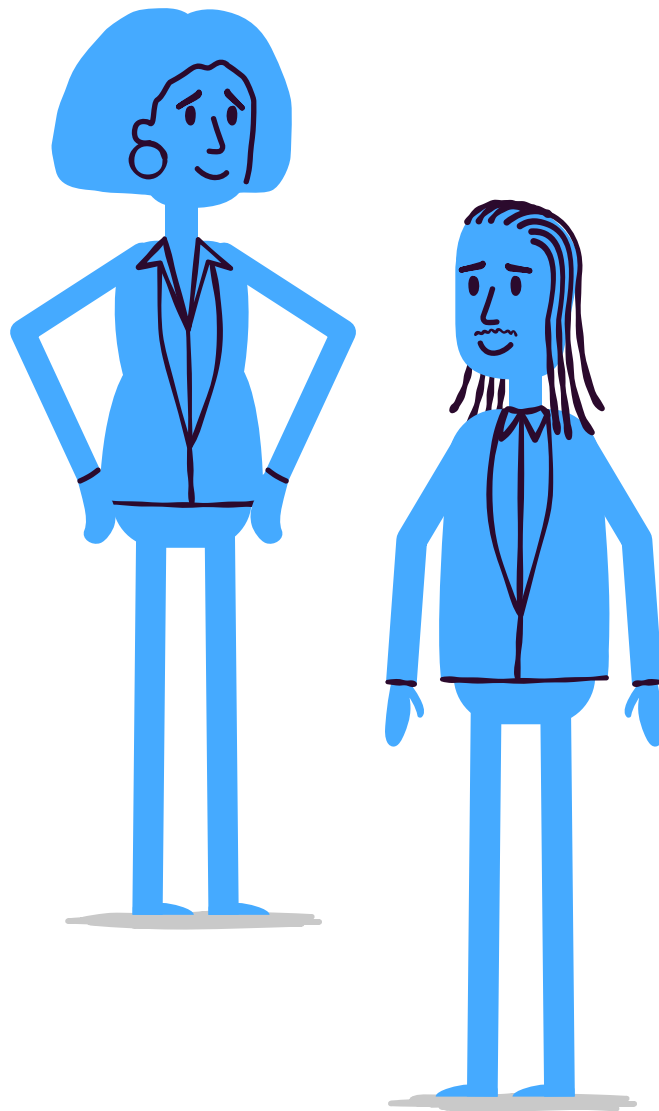
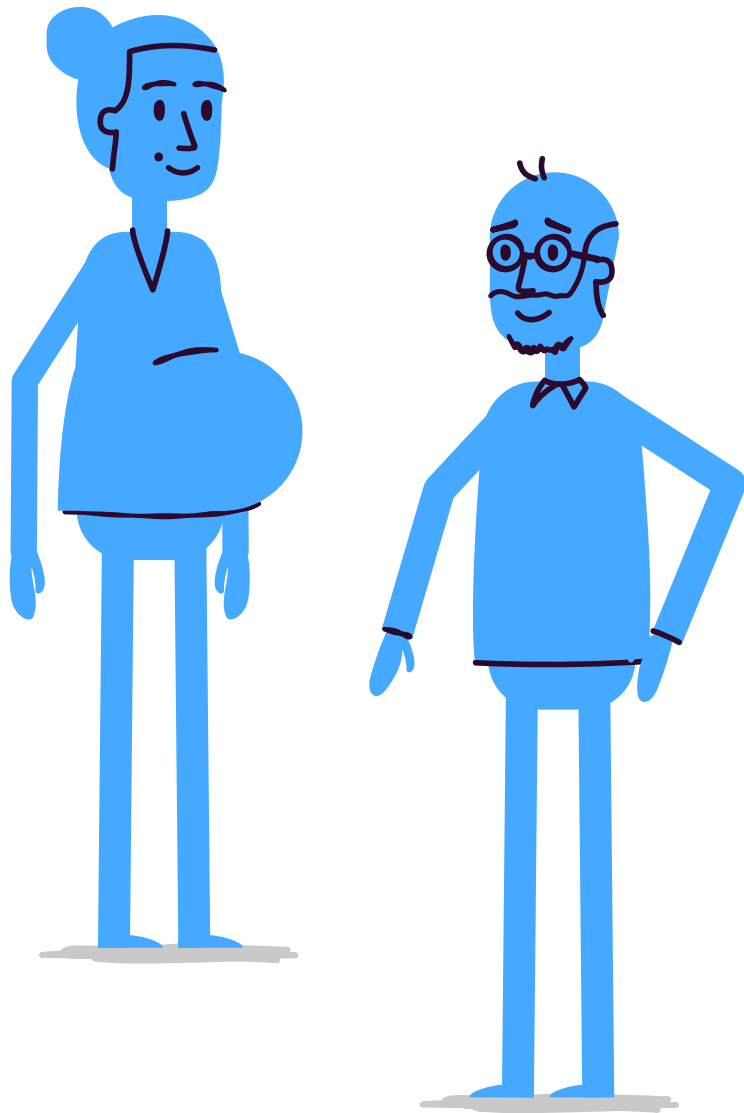


