.2 Mrs Y was admitted to hospital in 2011 and Mrs X initially did not want Mrs Y to return to Care Home 1 when she was discharged. Mrs X found an alternative care home but was told this home would charge a top up fee. The Council also found several alternative care homes which would have required a top up fee from Mrs X. These homes were not able to offer Mrs Y a placement. There is no record of what information or explanation the Council gave Mrs X about the top up fees, but the notes do record Mrs X was not happy about paying a top up fee.
- 4.3 As Mrs X could not find a suitable alternative care home, it was agreed that Mrs Y would return to Care Home 1. The Council provided a copy of the care home placement agreement and third party funding agreement. This states it should be completed where a third party has agreed to pay a weekly top up amount because the home chosen has a fee which is greater than the Council would usually expect to pay. It specifies a top up of £50 a week. While the agreement provided is signed by the Council, it is not signed by either Care Home 1 or Mrs X.
- 4.4 Mrs X says she repeatedly questioned the need for the top up fee and what it related to. She says the Council did not consider whether she could afford to pay the top up fee and her concerns were not recorded.
- 4.5 The Council's records show that Mrs X told the Council at a review meeting in July 2019 that she was finding it difficult to pay the top up fee. The notes state they discussed looking at alternative nursing homes and trying to negotiate a lower top up fee. Mrs X did not want Mrs Y to move to another home.

- 4.6 Mrs X contacted the Council again the following month as she had completed a financial assessment form as part of the reassessment of Mrs Y's contribution towards the cost of her care. The form referred to family or friends paying a top up fee because Mrs Y had chosen more expensive accommodation than the Council was able to pay for. This prompted Mrs X to research top up fees and to question why they were not offered a home where a top up fee was not needed. She felt the Council had not offered her the correct support at a sad and stressful time and asked the Council to look into this.
- 4.7 In subsequent discussions with the Council Mrs X reiterated the Council had placed Mrs Y at Care Home 1 without informing her about top up fees and without offering the choice of a home without a top up fee. Mrs X also said she had learnt that other individuals with placements funded by the Council did not have to pay top up fees and she asked for the same parity for Mrs Y. An officer informed Mrs X that there were no records of discussions about Mrs Y's placement in 2007 as the file had been destroyed. But they said a social worker would have told Mrs X about top up fees at the time of the placement and that she would have had a choice of placements, as this was the Council's policy. The Council suggested looking for an alternative care home that does not charge a top up fee.
- 4.8 The Council also contacted Care Home 1 to explain Mrs X was not able to afford the top up and to ask whether the charges could be disregarded.
- 4.9 Mrs X had accrued arrears of top up fees of £2,298. Care Home 1 offered to waive future top up fees if Mrs X cleared these arrears. Mrs X was unhappy she was expected to pay the arrears. She said she had stopped paying the top up fees when she complained to Care Home 1 about them in September 2019. She asserted that had the care home dealt with her queries promptly these arrears would not have accrued.
- 4.10 In June 2020 Mrs X made a formal complaint to the Council. She complained the Council had arranged the placement at Care Home 1 in 2007 and had not given her any choice of alternative care homes. Mrs X complained she was led to believe all nursing homes had top up fees which had to be paid by a third party. But her mother-in-law had now moved to Care Home 1 and was not paying a top up fee. She had looked at moving Mrs Y to another care home but did not consider this the right thing to do as Mrs Y had been at Care Home 1 a long time and was settled. Mrs X asked the Council to investigate whether she should have had to pay top up fees for all this time.
- 4.11 The Council responded to Mrs X's complaint in February 2021. It apologised for the delay in responding. The Council referred to the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 which specified a time limit for making complaints. Although Mrs X complained she had been charged a top up fee since 2007, the Council would only consider events over a 12 month period. The Council noted the top up fee arrangement stopped on 1 May 2020 and advised it would consider the period 1 May 2019 to 30 May 2020.

- 4.12 The Council calculated that during this period Mrs X would have been charged top up fees of £5,200. As Mrs X had not paid all the fees, the Council offered to pay the arrears of £2,298 directly to Care Home 1 and to reimburse Mrs X the balance of £2,902. It also offered to pay Mrs X £250 for her time and trouble.
- 4.13 Mrs X was not satisfied by the Council's response and asked for her complaint to be reviewed. The Council's response confirmed it had checked with Care Home 1 and the outstanding balance in relation to top up fees had been waived from October 2019.
- 4.14 The Council also confirmed it carried out financial assessments to establish whether service users were required to fund or contribute towards their placement. It stated Mrs Y was not a self-funder and that the top up payment was a private arrangement between the care home and the family. As such the Council was not required to carry out a financial assessment for Mrs X.
- 4.15 Again, the Council only considered the 12 month period starting 1 May 2019. As Care Home 1 had waived the arrears, the Council recalculated the top up fees for the period 1 May 2019 to 30 September 2019 and offered to reimburse Mrs X £2,300. It would also reimburse a payment of £1,500 Mrs X had made and again offered £250 for her time and trouble.
- 4.16 Mrs X maintains the Council was wrong to require her to pay a top up fee from 2007 and has asked the LGSCO to investigate her concerns.
- 4.17 The Council confirmed its offer to Mrs X totalling £4,050 still stands.

