



Ombudsman

Human Rights: A guide for
Ombudsman staff when
investigating complaints



Ombudsman

2023 Office of the Ombudsman

Office of the Ombudsman
6 Earlsfort Terrace, Dublin 2, D02 W773.

Tel: 01 639 5600

Website: www.ombudsman.ie

Twitter: @OfficeOmbudsman



Ombudsman

**Human Rights: A guide for
Ombudsman staff when
investigating complaints**



Foreword

We all avail of public services at various stages of our lives. Public service bodies deliver a wide range of essential functions, such as education, healthcare, social welfare and much more. How public services are provided can greatly impact on our well-being and quality of life.

All public service providers are required to adopt a human rights based approach to the delivery of their services, in line with their public sector duty. This is not just a legal obligation but a moral imperative also. But what does this mean in practice? It means respecting the human rights of every individual seeking or accessing public services and treating everyone with respect and dignity. It means treating people as you would expect and wish to be treated, or as you would want your parents, siblings, children or friends to be treated.

Recognition and respect for the inherent dignity and worth of every individual, regardless of their background, identity and circumstances, lies at the heart of a human rights based approach.

By treating people with respect and dignity, public services providers can break down barriers and ensure that marginalised and vulnerable people are not excluded. Treating people with respect fosters trust between the person and the service provider. It is simply the right thing to do.

The benefits of respecting peoples' human rights and treating people with respect and dignity when delivering public services goes way beyond the benefit to each individual concerned. By recognising the inherent worth of each person and upholding their rights, Ireland can be a more inclusive, fair and just society. Public services that deliver their services informed by a human rights based approach can transform lives and create a more equitable society for all.

It is therefore essential for all public service providers to embed human rights into the design, implementation, and evaluation of the services they deliver. All public servants should be aware of and trained in the importance of a human rights based approach to the delivery of services.

We, in the Office of the Ombudsman, are committed to respecting the rights and dignity of every individual we serve. More than that, we believe we have an important role to play in ensuring that the broader public service lives up to its human rights obligations. We will contribute to achieving this by making human rights an integral part of our investigation of complaints about public bodies.

It is for this reason that we have developed this comprehensive guide for our staff to assist in considering the actions and decisions of public bodies, through a human rights lens.

In examining our own actions and decisions and those of other bodies, we will consider what each individual is entitled to expect when they engage with a public service provider.

We are committed to placing human rights at the core of our work and expect the same of other public service providers.

We would like to express our gratitude to all who have assisted in progressing this project and in the preparation and publication of this guide. In particular, we would like to thank the Northern Ireland Public Services Ombudsman, whose human rights manual we used as a template for developing our own guide. We would also like to thank the former Northern Ireland Public Services Ombudsman and current Police Ombudsman for Northern Ireland, Ms Marie Anderson who spoke to our staff about how her former office scoped and planned the introduction of a human rights lens into their casework. Finally, we would like to thank our own teams, led by Ms Jennifer Hanrahan and Ms Aoife Drudy, for their very considerable input and the team at Right Practice led by Dr Nazia Latif.

We are also grateful to the International Ombudsman Institute (IOI) for contributing to the funding of the development and publication of this guide. The guide will ensure that the work of our Office is grounded in protecting individuals and in assisting public service bodies to effectively apply human rights principles. The guide will be published on our website and we are happy to share our experience of promoting and implementing a human rights based approach to Ombudsman complaints handling with IOI members.



Ger Deering
Ombudsman



Elaine Cassidy
Director General

December 2023

Contents

Introduction	7
Acronyms.....	8

The System

The human rights system in Ireland	10
The FREDA Principles.....	13

Human Rights

The right to life	15
The right to be free from torture or cruel, inhuman or degrading treatment or punishment	19
The right to liberty and security of person	25
The right to a fair hearing	27
The right to respect for private and family life, home and correspondence	29
The right to freedom of thought, conscience and religion	36
The right to freedom of expression	39
Equality and non-discrimination	43
Women's rights.....	46

Introduction

The Office of the Ombudsman has an important role to play in encouraging public bodies to respect human rights. It can do this by examining whether public bodies have considered or shown due regard for human rights in their decision making. This human rights based approach is in keeping with the Office of the Ombudsman's vision to drive fairness, transparency and accountability in the delivery of public services.

While it is not the Ombudsman's role to declare breaches, violations or abuses of human rights, the Ombudsman considers that respect for human rights is a fundamental part of fair and sound decision making. It is also a legal obligation. Section 42 of the Irish Human Rights and Equality Act 2014 (IHREC Act) provides for the Public Sector Equality and Human Rights Duty which expects public bodies to have regard to the need to eliminate discrimination, promote equality of opportunity and protect the human rights of staff and service users. Section 3 of the European Convention on Human Rights Act 2003 (ECHR Act) requires organs of the State to perform its functions in a manner that is compatible with the European Convention on Human Rights (ECHR).

The purpose of this guide is to highlight the human rights that may be relevant to complaints received by the Ombudsman. It uses case law of Ireland and the European Court of Human Rights (ECtHR) to illustrate the types of practices that may constitute a violation of the relevant human right.

The rights that are referenced in this guide are those enshrined in the domestic law of Ireland: namely, the Irish Constitution, the ECHR and the ECHR Act, the EU Charter of Fundamental Rights, the IHREC Act, the Equal Status Acts 2000 – 2018 and those international human rights treaties that have the force of law in Ireland at this time. The main focus of the guide are those rights which are set out in the Irish Constitution and the ECHR.

Nothing in this guide permits or requires the Ombudsman to go beyond its legislative competence or remit or requires bodies within remit to do more than they are already legally bound to do.

Acronyms

CPR	Cardio-Pulmonary Resuscitation
DNAR	Do Not Attempt Resuscitation
ECHR	European Convention on Human Rights
ECHR Act	European Convention on Human Rights Act 2003
ECtHR	European Court of Human Rights
HSE	Health Service Executive
IHREC	Irish Human Rights and Equality Commission
IHREC Act	Irish Human Rights and Equality Commission Act 2014
PSP	Public Service Provider (aka 'public body')
UN	United Nations

For the purposes of this guide only, the word 'Ombudsman' may refer to either the Office Holder or the Office of the Ombudsman.



THE
SYSTEM

The System

The human rights system in Ireland

This section sets out the key legal sources of human rights and equality obligations in Ireland.

Ireland has a dualist legal system meaning that the Oireachtas is required to enact legislation before any international treaties to which Ireland is a signatory, can take effect in Ireland.

Constitution

The Irish Constitution, Bunreacht na hÉireann, is our fundamental legal document. The Constitution sets out how Ireland should be governed and the rights of its citizens and people living in Ireland. It has primacy over all law in Ireland. All legislation passed by the Government must be compatible with the Irish Constitution.

The Constitution sets out a number of rights including: the right to life (Article 40.3.2); equality before the law (Article 40.1); the right to a fair trial (Article 38.1); the right to liberty (Article 40.4); the right to freedom of expression, assembly and association (Article 40.6); and the protection of the family (Article 41).

In addition, the Courts have interpreted the Constitution as including certain other human rights. These are referred to as unenumerated rights (not explicitly set out in the Constitution but recognised by the Courts), and include: the right to bodily integrity; the right to freedom from torture, inhuman or degrading treatment or punishment; and the right to privacy.

European Convention on Human Rights

The European Convention on Human Rights (ECHR) is an international treaty, drafted in 1950, by the Council of Europe, to protect human rights and political freedoms in Europe. The ECHR has been implemented into Irish law through the European Convention on Human Rights Act 2003 (ECHR Act).

The Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union brings together the fundamental rights of everyone living in the European Union. The Charter contains 54 articles on rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. The Charter requires that all EU law and its implementation is compatible with it.

Equal Status Acts 2000-2018

The Equal Status Acts 2000-2018 (the Equal Status Acts) outline 10 grounds of discrimination, which are:

1. age
2. civil status
3. disability
4. family status
5. gender
6. being in receipt of rent supplement, housing assistance, or social welfare payments
7. membership of the Traveller community
8. race, colour or nationality
9. religion
10. sexual orientation.