# Who can make a complaint and what consent do you need?



# Contents

Welcome to this guide	3
What standards and regulations are relevant to this guide?	4
What you need to do	6



# Welcome to this guide

This guide is one of the Good Complaint Handling series. These are designed to help you meet the NHS Complaint Standards.

The guide explains who can make a complaint, including:

- who can make a complaint, and who can be a representative
- when consent is needed and how to get it
- what to do when you do not have consent
- how to handle complaints about a child or an adult who cannot provide consent
- how to handle complaints when there is no right of access to personal information
- the need to maintain confidentiality.

Read this guide alongside the [Model complaint handling procedure](#). You can find guides on related topics on our [website](#).

# What standards and regulations are relevant to this guide?

- **The Complaints Standards** set out expectations to help you deliver good complaint handling in your organisation.
- The [Local Authority Social Services and National Health Service Complaints \(England\) Regulations 2009](#) set out what the law says you must do.
- The Information Commissioner's Office website sets out how to manage consent.

What the Complaint Standards say:

## **Promoting a just and learning culture**

- Senior staff make sure staff are supported and trained in all aspects of dealing with complaints, from identifying a complaint to issuing a response, so that they meet the expectations set out in the Complaint Standards. This should include how to manage challenging conversations and behaviour.

## **Welcoming complaints in a positive way**

- Organisations clearly publicise how people can raise complaints in a range of ways that suits them and meets their specific needs. They make it easy for everybody to understand how the process works. This includes being clear about who can make a complaint and what will happen next.
- Organisations make sure people know how to get advice and support when they make a complaint. This includes giving details of appropriate independent complaints advocacy and advice providers, any Patient Advice and Liaison service (PALs), and other support networks.
- Organisations regularly promote their wish to hear from their service users and show how they use learning from all feedback (including complaints) to improve services.

What the Local Authority Social Services and National Health Service Complaints (England) Regulations 2009 say

These regulations set out who can make a complaint (in section 5):

1. A complaint may be made by
  - a. a person who receives or has received services from a responsible body; or
  - b. a person who is affected, or likely to be affected, by the action, omission or decision of the responsible body which is the subject of the complaint.