5. The Ombudsman's Findings – Upheld: Maladministration and injustice under Section 31(2) of the Local Government Act 1974

- 5.1 The failure to provide sufficient information about top up fees to enable Mrs X to make an informed choice about placements for her mother is fault. In the absence of an available care home placement which was within the Council's usual cost and could meet her needs, the Council should not have asked Mrs X to pay a top up fee. Requiring her to do so is fault.
- 5.2 The LGSCO are concerned that the Council considers the top up fee was a private matter between Care Home 1 and Mrs X and that there was no need for it to carry out a financial assessment. This is not the case. Legislation and government guidance, both before and since the implementation of the Care Act 2014 are clear that the council must be satisfied the third party is able and willing to pay the additional cost of any preferred accommodation for the likely duration of the placement. And that the third party must enter into a written agreement with the council to pay the additional cost.
- 5.3 The Council's Care Home Placement Agreement and Third Party Funding Agreement states it is a three way agreement between the Council, care home provider and the contributor. It can be terminated by either the provider or the

Council and states that should the contributor be unable to pay the top up they should contact the Council. It is therefore disingenuous of the Council to refer to the top up fee as a private matter between the care home and Mrs X, when clearly it is not.

- 5.4 There is no evidence of any consideration as whether Mrs X could afford to pay the top up fee either in the short term or for the duration of the arrangement. This is fault, as is the failure to ensure there was a signed written agreement in respect of the top up fees. Neither Mrs X nor Care Home 1 have signed the Council's care home placement agreement or third party funding agreement.
- 5.5 In 2019 the LGSCO found fault with the Council's practice of treating third party top up fees as a private matter between the care home and the third party. In that case we made recommendations that the Council review its third party top up fee arrangements to ensure all top up agreements were compliant with statutory guidance.
- 5.6 Since the LGSCO's decision in 2019 the Council has drafted new guidance for its staff and reviewed the information available to care providers and the public. It has not yet implemented these changes but states it will do so imminently.
- 5.7 The LGSCO also consider there to be fault in the way the Council has dealt with Mrs X's complaint. The Council claims the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 limit its investigation to a 12 month period. This is not an accurate reflection of the provisions of these regulations. Regulation 12 states a complaint must be made no later than 12 months after either:
 - the date on which the matter complained of occurred; or
 - if later, the date on which the matter complained of came to the complainant's notice.
- 5.8 In addition, the regulation states the time limit does not apply where the complainant has good reason for not making a complaint within the time limit and that despite the delay, it is still possible to investigate the complaint effectively and fairly.
- 5.9 The LGSCO consider the Council's decision to limit Mrs X's complaint to the period 1 May 2019 to 30 May 2020 was flawed. The time taken to investigate Mrs X's complaint is also unacceptable and is fault. The Council's complaints procedure states it will respond to complaints at stage 1 of the process within 20 working days. In this instance the Council took eight months to respond.

6. The Ombudsman's Recommendations

- 6.1 To remedy the injustice caused by the faults identified, the Council has agreed to complete the following:

- apologise to Mrs X and pay her £250 to recognise the distress, time and trouble she has experienced;
- refund Mrs X the top up fees she has paid since Mrs Y returned to Care Home 1 in March 2011;
- provide reminders/training to relevant staff of the importance of keeping clear records. The Council must be able to show it has offered at least one available and suitable care home. The Council should document why a care home is suitable for the individual, any challenge to what is suitable, and the outcome of that challenge.
- provide reminders/training to ensure relevant staff correctly consider and apply the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 and the Council's complaints procedure when responding to complaints.

7. The Council's View

- 7.1 The Council accepted the Ombudsman's recommendations at the draft report stage.
- 7.2 The Council has subsequently carried out the following actions:

All recommendations from the Ombudsman have been implemented outlined in section 6.1.

8. Legal and Resource Implications

- 8.1 The agreed payments will be made from an appropriate budget.

9. Risk Management & Equality Impact Assessment Issues

- 9.1 This was a historical case; Adult Social Care have previously amended the top up policy and procedures as a result of the Care Act 2014 and previous Ombudsman recommendations. There is a risk of future complaints in relation to third party top ups, these will be considered by the service, appropriate case audits and mitigate risks accordingly.

10. Compliance Issues

- 10.1 The top up policy was amended following the introduction of the Care Act 2014, this case predates the policy changes. All social workers have been reminded about the importance of discussing third party top ups with family members and noting this on the Adult Social Care system. Case file audits will be completed on any future complaints that involve a third party top up. All Ombudsman recommendations will be implemented without delay.

11. Recommendations

That the Audit Committee notes the actions being taken in response to the Local Government and Social Care Ombudsman's report.

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