

Ombudsman Complaints -Policies and Procedures Regarding Consent

(October 2016 Version)

Role of Ombudsman

Normally in examining complaints the Ombudsman seeks to determine whether the administrative actions of the body under examination have adversely affected an identifiable person and whether those actions amounted to maladministration. If this turns out to be the case the Ombudsman may recommend redress to remedy, mitigate or alter the adverse affect. In some cases the complaint is presented to the Ombudsman on behalf of complainants and in light of this the Office needs to encourage and facilitate such complaints with a consistent, straightforward and clear approach on the issue of consent while at the same time adhering to our obligations under Data Protection Acts. This reflects our aim to be as accessible as possible to all complainants.

In all cases it is a matter for the Ombudsman to decide on the merits of the case and, if warranted, what constitutes appropriate redress in any given case.

Examples of Complainants being Represented by Third Parties

Some common examples of situations where complainants have others present their complaints on their behalf are as follows:

Public Representatives acting on behalf of constituents;

Solicitors acting on behalf of clients;

Tax agents or accountants submitting revenue complaints on behalf of clients;

Teagasc Advisors/Planners submitting complaints on behalf of farmers;

Parents submitting complaints on behalf of their children;

Relatives of the complainant submitting complaints;

Next of kin submitting complaints in relation to deceased persons;

Relatives or others submitting complaints on behalf of a person who does not have the capacity to submit the complaint themselves.

Advocates (e.g. health advocates or Citizens Information advocates) acting for complainants. Under the Mental Health Act 2001 there is statutory provision for legal advocacy for people with mental illness. The Disability Act 2005 provides an entitlement to advocacy for persons with a disability while the Citizens Information Act 2007 provides for the establishment of a Personal Advocacy Service. There are a number of references in HIQA Standards to the role of advocacy and the need to make provision for service users to have access to independent advocates. In his Investigation Report *Learning to Get Better* the Ombudsman recommended that support should be given for the establishment of an independent advocacy service throughout the acute hospital sector. There are a number of NGOs such as Age Action and Sage which provide non-statutory advocacy services to particular groups of people.

Why is Consent an Issue of Concern?

We need to properly verify, where the person adversely affected has capacity to make the decision themselves, that he/she wants a third party to act on their behalf with the Office.

We need to be mindful that-

An unauthorised representative could possibly agree an outcome which is not to the satisfaction of the person adversely affected.

There is the possibility that the representative of the complainant may be receiving payment from the complainant whereas the services of this Office are free.

During the course of the examination of the complaint we may be processing personal data and we may be revealing private and confidential information about the person who was adversely affected to a third party in breach of the Data Protection Acts.

On occasion a representative may have the potential to derive financial benefit depending on the outcome of a complaint regarding the person who was adversely affected.

Procedures to be Followed by Caseworkers

1. If a complaint is submitted by a representative, either in person, in writing, on-line or by email with a form of consent attached with it indicating that the representative is authorised to act on behalf of the complainant the office should, nonetheless, follow the procedures as set out at 2 below and get the complainant to sign the office's version of the consent form.

2. Where the Representative has no apparent consent then he/she should be asked to provide full contact details for the complainant, unless already provided. The consent form should issue to the complainant directly and a deadline given for return of the form. The representative should be informed that the complaint examination process cannot proceed without the consent form being received and that we have requested same from the complainant. The representative should also be informed at this stage that, in the event of consent being granted, it may be deemed necessary during the complaint process for the Office to make direct contact with the complainant to obtain additional information, if appropriate.

3. If consent is received then the complaint process can proceed with the final decision letter being sent to the complainant with a copy to the representative. Upon initial receipt of the consent form from the complainant an acknowledgment of receipt should issue to the representative and the complainant.

4. The current policy in relation to the handling of complaints from public representatives (TDs, Senators and Councillors) will continue i.e. we do not require a consent form -we acknowledge complaint to the public representative and complainant; we engage directly with complainant and we copy any decision letter to the public representative at the same time as it issues to the complainant.

5. Complaints submitted by CICs will continue to be dealt with in line with current policy. We accept such complaints, deal directly with the complainant and inform the CIC and the complainant about the outcome.

6. Where a Residents' Association submits a complaint to this Office it may be signed by an individual member of the Association or sometimes by all of some of the members. This Office should channel all correspondence through one individual, normally the Secretary. As with any complaint we normally need to see evidence of adverse affect on an identifiable person or persons. In the context of

such complaints the evidence of consent for the complaint can be established by asking the association to provide written evidence of support for the complaint by the association e.g. minutes of a meeting where a motion has been put and agreed by the association or a written statement signed by members. As with any other complaint such complaints are dealt with on their own merits. However, caseworkers should be alert to the possibility that the outcome of such complaints may impact on local people other than members of the association and that there may not be a uniformity of opinion as to the outcome desired locally e.g. a complaint for or against local parking restrictions or a complaint about whether to extinguish a right of way or not.

The standard letters to issue to complainants and representatives under this consent policy are set out below.

