

Oversight and confidence Casework and customer service pilot projects 2013

Access to the police complaints system

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Introduction

1. The Independent Police Complaints Commission (IPCC) has a statutory duty to secure and maintain public confidence in the police complaints system in England and Wales, under the Police Reform Act 2002 (PRA). The Police Reform and Social Responsibility Act 2011 (PRORA), which came into force in November 2012, changed the way most complaints are handled.
2. There are some complaints – a small minority – that do not need to be dealt with in the complaints system set up under the PRA. If these exemptions apply, complaints may not be recorded at all, or recorded and then ‘disapplied’ (that is, the force can choose to deal with them in some other way), or the investigation can be stopped – ‘discontinued’. Effectively, this prevents people from having access to the complaints system that is overseen by the IPCC.
3. In many cases, applying these exemptions involves a subjective assessment of the merits of the complaint. There are three such exemptions in the PRA: that complaints are vexatious, oppressive, or an abuse of procedure. The PRORA added a fourth exemption in 2012: that a complaint is fanciful. If so, it need not be recorded¹.
4. Our experience under the PRA was that the three existing exemptions were sometimes misapplied. We were, therefore, concerned about the addition of a further, even more subjective, exemption. In addition, the IPCC is no longer the decision-maker in relation to the great majority of decisions to disapply; this is now dealt with within the professional standards department (PSD), usually by the chief officer or his or her delegate. If complaints are not recorded at all, there is a right of appeal to the IPCC; but, if a complaint is recorded and then subsequently disapplied, the appeal right is usually to the force. As a consequence, PSDs could use ‘disapplying’ as a way of avoiding any IPCC oversight of the complaint, using what we have termed the ‘disapplication loophole’.

¹ **Fanciful:** if, and only if, no reasonable person could lend any credence to it.

Vexatious: made without foundation which is intended, or tends, to vex, worry, annoy or embarrass.

Oppressive: made without foundation and is intended, or likely, to result in burdensome, harsh or wrongful treatment of the person complained against.

Abuse of procedure: where there has been manipulation or misuse of the complaints system in order to make or progress a complaint which, in all the circumstances of the particular case, should not have been made or should not be allowed to continue.

Aims

5. This project aimed to consider three questions:
 - a. Are the subjective grounds of vexatious, oppressive, abuse of procedure, and fanciful being applied correctly?
 - b. Are PSDs using what has been termed as the 'disapplication loophole' to avoid the IPCC assessing cases?
 - c. Has the introduction of the subjective grounds at the recording stage affected access to the police complaints system (particularly focusing on those people with a mental illness)?