Subject to certain exemptions, the Equal Status Acts prohibit discrimination in access to and use of goods and services and includes indirect discrimination and discrimination by association, sexual harassment and harassment and victimisation. The Equal Status Acts also allow positive action to promote equality. Services provided by the State which includes public service providers or “PSPs” [such as the Health Service Executive (HSE) and individual local authorities] are covered by the Equal Status Acts.

Irish Human Rights and Equality Commission Act

The Irish Human Rights and Equality Commission Act 2014 (IHREC Act) places a statutory obligation on public bodies to eliminate discrimination, promote equality of opportunity and protect the human rights of those to whom they provide services and their staff. This is known as the “Public Sector Duty” and is set out in section 42 of the IHREC Act (see more below).

The Public Sector Duty

Section 42 of the IHREC Act puts an obligation on public bodies, when performing their functions, to have regard to the need to eliminate discrimination, promote equality of opportunity and treatment for staff and persons to whom it provides services and to protect the human rights of staff and service users. This is known as the “Public Sector Duty.”

For the purpose of the Public Sector Duty, human rights means those rights and freedoms of individuals which are protected by the Irish Constitution, by the ECHR Act, and by provisions in other international treaties which have been given “*the force of law*” in Ireland.

The Irish Human Rights and Equality Commission (IHREC) is the body responsible for giving guidance regarding developing policies and exercising good practice and operational standards in relation to human rights and equality.

International Treaties

Ireland is a signatory to a number of international treaties. While these treaties have been ratified, the provisions of these treaties cannot be relied on to challenge the actions of the State in the Irish courts. This is because the terms of international agreements do not become part of Irish law unless expressly incorporated by or under an Act of the Oireachtas. The guide does not expressly focus on these rights.

Specialist bodies at the United Nations (UN) or Council of Europe monitor compliance. The exception is the ECHR, which is monitored by the ECtHR.

The European Convention on Human Rights Act 2003 (ECHR Act)

The ECHR became part of Irish law in 2003 when the ECHR Act came into effect. The ECHR Act means that a person who believes that their ECHR rights have been violated can seek a remedy in the Irish Courts. Where the Constitution and the ECHR conflict, the Constitution overrides the ECHR.

The following provisions of the ECHR Act may be relevant to the work of the Ombudsman:

- Section 2 of the ECHR Act sets out that when the Irish Courts make a judgment in relation to an existing piece of legislation, they must interpret Irish law in a manner that is compatible with the ECHR in so far as is possible, subject to the rules of law relating to interpretation and application.

The ECHR provisions are usually considered in parallel with the Irish Constitution as it has primacy over the ECHR Act. If the two conflict, the Constitution prevails.

- Section 3 of the ECHR Act creates a statutory obligation on every '*organ of the State*', whether that is a government department, a local authority or a public institution to '*perform[s] its functions in a manner compatible with the State's obligations under the Convention*'.
- Section 4 of the ECHR Act provides that decisions from the ECtHR may be used in arguments before the Irish Courts.
- Section 5 of the ECHR Act deals with 'declarations of incompatibility'. This means that a Court may make a declaration that a legal provision is incompatible with Ireland's obligations under the ECHR. The law in question remains in force, but the declaration may result in the Oireachtas repealing or replacing that (part of the) law.

The FREDA Principles

The FREDA principles are Fairness, Respect, Equality, Dignity and Autonomy. If a caseworker believes that one of these principles might arise in a given case it is likely that human rights apply. In such circumstances the caseworker should have regard to this guide when reviewing that case.

In addition to or instead of referring to specific human rights, public bodies may use the FREDA principles to inform their service provision.

While there is no requirement to do so, it may be appropriate for caseworkers to refer to the FREDA principles, where they are referred to by a complainant or when they are used by the PSP.

However, while helpful in informing decision making, the principles are open to subjective interpretation by complainants and public bodies. For this reason, it is also important to refer to the relevant human right when citing one or more of the FREDA principles. This approach will help ensure that the public body is clear about the obligations it has towards its service users. It will also ensure that the Ombudsman takes a consistent approach in outlining its expectation of public bodies with regard to human rights.

Incompatible legislation

Although unlikely, it may be that a public body would argue that it has no choice but to breach a person's human rights. This might be because the law the body must obey is itself incompatible with the requirements of human rights law. Under these circumstances, the public body should still be able to evidence how it showed regard for the human rights of the person concerned and identify that the legislation was the obstacle to the outcome being in keeping with human rights. Where a public body suggests that legislation prevents it from respecting an aggrieved person's human rights, the caseworker should refer the matter to their line manager.



HUMAN RIGHTS

The right to life (ECHR Article 2; the Irish Constitution Article 40.3.2)

The right to life means individuals should not have their lives ended and the State should take appropriate measures to safeguard human life and ensure that its actions should not put lives at risk. The right to life also includes the right to an effective investigation when life is taken by state actors, when someone dies in suspicious circumstances or where the State may have failed to protect life.

This right may be linked to the FREDA principles of Dignity and Respect.

Where the right applies

The right to life may arise in a number of circumstances but in particular can arise in cases involving:

- Hospitals
- Decisions made by medical professionals
- Mental health institutions
- Residential and nursing homes
- Direct Provision Centres
- Prisons

Concern for the respect for the right to life may arise in various situations including:

1. Where a PSP uses physical force against a person.
2. Where a person's life may be at risk and decisions are being made to withdraw life-sustaining treatments or not to resuscitate a person.
3. Where a person is under the care and/or supervision of a PSP and they are experiencing suicidal thoughts or posing a risk to other people's lives.

The following examples highlight situations where the right to life might arise.

Use of Physical Force

This could include the use of force in mental health wards, direct provision centres, nursing homes and prisons. The obligation also extends to private security firms working on behalf of or funded by a PSP.

Where the use of force by a public body (such as a mental health institution) leads to someone's death, that public body may have to ensure that the use of any force and the amount of force used, was necessary and that the individual's human rights were not thereby breached.

This right could also arise in situations where physical force and restraints have been used. The right requires the provision of adequate training and awareness-raising for staff that may use restraint techniques.

For example, where a restraint was used and ultimately caused a life threatening injury, the caseworker may wish to consider the right to life and whether the appropriate safeguards were put in place to mitigate the risks of such injuries occurring.

Life-saving medical treatment

In some cases, the right to life extends to placing an obligation on the public body to provide life-saving medical treatment, but there is no right to such medical treatment in all circumstances. Nor is it required that life be prolonged in all circumstances.

For example, a person who is on a permanent mechanical ventilation and who is experiencing pain does not have to have their life prolonged. Life saving treatment can cease in certain circumstances. This happened in the case of JJ which was decided by the Supreme Court in 2021.

Consent must be sought from patients/ their representatives before administering treatment even in life threatening circumstances.

For example, a patient who is aware of the risks can refuse to consent to their leg being amputated even if there is a high chance that failure to do so would result in death. This happened in the High Court case of CF (2023).

Do Not Attempt Resuscitation (DNAR) Notices

DNAR notices relate to a decision not to attempt CPR on a patient. DNAR notices are generally made in the context of the person's overall goals and preferences as well as the likelihood of success and the potential risks and harms. In general, DNAR notices are made with the consent of the patient in consultation with medical professionals. However, there are circumstances where consent is not required. Medical professionals should have regard to the right to life in making any decisions related to DNAR notices and DNAR notices should not be made arbitrarily on a discriminatory basis.

For example, if a circumstance arose where a DNAR notice was attached to everyone in a ward over the age of 77, the caseworker may wish to consider whether regard was had to the right to life in making this decision.

Health Care Settings

There is a positive duty in therapeutic settings such as hospitals or nursing homes for adequate supervision of vulnerable patients or residents to keep them safe from harm. This includes an obligation to adequately supervise individuals in the PSP's care.

For example, where there is a complaint that a vulnerable relative has left a health care setting (i.e. run away from or wandered off) and as a result, suffered injuries or was at risk of injury, the caseworker may wish to consider whether proper regard was had to the relative's right to life.