2. A complaint may be made by a person (in this regulation, referred to as a representative) acting on behalf of a person mentioned in paragraph (1) who:
  - a. has died
  - b. is a child
  - c. is unable to make the complaint themselves because of — (i) physical incapacity; (ii) lack of capacity within the meaning of the Mental Capacity Act 2005(a); or (d) has requested the representative to act on their behalf.
3. Where a representative makes a complaint on behalf of a child, the responsible body to which the complaint is made:
  - a. must not consider the complaint unless it is satisfied that there are reasonable grounds for the complaint being made by a representative instead of the child; and
  - b. if it is not so satisfied, [it] must notify the representative in writing, and state the reason for its decision.
4. This paragraph applies where—
  - a. a representative makes a complaint on behalf of—
    - (i) a child; or
    - (ii) a person who lacks capacity within the meaning of the Mental Capacity Act 2005; and
  - b. the responsible body to which the complaint is made is satisfied that the representative is not conducting the complaint in the best interests of the person on whose behalf the complaint is made.
5. Where paragraph (4) applies—
  - a. the complaint must not be considered or further considered under these Regulations; and
  - b. the responsible body must notify the representative in writing and state the reason for its decision.
6. In these Regulations any reference to a complainant includes a reference to a representative.

### **What the Information Commissioner's Office says**

The Information Commissioner's Office refers to Article 4(11) of [Regulation \(EU\) 2016/679 \(United Kingdom General Data Protection Regulation\)](#), which defines consent as:

Any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.



**Tip:** If you are dealing with a complex situation and are not sure what to do, contact your organisation's legal or information rights team or the [Information Commissioner's Office \(ICO\)](#) for advice.

---

# What you need to do

Which steps you take depends on the situation:

If the person complaining has been directly affected

Most complaints are made by the person who received the care or service they are complaining about, or who has been affected by a decision made by your organisation.



When you receive the complaint, the first step is to explain to them what you will do to look into their complaint. As part of that, you need to explain that you will need to look at any relevant personal information, such as their medical records, and other relevant records. Get their written consent to do this and keep this in the case records.



Explain that other relevant people inside (and potentially outside) your organisation may need to see this information as part of your investigation and response to their complaint. See the sample consent forms.

If the person is complaining on behalf of someone else

If the person directly affected does not want to complain themselves, they can ask someone else to complain on their behalf. This representative will then act on their behalf throughout the process.

A representative can be anyone. There is no restriction on who can act as a representative. It might be:

- a family member
- a friend
- an advocate
- a legal representative
- an MP or local councillor
- someone else.



If the person is using a representative, you need to follow confidentiality and data protection laws. The person needs to authorise the representative to act on their behalf. They must also authorise you to discuss their complaint and share their personal information with the representative. See Sample consent forms [insert numbers].



If the person affected does not consent to you discussing the complaint with their representative, you need to consider whether there are any issues in the complaint that relate to the representative. If there are, you can consider those issues because the representative will then be making the complaint on their own behalf.



Explain to the person that you can investigate only the issues that directly affect them. Without the consent of the other person involved, you will not be able to investigate any matters relating to them or share personal information about them. This may leave some of the person's concerns unanswered.

### **If the person complaining is a child, or is representing a child**

If the child has sufficient maturity and understanding, they can either make the complaint themselves or consent to a representative making the complaint on their behalf.



If a child wants to make a complaint and you judge that they do not have sufficient understanding of what is involved, someone with parental responsibility can make a complaint on their behalf. In these circumstances, you do not need consent from the child, nor from the other parent or guardian.



Explain the process to the child in a way that they can understand, as far as possible. This includes telling them that you may need to share information from their medical records – and sometimes, other relevant records – with the people looking into the complaint and with their representative.

### **If the person complaining is representing an adult who cannot give consent**

If the person affected does not have the capacity to consent to the complaint being made on their behalf, you need to:



Check whether the representative has a legitimate interest in the person's welfare.



Assess whether there is a conflict of interest.



Find out if the representative has a right to access the person's personal information (see the Tip below/or where?). For example, are they an attorney with authority to manage the person's property and affairs? Have they been appointed by the Courts to make these decisions? If not, you need to establish right of access.



When you have the information about the right of access to relevant personal information, add this to your records.



Even if you're mostly dealing with the representative, you also need to update the person themselves about any investigation, where possible.