Methodology

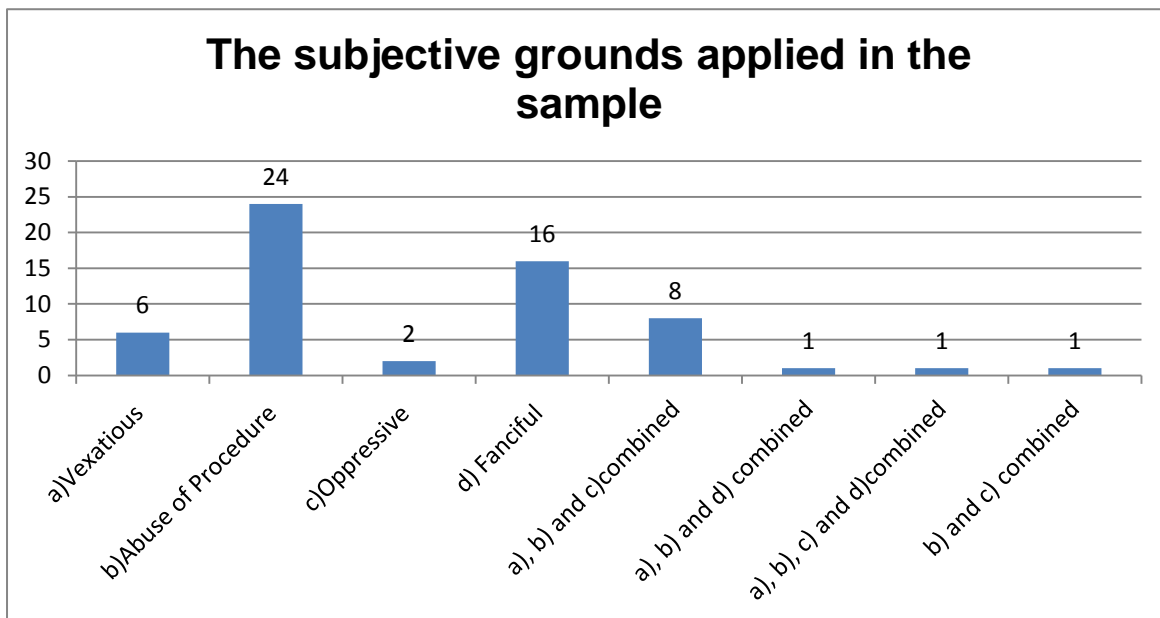
6. We selected a sample of six PSDs for this project² by reviewing statistical data about the number of dispensation applications and other criteria, such as the relevant grounds and the number of applications refused (between April 2011 and March 2013).
7. Each of the PSDs was asked to provide paperwork from complaints that were not recorded and disappplied on the relevant subjective grounds between 22 November 2012 and the end of July 2013. These were cases where the complainant had not submitted an appeal to the IPCC.
8. Given the low number of relevant cases from the six PSDs, the sample was increased to include a total of nine PSDs. The number of relevant complaints from each PSD was low and ranged from three to 12. In total, 59 relevant complaints formed the sample of cases reviewed.
9. We analysed these cases to see whether the correct ground had been applied and, if not, the reason why. We also considered the way decisions were explained to complainants, including how sensitively they were communicated and the quality of information provided.
10. We also interviewed a staff member involved in making recording decisions from each of the nine PSDs, either face-to-face or by telephone. The discussions centred around four main areas: training/guidance received; concerns about recording decisions; access (particularly of complainants with a mental health illness); and, the standard of explanations in the letters.
11. The main obstacle we experienced was the low number of relevant complaints, in order to make significant findings. Being able to talk to PSD

² A statistical report extracted the dispensation applications to the IPCC between 01/04/11 and 31/03/13, where applications had been made on the grounds of vexatious, oppressive or abuse of procedure and the applications had been refused. Fanciful is a new definition created by the PRSRA and there was no data comparison possible for this ground. This allowed us to identify forces likely to have made a significant number of non-recording decisions or disapplications on these grounds for us to sample.

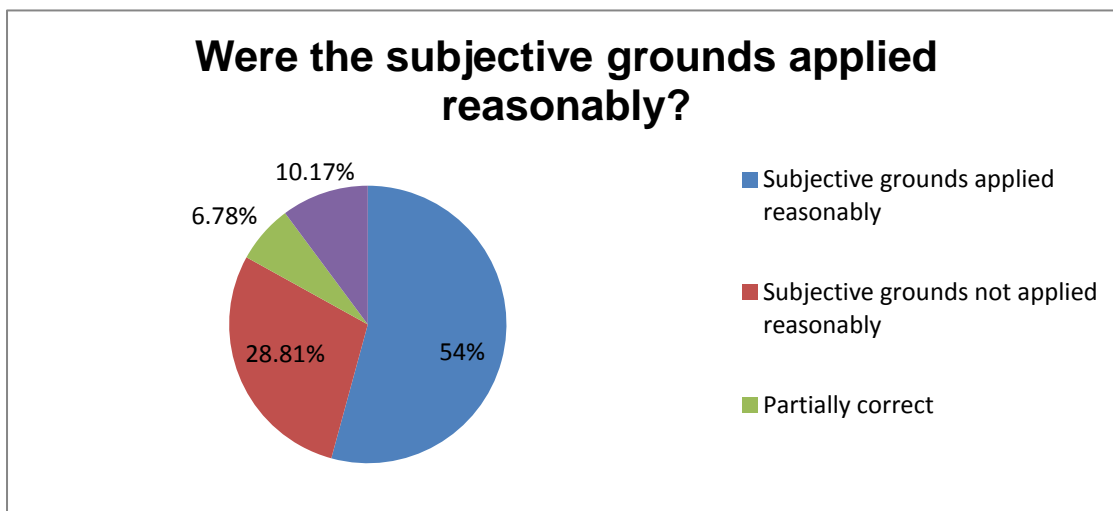
staff members provided a greater understanding of what was happening. PSDs were generally willing to engage in the discussions and welcomed the review as a way of achieving high standards.

