

# Who is a suitable complainant?

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## The legislation

Sections 9(1) to 9(3) of the HSC Act 1993 and section 6(2) of the PC Act 1967 says that a complaint "shall not" be entertained by the Ombudsman unless it is made by the aggrieved himself. The only exception to that rule is where the aggrieved has died or is "for any reason unable to act for himself". In those circumstances, a complaint may be made by the aggrieved's personal representative (the executor of his will, or the administrator of his estate if there was no will) a member of his family or some body (HSC only) or individual suitable to represent him.

### **HSCA s.9(1) to 9(3)**      **"Requirements to be complied with.**

- (1) The following requirements apply in relation to a complaint made to the Commissioner.*
- (2) A complaint must be made in writing.*
- (3) The complaint shall not be entertained unless it is made -*
  - (a) by the person aggrieved, or*
  - (b) where the person by whom a complaint might have been made has died or is for any reason unable to act for himself, by –*
    - (i) his personal representative,*
    - (ii) a member of his family, or*
    - (iii) some body or individual suitable to represent him."*

### **PCA s.6(2)**      **"Provisions relating to complaints.**

*(2) Where the person by whom a complaint might have been made under the foregoing provisions of this Act has died or is for any reason unable to act for himself, the complaint may be made by his personal representative or by a member of his family or other individual suitable to represent him; but except as aforesaid a complaint shall not be entertained under this Act unless made by the person aggrieved himself."*

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## When does the issue of suitability arise?

The issue of whether someone is a suitable complainant only arises when the aggrieved is incapable of bringing his/her own complaint. If the aggrieved is adult, mentally competent and not otherwise unable for whatever reason to complain for themselves (for example not lost in the caves of Borneo, in prison in South America or otherwise physically incapable of communication) then they are the complainant and we CANNOT take a complaint on their behalf from anyone else.

If someone claims to be making a complaint on behalf of someone who is said to be unable to complain, we need to be reasonably satisfied that this is the case. We should generally ask for some independent evidence that the aggrieved is incapable, e.g. medical reports.

If there is a dispute about whether the aggrieved is capable, we may need to seek additional information by looking at the medical records (we do not need consent and in these circumstances obtaining it may be problematic) and/or by getting our own advice from an IPA/EPA. We may need to visit the aggrieved.

The competence of children does not rely on age alone, but on maturity. As a rule of thumb, a child over the age of 16 should be treated as competent unless there is evidence to the contrary, but younger teenagers may also be capable of making these decisions themselves.

Only when we are satisfied that the aggrieved is incapable of acting on his own behalf do we look at the suitability of the complainant.

### How do we determine suitability?

Suitability is a decision for us to reach on reasonable grounds. Generally, evidence of a conflict of interest or potential conflict of interest between the aggrieved and the complainant indicates that the complainant may not be suitable, for example:

- Parent accused of child abuse complaining about actions of the Trust in child protection matters where the aim is to have the child returned
- Relative challenging action by Trust in respect of vulnerable adult where the relative (or another close relative) has been accused of financial abuse

There may be lots of other reasons for lack of suitability; this will vary from case to case. It is not of itself a legal issue, but one based on individual facts.

### What if the complainant is not "suitable"?

If we do not consider the complainant to be suitable, we might wish to suggest they find someone more neutral (e.g. social worker, or ICAS representative) to bring the complaint.

### What if the aggrieved wishes to be represented?

If the aggrieved is competent to make his own complaint but wishes someone else to represent him in that endeavour, the aggrieved remains the complainant but has a representative. We would need confirmation from the aggrieved (in writing or otherwise) that he consents to the representative acting for him.

The representative does not need to be a "professional" (e.g. lawyer, accountant, or ICAS rep) but could be a member of the family, a friend or anyone the complainant appoints.

Note that technically the complaint must be made by the aggrieved (not by the representative). However, in practice, we accept a complaint from a representative with concurrent or subsequent written confirmation from the aggrieved that he supports the complaint.

Once the complaint has been made by the aggrieved, we can deal directly with the representative throughout if that is what the complainant wants (including sending the representative the report).

By virtue of s.11(3)(b) HSCA & PCA we can determine whether the complainant may be represented in an investigation (and by whom), so if we have reasonable grounds to object to a representative we can refuse to accept them (see above on determining suitability).

### Further reading

- Legal Briefing Note "When may someone complain for or represent someone else?"
- Casework Guidance (Assessment): section 2.5.11- 2.5.18 [**NB:** *this reference likely to have changed – need to check with Neil Armstrong.*]