The positive duty to protect life requires the State to take steps to prevent life-threatening conditions through, for example, vaccination programmes. It also includes a duty on a health authority / public health agency to inform the public of threats to life, which could include epidemics and pandemics. A note on the human rights considerations and Covid-19 is included below.

Safeguarding and patient safety procedures within and across relevant PSPs require particular attention. Assessing the extent to which procedures (such as the HSE's Safeguarding Vulnerable Persons at Risk of Abuse National Policy & Procedures etc.) have been followed will also be important in some social and health care investigations.

Obligations on the PSP

The State must not take life arbitrarily and must not act with disregard for human life.

The State must also adopt positive measures to protect individuals in the types of settings identified above. This can include, for example: the regulation of hospitals or nursing homes by inspecting bodies such as HIQA; and actions to ensure that adequate systems, rules, personnel and policies are in place to protect the lives of patients and to mitigate risk.

There are limitations to the obligations imposed on the State in respect of the right to life. For example, the right to life does not include a right of access to all forms of medical treatment.

What the caseworker should consider

PSPs should be able to evidence an awareness of the right to life being relevant in the case's particular circumstances and justify their decisions or actions accordingly.

Useful questions to ask the PSP

Where the right to life is considered relevant, caseworkers should ask the following:

- What is the relationship between the person aggrieved and the PSP? Is the person a patient, a client or under the care of the PSP?
- The right to life will not apply in all circumstances. The right to life is particularly significant where the PSP has a duty to safeguard the life of the person. For instance,

the right to life is very relevant to a patient in a hospital and less relevant to an applicant applying for a learner's permit.

- What was the impact of the PSP's action on the person aggrieved? (i.e. adverse effect)
For example, did the action result in or increase the risk of death or physical harm to the person? Has the action caused or exacerbated an illness or condition and/or could it have done so?
- What are the PSP's particular obligations (positive and negative) in this area and have those obligations been met?
For example, does the law require the PSP to take certain steps or not to take certain steps? Are there any other protocols or guidance which the PSP should have regard to?
- What steps were taken by the PSP to meet those obligations?
For example, what information was provided to the person aggrieved? What training is given to staff?
- Has the PSP identified that the decision or action taken may have an impact on the right to life of the person and can it demonstrate that this right was considered in its decision making?
- Was the complainant's or their representative's wishes ascertained and respected?

Where the right to life is considered relevant to a health complaint, caseworkers should consider the relevant Protocols, Guidance and Policies issued by the Department of Health, the HSE and/or the relevant PSP, as applicable.

Special procedures in certain cases

Complaints might also be received that explicitly claim that life is at risk. This might be the life of the person aggrieved and/or others in the same institution or situation as the person aggrieved. Alternatively, a preliminary or substantive investigation might begin to uncover that life is at risk. In investigating such complaints, there may be a duty on the Ombudsman to report its concerns to the relevant authorities (such as An Garda Síochána, Tusla, the HSE's National Safeguarding Office, HIQA or similar, as appropriate) in the public interest.

The right to be free from torture or cruel, inhuman or degrading treatment or punishment (ECHR Article 3; the Irish Constitution Articles 40.3.1 & 40.3.2 unenumerated rights)

This right means that a person should not be subject to torture, or cruel, or inhuman or degrading treatment or punishment.

Torture means severe pain or suffering, physical or mental, intentionally inflicted. Inhuman or degrading treatment means treatment which is applied for hours at a stretch and causes either actual bodily injury or intense physical and mental suffering, intentionally or otherwise. Inhuman treatment is prolonged actions which cause intense physical or mental suffering regardless of whether or not it is intentionally inflicted. Similarly, degrading treatment means treatment that is extremely humiliating or undignified, regardless of whether it was intentionally inflicted or not.

Treatment or punishment that is found to be inhuman will also be considered degrading but degrading treatment need not be considered inhuman. The words used in communicating the Ombudsman's conclusions therefore should take account of these definitions and distinctions.

The right to be free from torture or cruel, inhuman or degrading treatment or punishment is absolute and can never be limited or interfered with whatever the circumstances.

Where complainants themselves use phrases or words that say or suggest that their dignity was not respected, caseworkers should consider whether the right to be free from torture and cruel, inhuman or degrading treatment or punishment applies.

This right may be linked to the FREDA principles of Dignity and Respect.

It is important to note that a minimum level of severity must be reached before a violation of this right is found by the domestic courts and the ECtHR. The Ombudsman should take into account the level of severity before using phrases such as 'cruel', 'inhuman' or 'degrading'.

The criteria for establishing torture or cruel, inhuman or degrading treatment has evolved over time. The impact of the treatment on the individual concerned is crucial in establishing whether the treatment was cruel, inhuman or degrading.

While unlikely, where a caseworker believes that the person aggrieved is or has been a victim of torture, this is a criminal matter and therefore should be reported to the relevant authorities (i.e. the Gardaí).

Where the right applies

This right may be relevant where a person is at risk of serious harm including where a person is neglected or cared for in a way that causes serious harm, suffering or humiliation.

A person might be subject to cruel, inhuman or degrading treatment in a range of settings including:

- Hospitals
- Nursing and residential homes
- Housing
- Direct Provision Centres
- Prisons

The following examples highlight situations that the courts or the international treaty monitoring bodies have determined constitute violations of the right to be free from inhuman or degrading treatment or punishment.

Social isolation

Inhuman and degrading treatment can involve social isolation, lack of meaningful activity and lack of access to fresh air. Such an issue may arise in prisons. Many factors can lead to social isolation such as a failure to provide someone with the level of care required to enable them to socialise with others, leave their home or engage in any meaningful activity.

Medical treatment

Withholding appropriate medical care where someone is suffering from a serious illness could in certain circumstances amount to inhuman and degrading treatment.

For example, where a patient is inappropriately left without pain medication while being treated in hospital for a prolonged period of time, the caseworker may wish to consider whether regard was had to the patient's right to be free from torture or cruel, inhuman or degrading treatment.

Providing medical treatment against the wishes of a patient or providing medical treatment to a patient who lacks the relevant capacity when it is known that he or she would have refused the treatment, might be considered inhuman or degrading treatment. A measure which is medically necessary by the standards of the ordinary principle of medical need is unlikely to be regarded as inhuman or degrading but the medical need must be established.

For example, force feeding a patient who refuses to eat in order to save their life may not be considered torture or cruel, inhuman or degrading treatment. However, force

feeding a prisoner on hunger strike without demonstrating medical necessity may be considered to be a form of torture or cruel, inhuman or degrading treatment.

“Dignity in death” falls within the scope of the right to be free from inhuman or degrading treatment. However, this must be balanced with the right to life. For case studies, please see our [A Good Death](#) Report (2014) and [Progress Report](#) (2018).

Overcrowding

Overcrowding leading to a complete lack of privacy and dignity, could amount to a violation of the right to be free from inhuman and degrading treatment or punishment.

For example, situations in prisons where conditions included severe overcrowding such as 24 inmates being held in a cell together without sufficient beds for each inmate have been considered to amount to inhuman and degrading treatment. This happened in the ECtHR case of *Kalashnikov v Russia*.

Caseworkers should be particularly mindful of emergency accommodation, direct provision centres and other forms of accommodation and the impact that overcrowding may have on an individual.

In a Social Housing context, overcrowding is defined in [s. 63 of the Housing Act 1966](#).

Caseworkers should be mindful that a minimum level of severity must be reached before a measure is considered to be inhuman or degrading and regard should be had to the individual circumstances of a case.

For example, it isn't uncommon for social housing to become unsuitable for a family due to overcrowding as the members of the family increase or grow up. In those circumstances, tenants can apply for a transfer which may take a substantial period of time. This situation is unlikely to be considered inhuman or degrading treatment on its own. Although, when coupled with other issues such as lack of sanitation and lack of appropriate facilities for a tenant with a disability for example, the accommodation may amount to inhuman or degrading treatment. Caseworkers should also consider the issue of overcrowding under the right to private and family life (see section below).