Findings

Application of the subjective grounds

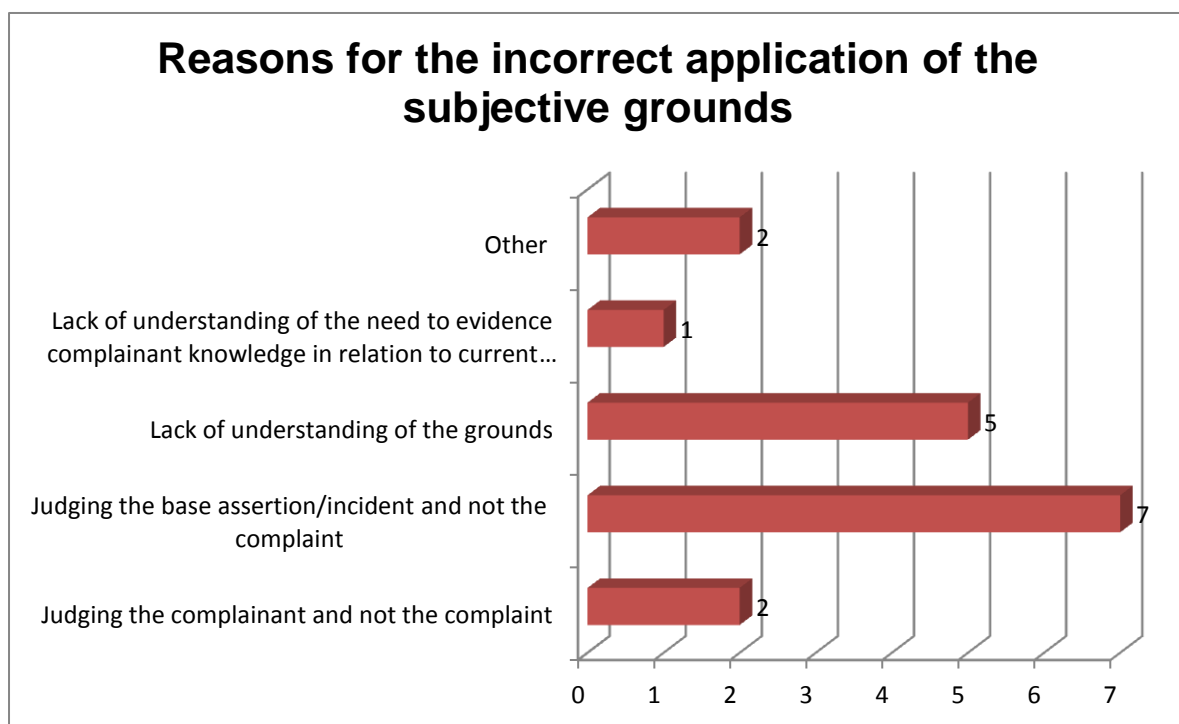


12. In the majority (41 per cent) of cases we sampled, abuse of procedure was the ground applied. The next most frequently applied ground was fanciful (27 per cent), then vexatious (10 per cent) and, finally, oppressive (3 per cent). In a number of cases (11) a combination of the subjective grounds was applied. The legislation cites vexatious, abuse of procedure or oppressive as one ground which might explain the relatively high number (8) of cases where all three are cited. It might not necessarily have been the case that the assessing officer felt all three grounds were applicable.
13. The subjective grounds were applied correctly to 54 per cent (32) of the complaints within the sample.



14. In 10.7 per cent of the complaints in the sample (6), we were unable to determine whether a correct decision had been made due to the lack of information or lack of rationale in the recording letters. In two of these cases, the force had failed to send a recording letter giving the right of appeal. This was because the force deemed them to be from persistent complainants. This gives a perception that the complainant was being judged, rather than the complaint, when the recording decisions were made.
15. In 6.7 per cent of the complaints in the sample (4) the decision was partially correct. These were cases where the decision-maker had insufficiently considered all of the allegations in the complaint letter. For example, one allegation was about the issuing of a parking ticket and another allegation was that the officer lied that a call had been made to the complainant to inform him that his car was going to be towed away. The first allegation was correctly identified as an abuse of procedure because there is a process in place to challenge a parking ticket, but the second allegation should have been recorded under the Police Reform Act.