Scenarios to be Aware of

A. It should not be assumed that the fact that a public body has examined a complaint from a representative that consent has already been granted. In any case if a complaint comes before the Ombudsman we must get specific consent in relation to the Ombudsman pursuing the case. If it becomes apparent that a reviewable agency has dealt with a representative on behalf of a complainant without consent we should point out to the reviewable agency that this was not appropriate.

B. If a representative suggests that the complainant does not have the capacity to give informed consent due to illness or disability the caseworker should discuss the matter with his/her line manager in order to decide if supporting evidence is required to sustain the claim e.g. evidence from a GP, a Public Health Nurse or the manager of an institution. It would be preferable that some form of independent evidence should be sought. Generally speaking, adults are presumed to be capable of making decisions unless the opposite has been demonstrated. No personal data should be shared with the representative unless strictly necessary.

C. If it becomes apparent that the complainant who is being represented is under 18 consider whether the matter is more appropriate for the Office of the Ombudsman for Children.

D. If the original decision is conveyed to the complainant who was adversely affected and a third party wishes to appeal the decision on their behalf then consent should also be obtained in such a case.

E. If the complaint is being made relating to a deceased person the caseworker needs to consider whether it is appropriate and practically possible to pursue the complaint. In some cases such complaints might possibly be refused e.g. a personal benefit or entitlement which was refused before the person became deceased and where no other person has entitlement to the refused benefit or entitlement. In other cases it may be appropriate to accept a complaint relating to a deceased person e.g. an estate has suffered loss as a result of an alleged improper decision by a reviewable agency.

F. Cases have arisen in the past with regard to complaints received from family members on behalf of deceased relatives (particularly in health and care cases) where it emerges that the views and claims of those submitting the complaint may differ from other members of the family and those other family members do not have cause for complaint. We should be particularly cautious in deciding whether to pursue such complaints and caseworkers are advised to consult their line manager in the event of such cases.

Notwithstanding the procedures recommended in this guideline document this does not preclude a caseworker deciding, in consultation with his/her line manager, that the need for consent should be set aside on the grounds of urgency e.g. a serious allegation is made that a very vulnerable person has or may come to harm due to the actions of a reviewable agency.

If a caseworker has any doubts about the validity of a consent form received it should be discussed with his/her Senior Investigator. Generally speaking, for a person's consent to be valid, the person must be: capable of taking that particular decision ("competent"); acting voluntarily (not under pressure or duress from anyone); provided with enough information to enable them to make the decision.

Note; The Assisted Decision-Making (Capacity) Act 2105, when commenced, will provide a rigorous statutory framework around the issue of consent. This policy document will have to be reviewed and updated following its commencement.

Letter 1 - To Rep (advising of procedure)

Dear [*Representative*]

I refer to your complaint to this Office on behalf of Mr/Ms XXX about [*Public Service Provider*] regarding [*brief description of complaint*].

The Office of the Ombudsman provides an impartial, independent and free service to its complainants. We usually deal directly with complainants in considering their complaints, however, we are also happy to work with representatives where this is the preferred option of the complainant. In this regard, and in accordance with our Consent Policy, we have today written to Mr/Ms XXX and requested [*him/her*] to provide us with [*his/her*] written consent for you to represent [*him/her*], and for us to correspond directly you in the matter. Enclosed for your information is a copy of the consent form that was sent to Mr/Ms XXX.

We will contact you again when we receive the completed and signed consent form from Mr/Ms XXX confirming that [*he/she*] has consented to you representing [*him/her*] in this matter. I should point out however, that if the completed and signed consent form is not returned to this Office, or if Mr/Ms XXX otherwise indicates that it is not [*his/her*] wish for you to represent [*him/her*], we will inform you accordingly.

We will be in touch with you again as soon as possible with a further update.

Yours sincerely

Caseworker

Letter 2 - To Rep. (seeking contact details of complainants)

Dear [*Representative*]

I refer to your complaint to this Office on behalf of Mr/Ms XXX about [*Public Service Provider*] regarding [*brief description of complaint*].

The Office of the Ombudsman provides an impartial, independent and free service to its complainants. We usually deal directly with complainants in considering their complaints, however, we are also happy to work with representatives where this is the preferred option of the complainant. In this regard, and in accordance with our Consent Policy, it will be necessary for us to write to Mr/Ms XXX to requested [*him/her*] to provide us with [*his/her*] written consent for you to represent [*him/her*], and for us to correspond directly you in the matter. Unfortunately, you have not provided us with Mr/Ms XXX's contact details to enable us to write to [*him/her*]. I would be grateful therefore, if you would send me Mr/Ms XXX's postal address and/or e-mail address so that we may contact [*him/her*] directly in this regard. A pre-paid envelope is enclosed for your reply.

We will contact you again when we receive the completed and signed consent form from Mr/Ms XXX confirming that [*he/she*] has consented to you representing [*him/her*] in this matter. I should point out however, that if the completed and signed consent form is not returned to this Office, or if Mr/Ms XXX otherwise indicates that it is not [*his/her*] wish for you to represent [*him/her*], we will inform you accordingly and an investigation of the complaint will not be initiated.