Asylum seekers

The ECtHR has commented that asylum seekers are entitled to special protection. Asylum seekers are entitled to hygienic living conditions that are well ventilated and not overcrowded. PSPs must also be mindful of the trauma that asylum seekers may have experienced.

Harassment and Racial Discrimination

Discrimination on grounds of race may also amount to degrading treatment if it shows a contempt or lack of respect for the person and is designed to humiliate or debase the person.

For example, in a ECtHR case (*Dordevic v Croatia*), the court found that the State had acted in breach of the right to be free from inhuman and degrading treatment because it had failed to protect a mother and her child, who had a disability, from being physically and verbally harassed over four years, by children living in the neighbourhood. The family had complained to several different public bodies, including the police, but none had helped the family.

The right to respect for private and family life imposes a positive obligation on the State outside the sphere of criminal law, where the authorities are aware of serious harassment.

Discrimination on the grounds of race when accessing goods and services may also be a breach of the Equal Status Acts.

Inadequate personal care

The right to be free from inhuman or degrading treatment also has the potential to apply to continence needs and in particular leaving incontinence pads unchanged for prolonged periods to the extent that the individual becomes wet or soiled. This might arise in a nursing home or residential care setting in particular.

For example, where a Nursing Home resident is left in incontinence pads, unchanged for a prolonged period of time, the caseworker might consider whether this treatment might amount to inhuman or degrading treatment and whether the PSP had regard to this.

Restraints

The persistent use of bed cages in psychiatric establishments has been found by human rights bodies (such as the UN Human Rights Committee) to be inhuman and degrading. Caseworkers should consider this in light of the use of, for example, bed rails in healthcare settings such as hospitals and nursing homes.

In non-custodial settings such as hospitals or nursing homes for example, restraints should only be used where the individual concerned is at risk of imminent harm or is likely to cause harm to himself and/or a third person. The risk of damage to property or to control challenging behaviour are not considered to be acceptable reasons to employ any form of restraint.

The following guidance materials and policies might assist caseworkers in establishing the appropriateness of the use of restraint;

- Guidance on promoting a care environment that is free from restrictive practice, Older People's Services, HIQA, 2019
- Code of Practice on the Use of Physical Restraint in Approved Centres, Mental Health Commission, 2009 and
- HSE's Safeguarding Vulnerable Persons at Risk of Abuse, 2014.

Domestic violence

The failure of public authorities to protect people from abuse in their own homes has been ruled by the ECtHR in certain circumstances to be a violation of the right to be free from inhuman or degrading treatment. While the Office of the Ombudsman does not have jurisdiction over policing, it deals with complaints involving suitable housing allocation or relocation, which may involve survivors of domestic violence. Where PSPs are aware of domestic abuse or threats of domestic abuse their decisions should concentrate on keeping the victims safe, including in housing allocation. It may also be appropriate to offer additional support services to victims and survivors.

For example, where a local authority is aware that a social housing tenant is being subjected to persistent threats of violence from another tenant and has failed to take any action to address the issue, the caseworker may wish to consider whether the tenant's treatment might amount to torture, cruel, inhuman or degrading treatment and whether the PSP had regard to this.

Housing

There is no legally binding right to housing in Ireland. However, access to housing and accommodation and the standard of that accommodation could impact on a person's right to be free from torture or cruel, inhuman or degrading treatment.

For example, where a local authority is aware that a child with severe disabilities is living in social housing which is overcrowded and has inadequate sanitation facilities, the caseworker may wish to consider whether the conditions might amount to torture, cruel, inhuman or degrading treatment and whether the PSP had regard to this.

Obligations

Negative and positive obligations follow from the right to be free from torture or cruel, inhuman or degrading treatment or punishment.

This can include provision of:

- basics such as food, water, shelter from the elements, fresh air and opportunities for social interaction.
- physical and emotional safety for individuals, including when threats to that safety arise from private actors.

There can be no legitimate reason for interfering with the right to be free from torture or cruel, inhuman or degrading treatment. The right to be free from torture or cruel, inhuman and degrading treatment is an absolute one. Limited resources, whether that be in terms of staff numbers or economic resources, cannot be considered mitigating factors.

It would not be unreasonable for the Ombudsman to expect public bodies to demonstrate that their policies, guidance and training materials include information on inhuman and degrading treatment. In healthcare settings, where staff might often have pressures on their time or lack of resources, awareness of this is particularly important.

What the caseworker should consider

A minimum level of severity must be reached before a violation of this right is found by the domestic courts and the ECtHR. Similarly, the Ombudsman should take into account the level of severity before using phrases such as 'cruel', 'inhuman' or 'degrading'.

The level of severity that is needed depends on the person and the circumstances.

For example, treatment that could be used lawfully on an adult may be considered inhuman or degrading if used on a child or a vulnerable person. The impact of the treatment on the individual concerned is crucial in establishing whether the treatment was cruel, inhuman or degrading.

Useful questions to ask the PSP

Where it is assessed that the right to be free from inhuman and degrading treatment is relevant to a complaint, caseworkers should aim to establish the following:

- What was the nature of the public body's obligations toward the person aggrieved? For example, was it the public body's duty to make certain provisions for the person aggrieved in the form of care or treatment? Or was it its duty to refrain from certain actions such as using restraining techniques?
- Were the obligations met by the body? If not, was the failure intentional or was it a result of neglect?
- If the minimum threshold has not been met but the impact on the person aggrieved is significant, could the right to respect for private and family life apply? (See section 'The right to respect for private and family life').

For example, where an incontinent resident in a nursing home is left unchanged for a prolonged period of time this is likely to be considered degrading treatment. Where a resident who is not incontinent, but who requires assistance with mobility, is required to wear incontinence pads through the night as there is no one available to assist them to go to the bathroom, this is less likely to be considered degrading treatment but it does have an impact on their dignity and as such, it may be considered an interference with their private and family life.

The right to liberty and security of person (ECHR Article 5; the Irish Constitution Article 40.4.1)

This right means that a person should not be held against their will except in certain circumstances and where there is a legal power to do so. The right guarantees freedom from arbitrary arrest or detention.

The right to liberty may be linked to the FREDA principles of Fairness and Autonomy.

Prolonged periods of deprivation or restriction of liberty could also involve the right to be free from cruel, inhuman or degrading treatment or punishment.

Where the right applies

Deprivations of liberty may arise in many circumstances but in particular may occur in:

- Direct provision centres
- Nursing or residential homes
- Hospitals
- Prisons
- Mental health services.

'De facto' detention

Certain establishments may take an action that deprives persons of their liberty at certain times of the day. A care home for older people or a direct provision centre might lock rooms at night-time to prevent residents from leaving or setting off alarms in the building. It is also important for caseworkers to think about de facto deprivation of liberty, for example, where an individual is, in theory, free to leave an establishment but, in practice, could not possibly do so.

An example would be a resident of a nursing home with severe dementia not being allowed to leave the grounds of the facility without someone accompanying them. Under such circumstances, it is important to think about the reasons the measures are in place. For example, is it for the safety of the resident and is the restriction proportionate in relation to the risk of allowing the resident to move freely and unsupervised?

Obligations

Public bodies must not deprive individuals of their liberty except in certain circumstances. Under the ECHR, these circumstances are:

- the person has been convicted of a crime by a court
- the person has not followed a court order

- to bring a person before a court because they are suspected of committing a crime, to prevent a person committing a crime or to prevent a person from leaving the country after committing a crime
- the person is under 18 and is detained to receive educational supervision
- for the prevention of spreading of infectious disease
- the person is suffering from a certain mental illness, is an alcoholic, a drug addict or a homeless person (in certain circumstances)
- the person is trying to enter the country illegally or where there is a deportation order or extradition order against them

For the detention to comply with human rights standards, it must follow a procedure prescribed by law and it must be reasonable. A person can be deprived of their liberty where a person's own interests necessitate their detention.

However, there needs to be a relationship between the ground for detention and the place and conditions of detention.

For example, detaining someone with a mental illness must be in a therapeutic environment. A minor who needs to be detained in a high support secure education facility should not be detained in a prison setting. This happened in the case of *DG v Ireland*, 2002.