Reasons for the incorrect application of the subjective grounds



16. The most frequent reason for the subjective grounds being applied incorrectly was that the decision-maker was judging the base assertion/incident instead of the complaint. In one case, a complainant alleged that the police had failed to help him with his concerns that intruders were entering his home. The decision-maker assessed the likelihood of there being intruders instead of considering the complaint – which was about the police failing to help. Where the base assertion/incident had been judged, the complaints were categorised as fanciful in six out of seven cases.
17. In five cases, the decision-maker did not have a clear understanding about which

grounds to rely on. In some cases, an incorrect ground for not recording the complaint had been applied. For example, the off-duty argument³ could have been applied. In one case, the person was not actually making any conduct allegations and, therefore, there was no need to make a recording decision.

18. In one case, reference was made to the complainant's previous complaints, which had not been upheld. There was a failure to demonstrate how the current complaint was without foundation or an abuse of procedure; it was about a different incident and a different officer.
19. In two cases, we considered that to some degree the complainant was being judged. Although the recording letters did not specifically refer to the complainants as being vexatious or oppressive, in one case the decision-maker referred to the nature of the complaints being minor and the complainant not being happy with how any of his concerns were addressed.
20. In one case the decision-maker had not sufficiently considered what was being alleged. In the other case it was unclear.

Conclusions

Vexatious ground

21. In half of these cases (3), either an incorrect decision had been made or there was insufficient information/rationale provided to make a decision. In these cases, the complainant had been judged rather than the complaint. No information had been provided to the complainant justifying the decision, there was reference to the person's complaint history or there was actual reference to the person being judged.

Oppressive ground

22. This ground was applied correctly in both examples seen.

Abuse of procedure ground

23. A correct decision was made in 19 out of 24 cases where this ground was applied alone (rather than in combination with other subjective grounds). This suggests the abuse of procedure ground is generally being applied correctly.

Combination of grounds

24. In five of these cases, an incorrect decision was made or there was insufficient rationale to make a determination. One PSD used a combination of the grounds a) vexatious, b) oppressive and c) abuse of procedure in many of their decision letters without providing rationale to justify why each ground was specified. This appeared to result from an over reliance on a template letter where the wording has been taken directly from the legislation.

Fanciful ground

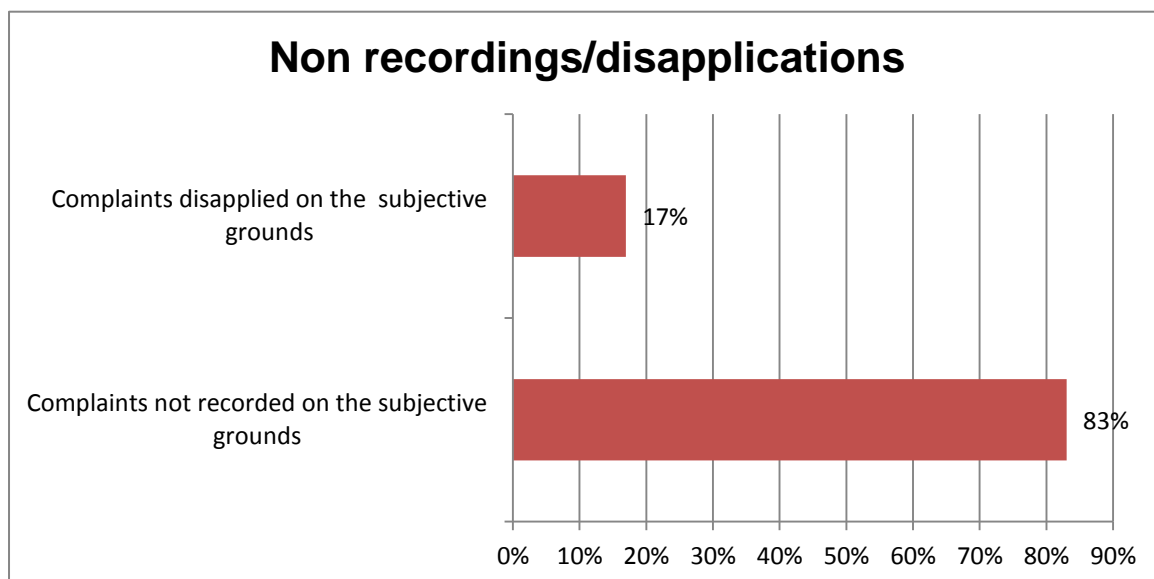
25. The fanciful ground was applied correctly in only two out of 16 cases. In a number

³ Off-duty conduct which, if proved, would not bring the force into disrepute is not required to be recorded as a complaint.

of cases, the complaints were about the police failing to investigate a criminal allegation because it was not deemed credible. Complaints about police officers failing to investigate reported crimes are not fanciful complaints.

