



Northern Ireland

Public Services
Ombudsman

Human Rights Manual



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

Human Rights Manual



Preface

In carrying out our statutory functions my Office is committed to seeking a fair and efficient public service for everyone in Northern Ireland. A key reason therefore for the participation of my Office in this joint project with the NIHRC is to ensure that consideration of human rights is an integral part of our investigation of complaints of maladministration. The manual that has been developed out of this initiative provides a guide for my staff against which they are enabled to evaluate the action of public bodies.

The purpose of the manual is to ensure that our work is rooted in protecting individuals and in assisting bodies to effectively apply human rights principles. In applying these general standards our approach will be informed by a specific set of values described collectively as FREDA – Fairness, Respect, Equality, Dignity and Autonomy. These values are fundamentally important and they reflect what each individual should expect when they engage with public services. Having decided to adopt this approach, I would commend it to all who have a leadership role in the delivery of public services. For my part, I would also intend to use the FREDA values to inform decisions in relation to developing an appropriate remedy in cases where I have found injustice as a result of maladministration.

The first principle of Good Administration ‘Getting it right’ – acting in accordance with the law and with regard for the rights of those concerned – explicitly creates an expectation that public authorities will have ‘regard for rights’ and failure to do so will attract criticism by me. In undertaking an investigation I will interpret ‘rights’ broadly so as to include conformity with the specific standards contained in the full range of international treaties ratified by the UK Government; the Human Rights Act 1998, equality legislation and the provisions of the Northern Ireland Act 1998. The principles of good administration, FREDA values, ratified human rights instruments and domestic human rights and equality laws together comprise the ‘normative framework’ within which I will judge public administration. In adopting this framework I am committed to placing human rights at the core of the work of my office.

I am grateful to the IOI for funding the publication of the manual which will enable its distribution in partnership with my Office. This has been and continues to be a journey of learning and development for all involved.

Marie Anderson
Northern Ireland Public Services Ombudsman

Foreword

by Emily O'Reilly; European Ombudsman



One of the most significant achievements of the Belfast (Good Friday) Agreement of 1998 is the extent to which it has put human rights considerations at the very heart of the new political dispensation.

Human rights are based on universal moral principles. Humanising bureaucracy and improving service to people lie at the heart of the Ombudsman's work and upholding human rights is fundamental to achieving these goals. Implicitly or explicitly, every Ombudsman attempts to ensure that human rights are protected.

However, there will always be a tension between human rights principles and the reality of how government is delivered. In Northern Ireland, the Northern Ireland Public Service Ombudsman (NIPSO) is one of the key players in holding government to account and in seeking to ensure that principle and practice do not drift apart.

NIPSO manual, with its human rights based approach to dealing with complaints, will be of considerable interest to ombudsmen across Europe. The manual focuses on several aspects of this approach, including participation, non-discrimination and equality, empowerment, accountability and human rights law.

In much of Europe, the ombudsman's role has become synonymous with the championing of human rights. Over the last two decades several countries have adapted the traditional title of Ombudsman to incorporate this important function. Slovenia has a Human Rights Ombudsman and Poland a Human Rights Defender, for example. In other European countries, including Portugal, Finland and Spain, the national institutions for human rights and the public service ombudsman are one and the same entity.

But whether or not 'human rights' is in the title, all public service ombudsmen must be at the forefront in defending and promoting the human rights of ordinary people in their dealings with government. I welcome this manual which will further our knowledge and understanding of how that can be done in practice.

Contents

Can we? Should we?

Human Rights and the NIPSO's Jurisdiction 04

The System

The Human Rights System in the UK..... 07

1

Human Rights

The right to life.....21

The right to an effective investigation23

The right to be free from torture or cruel, inhuman or degrading treatment or punishment27

The right to liberty and security of person35

The right to a fair hearing39

The right to respect for private and family life, home and correspondence.....45

The right to freedom of thought, conscience and religion57

The right to freedom of expression.....63

The right to health.....67

The right to an adequate standard of living71

The right to education.....75

The right to social security.....79

2 Equality and Non-discrimination

Children	84
Disabled people	87
Women's rights	90
Ethnic minorities, migrants and asylum seekers	92

3 Assessing, Investigating and Reporting

Examples	97
Forms	102

4 Practical Tools

Human Rights based approach to assessing complaints screening tool	122
Initial Assessment and Assessment	123
case analysis for handover to investigation team	126

Can we? Should we?