What the caseworker should consider

Where the right to liberty and security of a person is considered relevant to a complaint, caseworkers should think about the procedural safeguards guaranteed by the right to liberty and the extent to which these have been granted to the detained person.

Useful questions to ask the PSP

Caseworkers should aim to establish the following:

- Was expert medical advice (where relevant) sought prior to detention and in subsequent reviews, regarding the need for continuing with the detention?
- Were opportunities available to the person who was detained to challenge their detention initially and subsequently? Were these opportunities accessible to the detained person?
- Were less restrictive means considered? if not, why were less restrictive means not considered?

Where individuals with cognitive impairments such as dementia are being detained, the public body must ensure:

1. The person has been "reliably shown" by "objective medical expertise" (for example psychiatric evidence) to be of unsound mind (except in respect of emergency procedures),

2. The person's "mental disorder" was of a kind or degree warranting "compulsory confinement", and
3. The validity of continued confinement depends upon the "persistence of such a disorder", requiring further expert psychiatric evidence.

The right to a fair hearing (ECHR Article 6; the Irish Constitution Articles 38.1 [Criminal Trials] and 40.3.1 [Other hearings])

This means that a person has the right to a fair hearing in the determination of civil rights and in civil and criminal proceedings.

The manner to which fair procedures apply depends on the forum in question, the subject matter and the rights at risk.

The right to a fair hearing may be linked to the FREDA principles of Fairness.

Where the right applies

The right to a fair hearing imposes obligations on a large volume of PSPs including but not limited to:

- Agricultural Appeals Office
- Social Welfare Appeals Office
- Legal Services Regulatory Authority and
- Residential Tenancies Board etc.

The Ombudsman's [Model Complaints System](#) and [The Ombudsman's Guide to Good Administration](#) already contain many of the elements required in a fair hearing. For example, the expectation that public bodies will be accessible, open and honest in their handling of complaints is vital. **Referring to the human right to a fair hearing as a good practice model in communications with public bodies is encouraged.**

It is important however to be aware of the distinction between what good practice is, in human rights terms, and what are legal requirements.

Obligations

States can guarantee the right to a fair hearing through a mix of general and specialist courts and tribunals, as in Ireland.

What the caseworker should consider

In establishing whether and how a body has shown regard for the right to a fair hearing, caseworkers should consider what the nature of the PSP is, what the rights at issue are and whether there are rules which the body is required to observe.

Useful questions to ask the PSP

Caseworkers should aim to establish the following:

- Does the action of the PSP impact on the complainant's rights and, if so, what rights are at risk?

For instance, a decision which affects a person's liberty will attract a higher standard of fair procedures than imposing a fine for littering.

- Does the PSP have a procedure for handling the decision? Was that procedure provided to the complainant and was it followed in this particular case?
- Was the complainant provided with a written decision and the reasons for that decision?
- Was the complainant given an opportunity to put forward their case?

The right to respect for private and family life, home and correspondence (ECHR Article 8; the Irish Constitution Articles 40.3.1; 40.5; 41 & 42)

This right protects a person's private and family life and the home from unwarranted interference by the State. It also means that if decisions are being taken which will affect a person's private and family life, that that person must generally be involved in the decision-making process.

This right can be restricted in certain circumstances (see below).

The Irish Constitution protects a person's right to privacy and the rights of the family. Under the ECHR, the right to private and family life is applicable in a wide range of settings and situations. There are four aspects to this right expressly mentioned in the text of Article 8 ECHR and these are explored further below.

Private life

Private life covers more than physical privacy and includes issues such as personal choices, relationships, access to personal information, participation in community life and mental well-being.

Family life

Under the ECHR, the term family is to be construed widely and not restricted to blood relatives. The concept of family covers engaged couples, cohabiting couples and same-sex couples. It also includes relationships with siblings, grandparents, foster parents and foster children. Under the Constitution, the family founded on marriage has particular protection.

Home

The right to respect for the home is not a right to housing but to the enjoyment of the home that one already has. The ECtHR has described "home" as "the place, the physically defined area, where private and family life develops" (*Moreno Gomez v Spain* (2005)).

Correspondence

Correspondence covers all forms of communication, including letters, phone calls and emails.

The right to private and family life may be linked to the FREDA principles of Respect, Dignity and Autonomy.

The Ombudsman receives a number of complaints about the provision of information; this can include issues of data protection and freedom of information. Caseworkers should continue to direct complainants to the Office of the Information Commissioner (OIC) or Data Protection Commission (DPC) as appropriate.

Where the right applies

The right to private and family life is applicable in a wide range of settings and situations including:

- Direct provision centres
- Nursing or residential homes
- Hospitals
- Prisons
- Mental health services
- Housing.

This right is not limited to the home or to a private place but to anywhere where there is a legitimate expectation of privacy.

For example, the publication of CCTV footage of an individual attempting suicide was considered to be an interference with the individual's right to private life, in the ECtHR case of *Peck v UK (2003)*.

Medical care and treatment

The positive obligation to respect and promote the right to private and family life applies to the way in which health and social care providers exercise their powers and perform their duties. It does not impose an obligation to provide all types of medical treatment and care.

The right extends to being provided with all relevant information regarding choice of medical treatment and risks of medical procedures, no matter how low those risks may be.

Housing

There is no specific legally binding right to housing. However, decisions regarding the provision of housing and accommodation may impact on a person's private and family life and PSPs should not make a decision or take action that arbitrarily interferes with a person's housing.

For example, evicting a local authority tenant has a significant impact on their private and family life and for that reason procedural safeguards should be in place. Similarly evicting a resident from emergency accommodation is likely to have a significant impact on that resident's private and family life.

Physical and psychological integrity

The right to protection of one's physical and psychological integrity is a key aspect of the right to private and family life. Measures that affect physical integrity or mental health may constitute a violation of the right to private and family life, if they are carried out against the person's will.

For example, parents of a baby may be entitled to refuse medical procedures against medical advice in circumstances where there is no immediate threat to that child. This happened in the case of *The North Western Health Board v H.W. & C.W.*

However, not all medical treatment, against a person's will, amounts to an unlawful interference. The treatment must be necessary and proportionate to pursuing a legitimate aim.

For example, parents of a child may not be entitled to refuse a blood transfusion, even on religious grounds, where such refusal would result in the death of the child. This happened in the case of *Temple Street v D* in 2011.

Provision of facilities to people with disabilities

The right to private and family life is also relevant to complaints about public bodies' efforts to facilitate mobility and the quality of life of disabled persons.

The ECtHR has also accepted that in some circumstances Article 8 ECHR places a positive obligation to provide housing assistance to a person, suffering from a serious disease, where the impact of the refusal has a significant impact on the private life of the individual.

Reproductive rights

The right to private and family life incorporates the right to respect decisions to become or not to become a parent.

Institutional settings

Prisons, hospitals, mental health institutions, care and nursing homes and direct provision centres should also make every effort to accommodate and respect the wishes of patients or residents. This includes choices around dress, food and single-sex wards. The right to private and family life also requires public authorities to facilitate a degree of association with others, for those in its care, and to maintain contact with their families.

Planning/Development

Planning and enforcement decisions have the potential to impact on the right to private and family life. This includes decisions that lead to residents being subject to excessive noise or pollution.

For example, where noisy businesses in a residential area are not complying with noise restrictions, the local authority has a duty to address this and failure to do so could amount to breach of its obligations under the right to respect of private and family life. This happened in the case of *Mileva and Others v Bulgaria* in 2010.

However, protection of the economy is a legitimate aim in interfering with the right to respect for private and family life.

A number of cases involving noise generated from airports close by have been lost because the economic interest and benefit of maintaining or extending the airport's operations outweighed the impact on the individuals who brought the cases [Powell and Rayner v UK (1990); Hatton v UK (2003); Flamenbaum and others v France (2012)].

Prisons

The right to private and family life also applies to prisoners.