- 26. In other cases, there was a lack of understanding of this ground. One complaint was disappplied on the fanciful ground, despite the fact that complaints cannot be disappplied on this ground. In another case, the allegations were about police hacking into a personal computer and phone devices which was unlikely, but not fanciful.
- 27. It was unclear why some complaints had been deemed fanciful, and in four cases there was insufficient information to make a determination. In some of these cases, our assessment is that there was no effort to establish if there were genuine concerns.

Use of the ‘disapplication loophole’



- 28. Significantly more complaints (49) were not recorded on subjective grounds than complaints disappplied on those grounds. This trend was reflected in most of the PSDs sampled. Five PSDs had no complaints disappplied on subjective grounds. These findings suggest that generally the concern about PSDs using the disapplication loophole to prevent IPCC assessment is unfounded.
- 29. Two PSDs had a higher number of complaints disappplied than not recorded on the subjective grounds. Both PSDs explained their tendency was to record the complaint and then disapply the legislation to that complaint, but their reasons for following this practice were different.
- 30. The first PSD did it with the intention of being more customer focused by giving the complainant an opportunity to provide representations. The recording letters detailed both the recording decision and the intention to disapply, requesting representations, which supports this explanation. These letters were clearly written, in Plain English and jargon-free.
- 31. While we agree this PSD’s customer-focused approach is highly commendable,

we are concerned that this practice could raise a complainant's expectations unduly. A PSD has 10 days to make a recording decision and PSDs are encouraged to explore a complaint with a complainant if they are unsure what decision to make. It would be possible for a PSD to obtain a complainant's representations at the recording stage.

32. The second PSD followed this practice because of frustrations about previous IPCC upheld decisions. The PSD felt further guidance was needed about how to apply the new recording exemptions, in particular the fanciful ground. This was also the PSD that disapplied a complaint on the fanciful ground (which is unlawful).

Access/reasonable adjustments

33. The majority of complainants (where ethnicity was recorded) were white (25). Data did not support a correlation between ethnicity and an incorrect decision.
34. Most (75 per cent) of the complaints were made by men (44). Data did not support a correlation between gender and an incorrect decision.
35. The complainant's age was not recorded in 42 per cent of the sample (25 cases). Where data was recorded, it did not support a correlation between age and an incorrect decision.
36. Just over a quarter (27 per cent) of the sample of complainants (16) had a stated mental health illness, communication difficulties or exhibited behaviour that could be an indication of mental health issues. To establish if this is unduly high in these particular complaints, or whether it is an accurate reflection of the remainder of the complaints system, will require further exploration.
37. The fanciful ground was incorrectly applied in most cases. The most frequent reason for an incorrect decision was that the matter giving rise to the complaint was being judged, not the complaint. We looked in further detail at whether this was more frequently the case where the complainant had or was felt to have mental health or communication issues.
38. The fanciful ground had been applied incorrectly in similarly high proportions for complainants who indicated a mental health illness (90 per cent) and those who did not (100 per cent). In just under half the cases (three out of seven complaints) where the base assertion had been judged, the complainant did not have any known mental health illness. The data did not support a correlation between mental health issues/communication difficulties (whether declared, inferred or otherwise) and an incorrect decision.
39. It was clear that PSDs have an awareness of the need, if required, to assist those people with a mental health issue to ensure any conduct complaints are recorded. Adjustments for these complainants were identified in a small number of the cases reviewed. They included an officer visiting, and asking the complainant for clarification via a letter. PSDs described adjustments they had made in other cases, such as: referring the person to the appropriate adult scheme; getting an inspector to visit a complainant; and, making a telephone call to get more information about concerns. Some PSDs took an holistic approach and shared information with the relevant mental health services to assist the complainant.