Human rights and the NIPSO's Jurisdictions

The governing legislation of the Northern Ireland Public Service Ombudsman (NIPSO) sets out its mandate and functions. It is the NIPSO's role to determine if there has been injustice in consequence of maladministration on the part of a body in jurisdiction. However, there is no definition of what constitutes maladministration in the governing legislation.

In respect of a decision in consequence of the exercise of clinical judgement the NIPSO can examine the merits of such a decision without first identifying maladministration. The NIPSO can only carry out an investigation into a body in the event of receiving a written complaint and that complaint meeting the criteria as set out in law. Furthermore, the NIPSO and his staff cannot draw inferences from complaints. Equally, however, it cannot expect the complainant to know all the circumstances that led to the maladministration. The investigation process may identify issues that were unknown at the beginning. It is however within the Ombudsman's competence and remit to investigate and comment on these issues when appropriate.

The NIPSO is a public authority under the Human Rights Act 1998. In using human rights as benchmarks against which to assess if there has been maladministration on the part of a body complained against, the NIPSO is fulfilling its mandate under its governing legislation and domestic human rights law.

The NIPSO has been, like other public services ombudsman, using the Principles of Good Administration (the Principles) to make a

determination as to whether maladministration has occurred. One of the Principles requires bodies in jurisdiction to "act in accordance with the law and with regard for the rights of those concerned". Bodies within the jurisdiction of the NIPSO therefore already have an expectation that they will be criticised should they fail to adhere to the Principles.

The rights that are the subject of a human rights-based approach and therefore form the basis of this manual are those enshrined in the domestic law of the UK: namely, the Human Rights Act 1998 and those international human rights treaties ratified by the UK.

Nothing in this manual therefore permits or requires the NIPSO to go beyond its legislative competence or remit or requires bodies in jurisdiction to do more than they are already legally bound to do.

A human-rights based approach to the work of the NIPSO reflects the essence of an Ombudsman's historic and fundamental objective of humanizing bureaucracy and improving the experience of service users. This is because human rights are a universal set of values. As legal entitlements, they are predicated on the notion that in order to live in peace and dignity they are the minimum that States must guarantee to all within their borders. A lack of regard for human rights can be maladministration. Injustice is nowhere defined but can include loss of opportunity, inconvenience and distress. Equally, human rights can also be an effective way of expressing the injustice suffered by an individual, as a consequence of maladministration.

This manual will assist Investigating Officers (IOs) in using a human rights-based approach in the decision to accept a complaint as well as investigating and reporting on the investigation. It will outline

what a human rights-based approach to NIPSO investigations involves in theory and in practice.

It will assist in:

- identifying when and which human rights are relevant in complaints received by the NIPSO
- identifying the human rights obligations of bodies in jurisdiction toward complainants
- identifying where bodies in jurisdiction have failed to meet the requirements of the first Principle by not demonstrating regard for the human rights of complainants.

A human rights-based approach

A human rights-based approach is predicated on the conviction that human rights compliant outcomes require a process that adheres to both the values which underpin human rights laws as well as their substantive content.

Participation

Participation of rights-holders is a key aspect of a human rights-based approach. Those that are likely to be impacted by decisions should be involved in decision-making and the public authority should actively seek out the views of rights holders. In Northern Ireland there is significant emphasis on consultation when Government is proposing new legislation or policies. Consultation is one important means of ensuring participation under a human rights-based approach. However, the duty-bearer (the public authority) needs to ensure that participation is both facilitated and

meaningful. It should not be left to the rights holders to discover that the Government is seeking their views. This requires making all the relevant information publicly available and ensuring that it is accessible to people in an appropriate range of languages and formats. Participation is not only relevant at the level of legislation and policy. At an operational level for example, it is important for the body to engage with rights holders to ensure that its policies and practices contribute to the realisation of human rights.

Non-discrimination and equality

The human rights-based approach requires all rights holders to be treated equally and without discrimination. Human rights law prohibits discrimination but it does require, in some cases, prioritising the needs of the most vulnerable and marginalised. This is particularly the case when resources are limited

Empowerment

The human rights-based approach means that everyone should know about their human rights and be supported to claim and enjoy them. Public authorities should be clear that they are not acting out of goodwill in their dealings with people but ensuring that people can claim and enjoy their legal entitlements. In using human rights in its investigations, the NIPSO is also empowering rights-holders by asking bodies in jurisdiction to demonstrate how they have shown regard for human rights.