For example, prisoners should not be unreasonably prevented from contacting people based outside the prison, including speaking to their families or to journalists. However, these rights can be restricted due to the nature of incarceration. For example, the prison staff may need to examine the content of the letters or prisoners may only be allowed to meet their families during designated visiting times.

Obligations

This right to private and family life is not an absolute right and can be interfered with. However, under the ECHR any interference, as with any qualified right, must be:

- In accordance with the law
- In pursuance of a legitimate aim
- Necessary in a democratic society and
- Proportionate

The legitimate aims are:

- To protect the interests of national security
- Public safety
- The economic well-being of the country
- The prevention of disorder or crime
- Health or morals
- The rights and freedoms of others

For example, a family, who was homeless, was rejected from the Caravan Loan Scheme due to having a small amount of arrears which they were in the process of clearing. The Council's policy is to refuse all applicants who have arrears in order to ensure that successful applicants are in a position to repay the loan they receive. In such a case, the caseworker would need to consider whether the Council, in refusing the family's application, had considered their right to family life and whether their exclusion from the Scheme, on the basis of a small amount of arrears, was proportionate to the goal of ensuring that all applicants could afford to pay back their loan.

The right to private and family life is often considered along with the right to be free from inhuman or degrading treatment or punishment by the ECtHR. Where the threshold for inhuman or degrading treatment is not met, it may be that there was still an unlawful interference with the right to private and family life.

Negative obligations

The right to respect for private and family life means people have a right to live their lives privately, and enjoy family relationships, home and correspondence without interference. To guarantee this right States must refrain from interference.

States must also regulate activities that have the potential to interfere with a person's private and family life. This can include regulation of surveillance techniques as well as the retention of data about individuals even if it has the purpose of tackling crime. Where the particular circumstances involve a potential breach of data protection legislation, this may be a matter more appropriate for the Data Protection Commission (DPC).

Positive Obligations

State inaction or refusal to act

The ECtHR has established positive duties on States in a number of areas where the State's inaction or refusal to act has been brought to its attention. As can be seen from the discussion above, these positive obligations apply in the field of healthcare, provision of facilities to the disabled etc.

For example, local authorities have powers under the Housing Acts to provide accommodation to those who are homeless. Where the local authority has not done so, a caseworker may wish to consider whether the local authority in failing or refusing to act, to assist a person in finding accommodation, has had regard to that person's right to private and family life.

Interference by non-state bodies

There is also a positive duty on PSPs to protect individuals from unlawful interference with their private and family life.

In institutional settings such as hospitals, nursing homes or direct provision centres, it is very important that public bodies are proactive in protecting the right to private and family life. Decisions about choice of dress, daily activities, interactions and food are all aspects of this right. Those responsible for delivering care and services in these institutional settings are expected to make every effort to ensure that choices are not only respected, but that effort is made to ascertain choices. Concerns around mental capacity are not an acceptable reason for imposing choices on a patient or resident. The Assisted Decision-Making (Capacity) Act further cements rights in this area at a domestic level and caseworkers should have regard to the rights and obligations which flow from that Act.

What caseworkers should consider

As stated above, the right to private and family life is wide in scope and continues to evolve. It is qualified and therefore it is recognised that at times, some interference with this right, may not only be acceptable but necessary. Where it has been established that there is interference with this right, the caseworker should also consider, whether the interference was:

- in accordance with the law
- in pursuit of a legitimate aim (e.g. in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedom of others) and
- proportionate

The legitimate aim stated by the PSP should be actively investigated as part of the wider investigation. Even if a legitimate aim is established, caseworkers will need to ascertain and comment on whether and how the PSP considered the proportionality of its actions. When the aggrieved person is vulnerable due to disability or age, for example, particular attention is required to assess the impact of the public body's actions or inactions on that person. With qualified rights, it is important for the Ombudsman to demonstrate in his communications with the parties concerned that he is aware of these qualifications, that he has considered and reasoned through these qualifications before arriving at his decision.

Complaints about institutional settings

While the same level of privacy in one's home cannot be guaranteed in an institutional setting, this does not mean that the level of obligation on those responsible for the institution to show regard for and respect human rights is less. It is recognised that the experience of the rights-holder may be different. Moreover, individuals in institutions are likely to be more vulnerable to abuse of rights because of their reliance on others for basic needs such as the supply of food, water and clothing. The types of 'legitimate aims' that an institution may claim in the context of health and social care complaints and which caseworkers should consider are:

- the safety of the individual concerned and/or the safety of other patients or residents
- the smooth and efficient running of the hospital, ward or care facility
- having to make the best use of limited resources and in particular staffing arrangements

These can be legitimate aims but the caseworker must then establish:

- was the legitimate aim relevant/ directly linked to the actions taken?
- was the interference with the right proportionate?
- were less intrusive approaches considered?
- why were less intrusive approaches not considered appropriate?

Direct Provision Centres

Direct provision centres can potentially raise many human rights concerns. People residing in direct provision centres are not there for therapeutic care, as in a health or social care setting, but equally they are not there for punitive reasons, as in a prison. Individuals in direct provision therefore require particular attention and caseworkers should be alert to practices and rules (formal and informal) that amount to an interference with private and family life. Caseworkers should ask whether the interference, such as specified meal times, curfews and restrictions on visits, is for a legitimate aim.

Useful questions to ask the PSP

1. Did the action or decision of the PSP have an impact on the complainant's private and family life? If so, what was the impact?
2. Was the PSP aware that its action may have had an impact on private and family life?
3. Did the PSP identify a reason for the interference?
4. Was the interference connected to the reason?
5. Did the PSP consider any other ways to achieve the purpose without interfering with the affected individual's private and family life?

The right to freedom of thought, conscience and religion (ECHR Article 9; the Irish Constitution Article 44)

This right protects a person's right to hold religious or other beliefs and also the right to manifest (show, demonstrate or practice) their religion or belief. The right to have a belief is absolute. The right to manifest that belief can be restricted in certain circumstances (see below).

This right applies to religious beliefs, but also to other beliefs such as environmentalism, pacifism and veganism. For a belief to be protected it should be serious, concern important aspects of human life or behaviour, be sincerely held and be worthy of respect in a democratic society.

The right to freedom of religion may be linked to the FREDA principles of Equality and Respect.

Religion is a protected characteristic under the Equal Status Acts.

The right to freedom of thought, conscience and religion is closely linked to the right to freedom of expression and the right to equal enjoyment of rights under Article 14 ECHR.

Where the right applies

The right to religious freedom requires the State to accommodate religious beliefs in a number of areas including:

- Health and Social care settings
- Education
- Direct Provision
- Prisons

Education

In the context of education, the right to freedom of religion is closely linked to the right of parents to have their children educated in accordance with their beliefs or philosophical convictions.

Religious education is referred to in Article 44.2.4 of the Irish Constitution and provides that the State cannot discriminate between schools based on religion when providing funding but the State can provide funding to schools with a religious ethos. Those schools can include religious instruction but must respect the right not to attend.

Prisons, health, social care and direct provision centres

Institutions must also protect the right to manifest religious beliefs or philosophical convictions.

For example, in certain settings this might involve ensuring single sex or side wards are available for those whose religious beliefs require them.

It may also require specialist diets such as vegetarian, vegan, Halal or Kosher being made available in institutions where people are likely to be placed for a prolonged period.

Caseworkers should be mindful that it may not always be possible in practical or financial terms for such requirements to be facilitated. However, the onus is on the public body being complained of, to provide sufficient explanation of the legitimate aim being pursued and whether the action taken or the lack of action taken, was proportionate to meeting that legitimate aim.

For example, a complaint is received that a direct provision centre is refusing to open its kitchen outside of its standard opening hours and this is impacting the residents who are of the Muslim faith who cannot eat during those hours during Ramadan. The caseworker might consider whether the complainant's right to manifest their religion has been impacted and whether the direct provision centre has had regard to this right.

The right encompasses decisions around end of life care and the wishes of loved ones with regard to funeral arrangements, rites and rituals.

For example, a post mortem examination may not be appropriate in all circumstances, such as, for a person who wishes to be buried in accordance with a particular faith. This was discussed in the ECtHR case of *Polat v Austria* (2021).