**Tip:** The representative's right to access personal information will usually have been considered during the period of care complained about. The person raising the complaint is likely to have been involved in discussions and decisions about care.

---

Here's a sample [provide link]

---



**Find out more:** See the Information Commissioner's guide [Who can access personal data?](#)

---

### **If a complaint is made on behalf of someone after their death**

Your duty of confidentiality to your patients and service users continues after their death.

If the person has died, their 'personal representative' or the legal executor of their estate will control access to any personal information, including clinical records.\* However, if anyone has a potential claim arising out of their death, such as family and friends named in the will, they too may be entitled to access the person's information.\*\*

\*Source: Case law relating to [Article 8 of the ECHR](#)

\*\*Source: The Access to Health Records Act 1990



Add the right of access to the relevant personal information to your case records.



If the person complaining is not the 'personal representative', executor or someone with legal access to their records, investigate the complaint and report back without releasing confidential personal information.

Here's an example

---



**Find out more:** See If the person complaining does not have access to personal information [link to para below if needed]

---



## **If the person complaining does not have access to personal information.**

There are no restrictions in the regulations on who can complain. But if the representative does not have right of access to personal information, there are some restrictions on the type of information you can share when you respond to a complaint.



At the start of the process, explain the situation to the representative. Say that you can investigate the matter, but that there will probably be a limit to the amount of information that you can share during the investigation. Explain that this may also limit what you can include in the response and this may leave some of their concerns unanswered.





Ask the person complaining if there is someone who does have right of access to the person's information who could make the complaint instead. If so, that person could appoint the original person complaining to continue progressing the complaint on their behalf.



If there is no one with right of access, ask if the person would still like you to continue with the investigation.




### **If the representative may not be acting in the person's best interests**

If you believe a representative is not acting in the best interests of the person affected, think about whether to halt work on the complaint. If you choose this option, you need to do two things:

-  Share your reasons with the representative in writing.
-  Tell them that if they are unhappy with your decision, they can complain to the Parliamentary and Health Service Ombudsman.

### **Confidentiality of complaints**

NHS organisations have a duty of confidentiality towards patients. For you, this means:

-  Only collect information from, and disclose it to, staff who are involved in considering the complaint.
-  Make sure all documents relating to an investigation are securely stored and kept separately from clinical and other patient records.
-  Make sure complaint records are accessible only to staff involved in the investigation.

However, complaints provide valuable learning, so you can anonymise and share them within your organisation. You can also publish them to demonstrate service improvement as long as it is not possible to identify the individuals involved from the information shared.

### See some examples

**Sample form 1** Consent for patient or service user making their own complaint

**Sample form 2** Consent for a representative to act on someone's behalf

**Sample form 3** Consent for complaints against multiple organisations (including health and social care)

**Sample form 4** Consent for an advocate\* to act on behalf of someone

**Sample form 5** Easy Read consent

**Sample form 6** Right to access information when the person cannot provide consent

\*Anyone who makes a complaint to the NHS is entitled to an independent complaints advocate. See [link to our relevant guide]



### Find out more

- Information Commissioner's Office GDPR Guide [Who can access personal data](#)
- The Information Commissioner's Office guide on: [What is valid consent?](#)
- BMA Guidance for health professionals May 2018: Access to Health Records <https://www.bma.org.uk/media/1868/bma-access-to-health-records-nov-19.pdf>
- Rethink factsheet: Complaints about the NHS or social services <https://www.rethink.org/advice-and-information/rights-restrictions/rights-and-restrictions/complaints-about-the-nhs-or-social-services/>
- Easy read factsheet: How information about you is shared with your family <https://www.nhs.uk/NHSEngland/AboutNHSservices/mental-health-services-explained/Documents/easy-read/MH-CoP-Sharing-my-Info-with-family.pdf>

If you would like this document in a different format, such as Daisy or large print, please contact us.

**Let's make  
complaints  
count!**

