

## When may someone complain for or represent someone else?

The appropriate sections in our legislation are:

- Parliamentary Commissioner Act 1967 - sections 6(2) and 7(2); and
  - Health Service Commissioners Act 1993 - sections 9(3) and 11(3)(b).
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### The legislation

#### Parliamentary Commissioner Act 1967, section 6(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."*

See below about section 7(2).

#### Health Service Commissioners Act 1993, section 9(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. "*

See below about section 11(3)(b).

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### What is the aim of these subsections?

The *1966 Notes on Clauses*, prepared for Ministers while the 1967 Act was a Bill, say this: "The general intention behind the provisions of this sub-section is to ensure that complaints are handled so far as possible in a personal and informal way, as befits an institution intended mainly to deal simply, directly and flexibly with private individuals' complaints. Legal representation is not ruled out . . . [referring to section 7(2)], but the Bill envisages it as exceptional."

That is a fair summary and applies as much to the section in the 1993 Act as to that in the 1967 Act.

## How do these provisions relate to representation by solicitors and others?

These provisions deal with who can make a complaint, rather than whether people can choose to be represented. Someone who is able to act for themselves can always choose to bring a complaint but authorise someone (such as a solicitor) to represent them for all or part of the process. That is dealt with in s.7(2) of the 1967 Act and s.11(3)(b) of the 1993 Act, (see Do the Acts contain any other provisions about representation for complaints? below). So if someone writes to complain for someone else, we must consider whether the writer is a complainant or a representative. If the writer is a representative acting on the aggrieved person's instructions, then for the purpose of s.6(2) PCA/s.9(3) HSCA the aggrieved person is making the complaint themselves and is the complainant, but wishes to be represented.

## How do we decide whether someone is unable to act for themselves?

Someone may be "unable to act" for themselves because of mental incapacity or physical incapacity. There may be other circumstances such as where someone is unreachable though perhaps alive. It is for the Ombudsman to decide whether a complaint is properly made.<sup>1</sup> In deciding whether to accept that the aggrieved person is unable to act for themselves, we must decide also what evidence to require. On both matters, there will usually be some discretion about the matter. See the Office guidance on the use of the Ombudsman's discretion.

For instance, the Acts do not require proof that the aggrieved cannot act for themselves. In the ordinary course, we take much on trust.<sup>2</sup> But we are entitled to ask for such evidence as we reasonably believe we need. We may need to take particular care if we have seen no evidence that the aggrieved person is unable to act for themselves, or if there is any other reason to be worried.<sup>3</sup>

Bear in mind that people may be incapable in some areas of their life but capable in others. Legal questions often arise in this area. **Seek advice** from the Legal team if unsure about such matters as the legal significance of the evidence which has been presented.

If we decide that we need evidence besides the report or opinion of the person complaining, inquiries to help us decide whether or not to investigate are within the definition of "for the purposes of an investigation". We have our normal investigation powers there (see Briefing Note on the Statutory Bar) - that could include seeking evidence from a relevant clinician confirming the position.

## What happens if we accept that the aggrieved is dead or unable to act?

We need to decide whether the complainant is fit to act instead. Here:

- A personal representative is a person responsible for administering the estate of a dead person, and, in England and Wales, is known as an *executor* if named in the will, or an *administrator* if appointed by the courts.<sup>4</sup> The executor or administrator can act in that capacity only after the aggrieved's death.<sup>5</sup>
- A member of the aggrieved's family can include any family member (not necessarily the "next of kin", a term which is often used but has no legal significance). "Family" is not defined in our Acts and the Ombudsman may adopt a broad reading of the term. No member of the family has a greater right to act, or a veto over another.
- Some other individual suitable to represent the aggrieved is a catch all category open to the Ombudsman's discretion, which must be exercised reasonably. Also, it can mean more than one individual. The 1993 Act adds "or body", which can include unincorporated bodies as well as corporate ones.

- For someone who has a power of attorney for the aggrieved person, see the Briefing Note on Powers of Attorney.

The decision whether someone else is fit to act instead is left to the Ombudsman, and is largely a matter of discretion. Again, it is for the Ombudsman to decide whether a complaint is properly made, and to decide what evidence to require. We may need to take particular care if one of these applies:

- There is any sign that there might be a conflict of interest between the aggrieved person and the person complaining - for instance that the complainant may not be acting in the best interests of the aggrieved person.
- Allowing the person to complain might give him access to confidential information about the aggrieved person which he should not have. (This may be a particular worry in health service cases.)

### **What happens if someone complains for a corporate body such as a company, or for a group of people?**

There are various situations, but sometimes it will be wrong to see that as a complainant complaining for another party. Thus, if a company complains through one of its officers such as the company secretary or managing director,<sup>6</sup> it might be best to see that as the company complaining for itself.

### **Are there other legal restrictions on who may complain for an aggrieved person?**

Yes. For example, if someone from the social services department of a Council complains for one of their clients under the 1967 Act, we cannot take the social service department as the complainant (see Briefing Note on Who may bring their own grievance to us?); but we can take the individual member of staff as the complainant. Or we could treat the member of staff as representing the client under s.7(2) PCA: see below. Either way, we still have a discretion whether to accept the member of staff as acting in that capacity.

### **What happens if we accept a complaint from someone on their own behalf, and we are later told that they have died or can no longer represent themselves?**

The above subsections deal mainly with making a complaint to us. There is nothing explicit in either Act about what happens if things change later. Also, what need is there for someone to act as *complainant* for an aggrieved person after we have decided to investigate a complaint? We have power to call for evidence from anyone we consider may be able to give it, and it is for us to decide how to run an investigation. We now normally give the complainant a chance to comment on a draft report. But that is not a requirement of the legislation, and it is for us to decide what to do if (say) the complainant has died.<sup>7</sup> For instance, the Ombudsman may or may not decide to discontinue an investigation: see the guidance in Casework Bulletin, Issue 3, August 2006 (PDF) on "Discontinuing investigations".