Obligations

PSPs should not interfere with a person's right to have a religion or belief.

PSPs should also not interfere with a person's right to manifest (show/practice) their religious belief, but this is a **qualified right** which can be interfered with in certain circumstances.

Under the ECHR, any interference, with a person's right to manifest their religious belief, as with any qualified right, must be:

- In accordance with the law
- In pursuance of a legitimate aim
- Necessary in a democratic society
- Proportionate

The legitimate aims are:

- The interests of public safety
- The protection of public order
- Health or morals
- The protection of the rights and freedoms of others

Public bodies also need to ensure that third parties also respect the right to manifest one's religious beliefs, thought or conscience.

In exercising freedom to manifest their religion, an individual's specific situation may need to be taken into account.

For example, where parents of a baby refuse life-saving treatment because of their religious belief, the health service may intervene and provide the treatment because while the right to refuse treatment on religious grounds is protected, the State's interest in protecting children outweighs this consideration. This happened in the case of *Temple Street v D* in 2011.

What caseworkers should consider

When considering complaints that raise issues of restrictions to or interferences with religious freedom, the default position ought to be that religious practices are accommodated unless there is a legitimate aim to refuse this. Religious beliefs should be factored into care plans, and end of life plans, when requested by the patient or resident.

In direct provision centres, religious beliefs ought to be accommodated. Limitations to providing certain foods, altering mealtimes, or allowing prayers and visits must have a legitimate aim.

Useful questions to ask the PSP

- Did the action of the PSP impact on the individual's freedom of thought, conscience or religion? If so, what was the impact?
- Did the PSP identify that its action may have an impact on the individual's freedom of thought, conscience or religion?
- Did the PSP identify a reason for the interference?
- Was the interference connected with the reason?
- Did the PSP consider any other ways in which to achieve its purpose without interfering with this right?

The right to freedom of expression (ECHR Article 10; the Irish Constitution Article 40.6)

The right to freedom of expression includes the freedom to hold opinions and ideas without interference from the State.

The right protects the dissemination of controversial opinions including those which others may find offensive. However, where that expression incites violence or hatred against others, an interference with the form of expression may be justified.

The right to freedom of expression is a qualified right and therefore may be interfered with in certain circumstances (see below).

The ECtHR has emphasised the link between freedom of expression and the achievement of other human rights.

The right to freedom of expression may be linked to the FREDA principles of Respect and Autonomy.

Where the right applies

All forms of expression are included in this right such as commercial speech and expression, social media, art as well as the spoken word and printed text including fiction and political expression. Freedom of expression also includes the right not to speak.

Whistle Blowing

The right to freedom of expression extends to protection when whistle blowing, particularly in health and social care settings responsible for vulnerable people. The Protected Disclosures Act prohibits employers from penalising a worker (defined in [section 3 of the Act](#), to include current and former employees, volunteers, independent contractors, trainees and job candidates) for making a protected disclosure (i.e. a report of alleged wrong doing). Certain organisations are prescribed in law to receive protected disclosures. Where a reporter is unsure of where to make their report, a report can be made to the Protected Disclosures Commissioner. For more information go to www.opdc.ie.

The right to receive and impart information

This right also includes the right to receive and impart information.

For example, where a residential home imposes a blanket ban on accessing the internet for all residents, the caseworker might consider whether due regard was had to residents' right to freedom of expression.

Complainants raising issues around freedom of information, however, may, more appropriately, be directed to the Office of the Information Commissioner (OIC). Caseworkers should continue with this procedure, where appropriate.

Obligations

As noted above interference with freedom of expression is permitted so long as that interference is:

- In accordance with the law
- In pursuance of a legitimate aim
- Necessary in a democratic society
- Proportionate

The legitimate aims are:

- In the interests of national security, territorial integrity or public safety
- For the prevention or disorder of crime
- Health or morals
- For the protection of the reputation or rights of others
- For preventing the disclosure of information received in confidence
- For maintaining the authority and impartiality of the judiciary

This list is exhaustive. Any interference with the right to freedom of expression that is not in pursuance of at least one of the aims specified above will be considered an unlawful interference with the right. However, the circumstances are widely drawn.

The duties resulting from the right to freedom of expression are largely negative. PSPs should be able to provide evidence as to why it has interfered with this right.

However, there are also some positive obligations to protect the right. This includes protecting the right from interference by private persons such as private employers.

For example, where an employee is dismissed because they made a protected disclosure that employee may be able to take legal action on foot of that dismissal.

What the caseworker should consider

Where the right to freedom of expression is considered relevant to a complaint, the Ombudsman needs to balance the impact of one person's or organisation's expression on the rights of others.

For example, where posters, pictures or banners convey certain opinions in a public building, this may result in some people feeling excluded from that place. This could be a hospital, school or direct provision centre. The expression (racist, misogynist or homophobic etc.) may not be of a severity that incites hatred or violence but may nonetheless exclude certain people or groups of people from exercising their rights.

Useful questions to ask the PSP

- Did the action of the PSP impact on the individual's freedom of expression (including their right to hold opinions and ideas and to impart information)? If so, what was the impact?
- Did the PSP identify, before taking action, that its action might have such an impact?
- Did the PSP identify a reason for the interference?
- Was the interference connected to the reason?
- Did the PSP consider any other ways in which to achieve its purpose without interfering with this right?

COVID-19 and Human Rights

Caseworkers will be familiar with the efforts of Ireland to prevent loss of life during the COVID-19 pandemic. In protecting the right to life many other rights were interfered with. The cessation of visits to hospitals, nursing homes and other institutional settings constituted an interference with the right to respect for private and family life, as well as the right to freedom of thought, conscience and religion and the right to freedom of expression. While the aim to protect life was legitimate, the Ombudsman may have to consider complaints about whether the PSP had regard to the proportionality of the interference. Many of the cases involving allegations of human rights abuses resulting from the State's actions during the pandemic have yet to be heard by the ECtHR. Many have been ruled inadmissible because the applicant did not exhaust domestic remedies in the first instance.

An important part of the Ombudsman's role in investigating complaints is to explore the extent to which human rights were considered in the decision-making of public bodies during the pandemic, particularly where protocols and guidance for institutional settings left room for the exercise of discretion in the case of family visits and outside activity. In some complaints, the efficacy of the protocols and guidance themselves may be the subject of the complaint. **As a guiding principle, blanket policies applying to everyone within an institutional setting regardless of their individual circumstances and conditions, are generally not in keeping with a human rights based approach.** Moreover, policies and guidance should include a timetable for review in order to ascertain their efficacy in the face of a rapidly changing situation.

Equality and Non-Discrimination (Article 14 ECHR; the Irish Constitution Article 40.1)

No one should be discriminated against because of their status or characteristics.

Discrimination occurs when someone is treated in a different way to someone else in a similar situation, or where people in very different situations are treated the same.

Equality is also one of the five FREDA principles.

The Equal Status Acts prohibit discrimination in the provisions of goods and services under ten protected grounds which are referred to above in the Equal Status Acts section.

This section focuses on the groups that are the subject of specialist treaties. Similar to the previous section, it outlines:

- what additional or different obligations fall to public bodies in jurisdiction in relation to these groups
- what caseworkers need to consider when investigating complaints where the aggrieved person belongs to one of these groups

Children

While the Office of the Ombudsman does not accept complaints from children or made on behalf of a child, (these would ordinarily fall to the Office of the Ombudsman for Children, see www.oco.ie) it may consider a complaint that has had an impact on an entire family including the children. All the rights discussed in this guide apply equally to children.

Persons with Disabilities

Obligations

Public bodies have a number of positive obligations towards people with disabilities.

The Equal Status Acts prohibit discrimination on the grounds of disability.

These apply in the range of settings as discussed in the previous section such as, but not limited to schools, hospitals, nursing homes and prisons.