Standard of explanation

40. The standard of explanation provided in the recording/disapplication letters varied widely. In three cases, no recording letter was sent out at all. Our assessment of the standard of the letters focused on three areas, which should all be present in a best practice decision letter:
- reference to the specific grounds being applied;
 - the grounds being explained or defined;
 - explanation of how the grounds applied to the particular complaint and circumstances.
41. In 41 per cent of cases where an incorrect decision had been made, there was no explanation in the letters supporting the grounds, even though this might have been detailed in a separate assessment form. Where the fanciful ground had been specified, there was either no or very limited further explanation supporting this ground. In one case, the fanciful ground was not specified in the recording letter but was detailed in an assessment document. In two other letters, the term 'wholly fanciful' was used. In talking to PSDs, it was clear they felt the term 'fanciful' was aggravating and has led to further complaints, which might account for the limited explanation in the letters. One PSD explained it was reluctant to use this ground because it is open to interpretation.
42. One PSD's letters were of an excellent standard, clearly written, with a customer service approach. Its letters showed the decision-maker understood the allegations and there was supporting explanation of the grounds being applied. The letters were also sensitively written, with consideration given to how the decision was phrased. This police service also had a very clear template paragraph, explaining the right of appeal to the Chief Constable:
- "...You have a right of appeal against this decision to the Chief Constable of this force..*
- The police (Complaints and Misconduct) Regulations 2012 allow the Chief Constable to delegate powers to other members of the force and therefore it is unlikely the appeal will be dealt with personally by the Chief Constable. Please note that any appeal you may lodge will not be considered by the Independent Police Complaints Commission, nor will they review the decision made by the Chief Constable or another officer appointed by him to deal with the appeal on his behalf..."*
43. In one PSD, there was an over reliance on the template letters. This meant that while certain combined grounds were specified (as set out in the legislation), they were not explained properly. The 'out of time' ground was given in two recording letters, despite this not being an exemption from recording a complaint.
44. The following template paragraph found in some recording letters was also a cause for concern because it wrongly gave the impression that this was the final stage in the process.
- "...However, I should point out that, in the event that I am directed to record your complaint, under Paragraph 7 of Schedule 3 to the Police Reform Act 2002 and*

Regulation 5 (a) of The Police (Complaints and Misconduct) Regulations 2012 I shall disapply the requirements of Schedule 3 of the Police Reform Act 2002. This means that your complaint would not have to be investigated and no further action would be taken....”

Training /guidance

45. All of the PSD assessors we spoke to were experienced, had been in the role for a period of time, and were familiar with the subjective grounds because they had applied for dispensations under the previous legislation. None of the PSD assessors had ever received training on making these decisions and had learned by experience.
46. Key points following discussion with PSDs:
 - a. Training and further guidance would be welcomed.
 - b. Further clarification is needed on when to apply the fanciful ground.
 - c. They felt the current statutory guidance was insufficient at explaining how to apply the grounds at the recording stage. Further guidance would be useful in explaining how some of the terminology from the previous complaint system should be applied to the new system.
 - d. Further clarification about applying the abuse of procedure ground would also be useful in the following scenarios:
 - i. complaints about personal issues relating to employment/pensions
 - ii. complaints about civil matters
 - iii. complaints about DPA/FOI requests for information
 - iv. complaints about speed/safety cameras
 - v. complaints about PSD officers tasked with addressing the original complaint
 - vi. complaints following matters heard in court or due to be heard in court
 - vii. complaints about crime recording decisions

Evaluation

47. The total number of relevant complaints from nine PSDs was 59, which is low. When considering the significance of the findings, this must be taken into consideration.
48. In just under half of the cases (46 per cent) either an incorrect decision was made (whether completely or in part) or we were unable to make a determination. The data did not support that this was because of discrimination. Instead, the cause was a lack of understanding of the grounds, how to apply them, and when they should be applied.
49. In 88 per cent of those cases determined as fanciful, this assessment was incorrect. Both the review of cases and the discussion with PSDs identified a concern about how the fanciful ground was being applied. This ground is

completely new and was not in the previous legislation. PSDs have commented that there is little guidance about when to apply this ground and one of the overriding concerns is that it is open to interpretation. A review of the cases suggests that this ground is not being applied correctly, primarily because the base assertion and not the complaint is being judged as fanciful. A clear message from PSDs is that they would like further guidance.

50. Our findings indicate that, for the majority of PSDs, concerns about the 'disapplication loophole' being used to avoid the IPCC overseeing cases were unfounded. Furthermore, in most cases PSDs welcomed the IPCC's feedback on cases to maintain high standards.

Further work

51. We will be publishing a regular Oversight Digest, to share guidance and advice as a result of our oversight work. One of the editions will deal with the subjective grounds for not recording or disapplying the legislation to complaints.
52. The nine PSDs subject to file sampling and analysis have been given individual recommendations.