If told that the aggrieved person has died or become incapable, we might wish to call for evidence of that. We might wish also to consider whether another is fit to act for them. (In both cases see above How do we decide whether someone is unable to act for themselves?) But we should also consider how far any representative is needed. We may be able to rely on the wider law on who can step into their shoes or represent them for this purpose or that. (Where someone is representing the aggrieved person it does not follow that we must or should give personal information about them to that representative. If in doubt seek legal advice.)

It may be better to consider whether the aggrieved needs to be represented under s.7(2) PCA / s.11(3)(b) HSCA (see below), than try to insert a "complainant" under one of the above subsections.

**What happens if we accept a complaint from someone on behalf of an aggrieved, and the complainant dies, can no longer act, or wishes to hand on to someone else?**

Again, there is nothing explicit in the Acts. Some of the same considerations apply, save that we are interested in who can reasonably and properly represent the aggrieved person, not the complainant. That is, so far as there is any need for that once an investigation has started.

But those considerations may have little bearing where the aggrieved is a body such as a company, and its officer who put the complaint is replaced. Here, there may be little for us to do beyond deciding what evidence we may need of the change of authorised officer.

One situation is a change in the individuals pursuing a complaint for a group of residents. There, depending on the circumstances, it might be reasonable merely to confirm with the old and new complainants that that is what they wish. However, if in doubt about the possible legal implications, in that or other situations, **seek advice** from the Legal team.

**Do the Acts contain any other provisions about who may complain and, if so, how do they relate to the above sections?**

Yes. Please see the Briefing Note on Who may complain to us from abroad?

**Do the Acts contain any other provisions about representation for complaints?**

Yes. There is s.7(2) of the 1967 Act:

*" ... and [the Commissioner] may determine whether any person may be represented, by counsel or solicitor or otherwise, in the investigation. "*

And there is s.11(3)(b) of the 1993 Act:

*" [the Commissioner] may determine whether any person may be represented, by counsel or solicitor or otherwise, in the investigation. "*

**What is the aim of these subsections?**

One aim is to allow legal representation, although it was envisaged that that would be unusual (see above What is the aim of these subsections?). The *1966 Notes on Clauses* say "But in some cases, for instance, major matters between a company and a department, it might well be appropriate." The aggrieved seldom wish to have such representation, and it is up to the Ombudsman to decide, under her discretion, whether to allow it. (It might, for instance, cause delay or extra costs.) Where she does allow it, she may choose to limit its scope. (Thus, if we interview the aggrieved person, we may wish to interview them on their own and not accompanied by a lawyer.)

Where we allow representation, we may, if we think fit, pay expenses and limited allowances (s.7(3) PCA and s.11(4) HSCA) but we are not obliged to do so and (subject to any internal guidance that may be produced) do not normally do so; nor have we usually recommended that the body complained about should pay such costs. This may need to be made clear to complainants.

These provisions allow also other kinds of representation. The same *Notes on Clauses* say that such a provision enables the Ombudsman to allow lay representation, "for example, the grown-up son to act for his mother when she is handicapped by inexperience or lack of education". Likewise, it enables us to allow a vulnerable person to be represented by someone such as a member of the social services department of the local council. Again, that is at our discretion, and there may be reasons to refuse to allow it. Again, we have the same discretion over costs and expenses.

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## Footnotes

- <sup>1</sup> See section 5(5) in the 1967 Act and section 3(3) of the 1993 Act.
- <sup>2</sup> For instance, we seldom try to check the identity of those who complain to us.
- <sup>3</sup> Some of the same points may arise over whether to accept that the aggrieved person has died.
- <sup>4</sup> Much the same applies in Northern Ireland, under somewhat different law. In Scotland an executor needs to be confirmed or appointed by the Sheriff Court; an executor named in the will is known as an *executor-nominate*, and one appointed by the court as an *executor-dative*. (However, sometimes the Sheriff's Court may appoint a *judicial factor*, whose role is more like that of an attorney. Also note that in Scotland, unlike in England and Wales, the law grants specific rights to certain survivors, whatever the wishes of the deceased person might be.) **Please ask** the Legal team if you need advice on the position in Scotland or Northern Ireland.
- <sup>5</sup> In England and Wales, the probate court will generally grant probate, or letters of administration, to the personal representatives. In those cases, a copy of the grant will confirm both the death and the appointment of the personal representatives. (But note that a later grant can replace an earlier grant.) However, where the estate is small and includes no land, the executors of a will usually do not need a grant of probate from the court; in those cases a copy of the will and a copy of the death certificate would be evidence. (But note again that a later will can replace an earlier.)
- <sup>6</sup> A company could complain through any officer or member of staff. Whether and when to ask for evidence that someone has authority to act for the company in the matter is left to the Ombudsman's discretion. However, the more junior the officer, the more likely we are to wish to see some such evidence.
- <sup>7</sup> Section 14 of the 1993 Act requires us to send a copy of the report, or a statement of the reasons for not investigating, to "the person who made the complaint". That does not entail that we should send it to a dead person, say; nor to someone by then represented by someone else. Sometimes, that duty may even be impossible to fulfil. If in doubt about the legal considerations, please ask the legal section for advice.

Content created: 2008

Content last reviewed: May 2013

Content owner: Legal Adviser