Reasonable accommodation

The principle of reasonable accommodation is very much part of Ireland's disability discrimination legislation. Reasonable accommodation is about ensuring that persons with disabilities can enjoy or exercise their human rights on an equal basis to all other human beings. It means that necessary and appropriate modifications and adjustments that do not impose a disproportionate or undue burden on public bodies must be undertaken by PSPs. This duty extends to private bodies as well. Recent cases in Ireland have helped define what is 'reasonable' under this duty.

For example, a hearing impaired student at university may find it difficult to follow aurally presented material at lectures. A reasonable accommodation may be to provide a note taking service for this student.

In order to establish what a disproportionate burden is, several things can be taken into account such as the financial cost of the measures involved, the other costs involved, staff time, the impact on services or productivity and the size and financial resources of the organisation.

For example, installing a lift so that an employee who uses a wheelchair can access their workplace is an appropriate measure but whether this is reasonable accommodation will depend on the business in question. A small company may not be able to afford to make this adjustment but it may be reasonable for a larger company to take this action.

It may be that the specific needs of persons with disabilities may require specific adjustments and provisions to ensure that treatment does not reach the threshold of becoming degrading or inhuman. This includes but is not limited to places of detention. For more information, see the section of this guide on the right to be free from torture or cruel, inhuman or degrading treatment.

People with mental health and/or intellectual disabilities

Mental health disabilities, intellectual disabilities, or learning disabilities are often cited as reasons for not consulting a person about decisions affecting their lives. This can be the case with, for example, older people with a condition such as dementia or younger people with learning disabilities. Human rights require that people with disabilities should be supported to make decisions about their lives and issues that impact on them. The Assisted Decision Making (Capacity) Act and Codes of Practice outline what is required. The HSE also has a dedicated space on its website on the Assisted Decision Making (Capacity) Act with explanatory videos and resources: [Assisted Decision-Making \(Capacity\) Act \(2015\) - HSE.ie](#)

Planning and Housing

Planning and housing authorities are also required to make reasonable accommodation for people with disabilities.

What caseworkers should consider

The Ombudsman may receive complaints from a person with a disability and/or his/her representative about:

- their care and treatment in a health setting
- access to buildings, services and sectoral plans
- planning decisions impacting on the quality of life of a disabled person

In considering these complaints, caseworkers need to be aware of the principle of reasonable adjustments/ reasonable accommodation remembering that the onus is on the public body to provide evidence that making the adjustment places a disproportionate burden on it. The onus is on the public body to make the case that it is unreasonable for them to make such an adjustment rather than on the disabled person to have to convince the authority that it is reasonable.

Useful questions to ask the PSP

- Does the individual have a disability that is relevant?
- Did the PSP discriminate against the individual on the basis of that disability?
- Did the PSP consider whether reasonable accommodation or reasonable adjustment might be required to enable the individual to be treated the same as others?
- If reasonable accommodation or adjustment was not provided, why not? Was that decision proportionate?

Caseworkers are reminded that the Ombudsman may also receive complaints about other PSPs and their (lack of) adherence to s.25-29 of the Disability Act.

Women's rights

The Equal Status Acts prohibit discrimination on the grounds of gender.

Obligations

The right to be free from inhuman or degrading treatment and the right to private and family life, as outlined above, place a positive duty on the State to protect women from domestic violence. The ECtHR has acknowledged that women disproportionately experience domestic violence.

Women are also entitled to special care and assistance with prenatal and post-natal care. This can include the provision of free maternity and post-natal services, where necessary.

What the caseworker should consider

All public bodies must ensure that women are afforded equal protection. This does not mean that women are treated exactly the same as men. When complaints are received caseworkers should consider the circumstances under which women are entitled to special protection. Health institutions have specific obligations to provide appropriate care and treatment to women during pregnancy, childbirth and in the post-natal period. Gender-sensitivity in the treatment provided to women is important and this extends to social care settings as well as detention facilities. For the Ombudsman's purposes, this would also be relevant in respect of the provision of health services to women living in direct provision centres.

Useful questions to ask PSPs

- Was the individual's gender relevant to the PSP's action?
- Did the PSP consider whether any special protection was required on the basis of gender?
- What options for protection were considered by the PSP?

Ethnic minorities, migrants, asylum seekers and refugees

The Equal Status Acts prohibit discrimination on the grounds of race.

Obligations

Under human rights law, the position of migrants and asylum seekers is somewhat different to that of ethnic minorities who are nationals of the country they live in (e.g. Travellers in the Irish context).

In the case of non-nationals, certain differences in treatment are considered acceptable. For example, certain categories of non-nationals are not allowed to vote or work, are not eligible for certain social protection payments or may have to pay higher fees than citizens to study at a university. Such differences in treatment are not acceptable in the case of ethnic minorities who are citizens of the country in which they live. These groups,

although diverse, are placed in one section because the obstacles they face, in enjoying and exercising their human rights, can be similar. These can include:

- Linguistic – where the first language of an individual is not English, there might be a lack of information available in a range of languages or an appropriate translation and interpreting policy.
- Cultural/ religious – there might be a lack of awareness or accommodation for people from different cultural or religious backgrounds. There might be particular issues in terms of how people from different generations are treated, dietary requirements or the availability of suitable places to observe religious customs or rituals.

Public bodies should work to remove these obstacles. Health providers, education establishments and other public bodies need to have suitable translated materials available for those who may need it. Many bodies translate materials into the five or six most frequently identified first languages of their users and make other language translations available on request.

Health establishments in particular should have appropriate interpreting policies in place to ensure that children or other close family members are not being relied on to interpret at medical consultations. Children in schools whose first language is not English should be offered Additional Educational Support.

What the caseworker should consider

The right to private and family life, the right to freedom of religion and the right to be educated in conformity with the beliefs of your parents are most likely to be involved in complaints about the treatment of ethnic minorities.

Caseworkers should be particularly alert to individuals in direct provision centres who may have experienced trauma in their home countries and during the journey to Ireland. They may also have had to face protestors and racist abuse outside their accommodation in Ireland. Caseworkers should be mindful of this and be accommodating and understanding in the manner in which they communicate with individuals living in direct provision centres or those within the asylum process.

Where a complaint is from a member of an ethnic minority, caseworkers should be alert to:

- Linguistic, cultural and/or religious barriers
- The situation of non-nationals. In Ireland, non-nationals (particularly those seeking asylum) are excluded from accessing certain services depending on their residency status. This may be a matter of poor administration, which the Ombudsman could potentially investigate further, or a matter that falls outside the Ombudsman's remit
- The link between ethnicity, culture and religion. It is important that all aspects of an individual's identity are considered. For example, a Muslim patient of Indian origin may have particular dietary requirements because of their religion and linguistic requirements because of their national origin. Public bodies should, as far as possible,

take account of all these factors

- The situation of Irish Travellers. Travellers are consistently singled out by the various UN treaty monitoring bodies as requiring particular attention and positive action in almost all areas of life in Ireland including in relation to accommodation, education, health and employment. Caseworkers should also be alert to the consistent and severe disadvantage faced by Irish Travellers

Useful questions to ask the PSP

- Is the individual from or associated with an ethnic minority?
- Did the PSP take into account the challenges and barriers faced by ethnic minorities when taking the action(s) or making the decision(s) it did?
- What did the PSP do to accommodate or take account of the challenges and barriers faced by ethnic minorities when taking the action(s) or making the decision(s) it did?

Conclusion

The categories discussed above are, of course, not mutually exclusive. A woman for example could be disabled and also from a minority community. Caseworkers in the Office of the Ombudsman should be mindful of these intersectional identities and the fact that they can increase the individual's level of vulnerability. When complaints are received where the person aggrieved is potentially vulnerable on a number of grounds, all the relevant areas should be investigated, where appropriate.

This guide has been produced to offer guidance to Ombudsman caseworkers on how to adopt a human right based approach to complaints received. It does not constitute legal advice. While every effort has been made to ensure that the information in this guide is accurate, the Office of the Ombudsman does not accept legal responsibility for any errors or omissions in, or for the accuracy of the information contained in this guide. The examples in this guide are provided for guidance purposes to inform Caseworkers' work only. Each complaint received by the Ombudsman is considered on its own facts.



Ombudsman