We will be in touch with you again as soon as possible with a further update.

Yours sincerely

Caseworker

Letter 3 - To Complainants (enclosing Consent Form and advising of procedure)

Dear Mr/Ms XXX

This Office has been contacted on your behalf by [*Representative*] regarding your complaint about [*Public Service Provider*] regarding [*brief description of complaint*].

The Office of the Ombudsman provides an impartial, independent and free service to its complainants. We usually deal directly with complainants (in this case you) in considering their complaints, however, we are also happy to work with representatives where this is the preferred option of the complainant. In this regard, and in accordance with our Consent Policy, before we commence any investigation of your complaint, it will be necessary for you to provide us with your written consent for [*Representative*] to represent you, and for us to correspond directly [*him/her*] in the matter.

If it is your wish for [*Representative*] to represent you in relation to your complaint about [*Public Service Provider*], please complete and sign the enclosed consent form and return it to us in the enclosed pre-paid envelope by [*give 2 weeks*]. When we receive the completed and signed consent form from you we will contact [*Representative*] confirming that you have consented to [*him/her*] representing you in this matter. I should point out however, that if you do not return the completed and signed consent form to this Office, or if you otherwise indicate that it is not your wish for [*Representative*] to represent you, we will inform [*him/her*] accordingly and an investigation of the complaint will not be initiated.

If you would like to discuss anything in this letter further, I can be contacted by telephone on [01 649 56XX] or by e-mail at XXXX@ombudsman.ie.

Yours sincerely

Caseworker

Letter 4 - To Complainants (ack receipt of Consent Form)

Dear Mr/Ms XXX,

I wish to acknowledge receipt of your completed Consent Form which confirms your consent for [*Representative*] to represent you in relation to your complaint to this Office about [*Public Service Provider*]. We will now inform [*Representative*] that we have received your consent for [him/her] to represent you, and for us to correspond with [him/her] in this matter. Your complaint will now be assigned a caseworker and our investigation will commence shortly.

We will write to you again when our investigation of the complaint has been completed, to advise you of the outcome.

Yours sincerely

Caseworker

Letter 5 - To Rep. (to advise that Consent Form has been returned by complainant)

Dear [*Representative*]

I refer again to your complaint to this Office on behalf of Mr/Ms XXX about [*Public Service Provider*] regarding [*brief description of complaint*].

This Office previously informed you that we required Mr/Mrs XXX's written consent for you to be [*his/her*] representative in relation to this matter, and that we had written to [*him/her*] directly in this regard. I am writing to you now to confirm that Mr/Mrs XXX's has provided [*his/her*] consent and to inform you that the complaint will now be assigned a caseworker and our investigation will commence shortly.

We will be in touch with you again shortly.

Yours sincerely

Case Worker

Letter 6 - To Rep. (to advise that Consent Form has not been returned by complainant)

Dear [*Representative*]

I refer again to your complaint to this Office on behalf of Mr/Ms XXX about [*Public Service Provider*] regarding [*brief description of complaint*].

This Office previously informed you that we required Mr/Mrs XXX's written consent for you to be [*his/her*] representative in relation to this matter, and that we had written to [*him/her*] directly in this regard. I am writing to you now to inform you that, having been in contact with Mr/Mrs XXX, [*he/she*] has not given [*his/her*] consent for you to represent [*him/her*] in relation to a complaint about [*Public Service Provider*] and, accordingly, this Office will not be initiating an investigation of the complaint.

Yours sincerely

Case Worker

OFFICE OF THE OMBUDSMAN

Consent Form

I, _____ [Block Capitals] hereby give my consent/authority for XXX to act on my behalf regarding my complaint to the Ombudsman against YYY regarding ZZZ.

I am aware that the Ombudsman provides a free service.

I understand that in granting this consent I am giving my representative full responsibility to deal with the Ombudsman's Office in relation to the processing of this particular complaint, unless otherwise notified by me in writing to the Office of the Ombudsman.

I understand that, for the purpose of the examination of my complaint against YYY, it may be necessary for the Office of the Ombudsman to :

- access and retain relevant personal information about me which is held by YYY and/or by third parties
- share such relevant personal information with XXX and/or with relevant third parties

(relevant personal information may include financial or medical information, as appropriate)

I understand that, notwithstanding the fact that I consent/authorise XXX to act on my behalf regarding my complaint to the Ombudsman, it may be necessary for the Office of the Ombudsman to contact me directly in relation to the matter if that Office considers it appropriate or necessary to do so for the purposes of its examination of my complaint.

I also understand that, in order to fully address my complaint about YYY on completion of the examination of same, it may be necessary for the Office of the Ombudsman to share relevant personal information with my representative, XXX.

Name (Block Capitals) _____

Address _____

Phone _____

Email _____

Normal Signature _____

Date _____