Accountability

The human rights-based approach requires that human rights are effectively monitored and appropriate remedies are provided when human rights are not respected. The NIPSO therefore has an

important role to play in making bodies in jurisdiction accountable for their actions and decisions. Accountability also requires that bodies make themselves accountable for their actions by having in place effective complaints mechanisms.

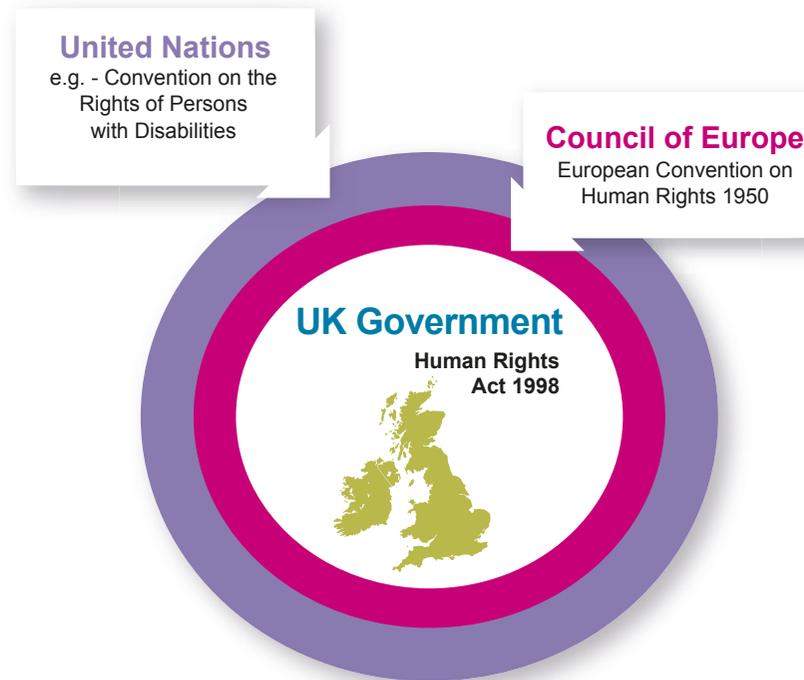
Wherever possible it is important for the NIPSO to honour the human rights-based approach in its investigations and in particular its engagement with complainants. What this means for the practice of the NIPSO will be covered in greater detail in Sections 1 and 2.

Normative basis – human rights law

The legal human rights framework to which the UK is a party underpins the human rights-based approach. All public authorities have a legal obligation to respect and protect human rights. This is a minimum legal requirement and the benchmark when assessing the actions of public authorities. The courts have tended to concentrate on the outcomes of cases that engage human rights and to rule on whether these are compliant. By contrast, the role of the NIPSO is to independently and impartially investigate complaints of maladministration, look at the processes followed by bodies in jurisdiction and comment on the extent to which these have shown regard for human rights in individual cases. Both the courts and NIPSO are concerned with justice for the rights holder/service user. In this sense, the normative basis of human rights law requires that policies, programmes and actions be targeted to respect, protect and fulfil human rights.

The System

The human rights system in the UK



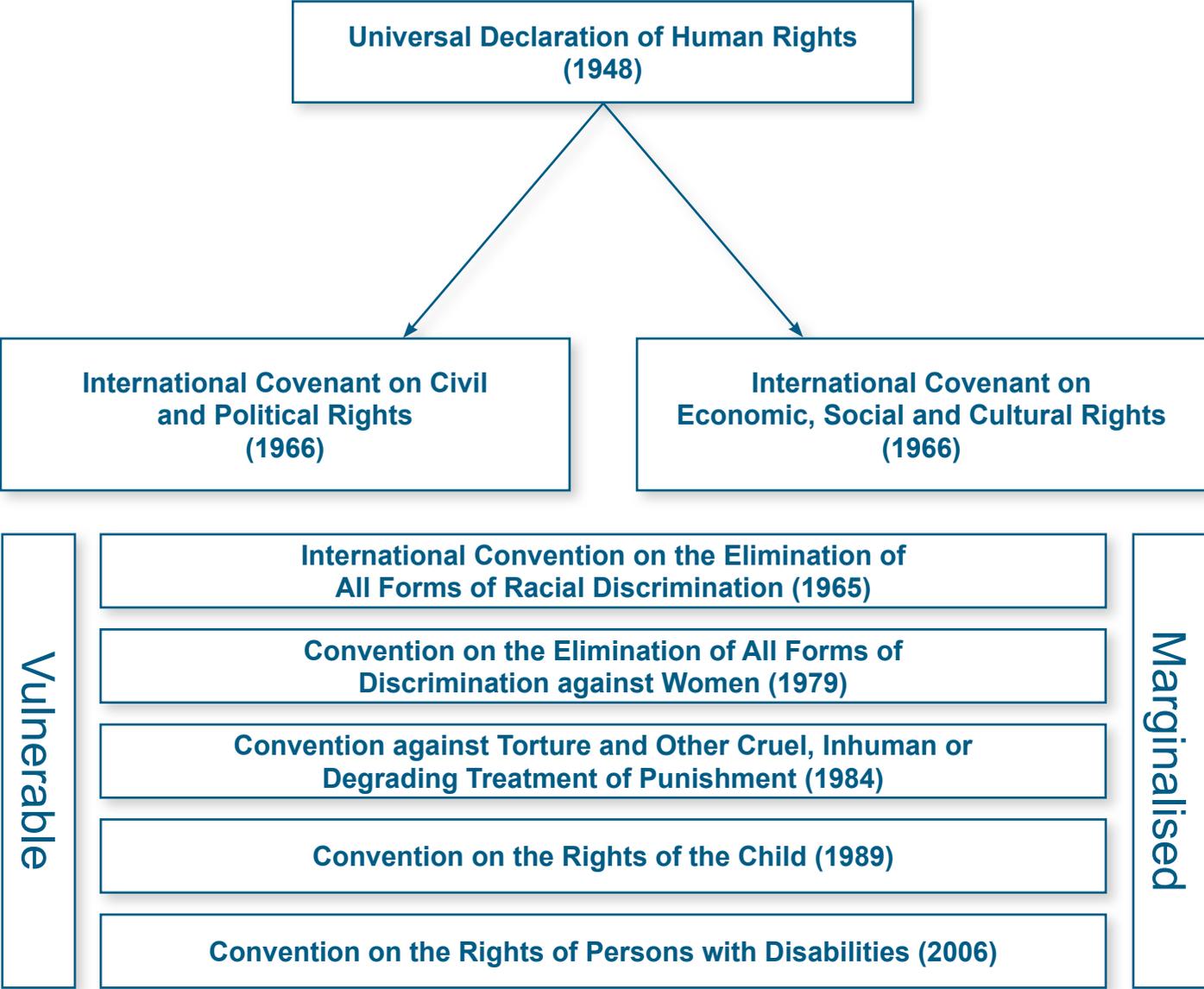
Layers of Human Rights Protection in the UK

There are three layers of human rights protection in the UK as depicted in the diagram above. The UK has agreed to uphold the human rights of those within its territories at the international, regional and domestic level.

The human rights treaties ratified by the UK are outlined in the Sections below. Specialist bodies at the United Nations (UN)

or Council of Europe monitor compliance. The exception is the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which is monitored by the European Court of Human Rights (ECtHR). Finally, the UK has given further domestic effect to the majority of rights contained in the ECHR through the Human Rights Act 1998.

United Nations Human Rights Instruments



List of UN Treaties and examining bodies

Treaty Name	Examining body	Right to Individual Petition
<i>International Covenant on Civil and Political Rights</i>	Human Rights Committee	No
<i>International Covenant on Economic, Social and Cultural Rights</i>	Committee on Economic, Social and Cultural Rights	No
<i>Convention on the Elimination of All Forms of Racial Discrimination</i>	Committee on the Elimination of Racial Discrimination	No
<i>Convention on the Elimination of All Forms of Discrimination Against Women</i>	Committee on the Elimination of Discrimination Against Women	Yes
<i>Convention on the Rights of the Child</i>	Committee on the Rights of the Child	No
<i>Convention on the Rights of Persons with Disabilities</i>	Committee on the Rights of Persons with Disabilities	Yes
<i>Convention Against Torture</i>	Committee Against Torture	No

An expert 'Committee' monitors compliance with each UN treaty. For example, compliance with the UN Convention on the Rights of the Child is monitored and examined by the UN Committee on the Rights of the Child. In ratifying each of these treaties the UK has agreed to submit periodic reports outlining what measures it has adopted (through legislation, policy, practice and budgets) to guarantee and promote the rights in that particular treaty. These are known as State Party reports. In parallel to the reports civil society groups and national human rights institutions submit their own reports outlining their matters in relation to their country's human rights record. The

Committee convenes at the UN in Geneva or sometimes in New York and will then:

- examine the State Party report and parallel reports
- engage in oral dialogue with the representatives of the State Party on pre-arranged examination dates
- listen to oral presentations from the national human rights institution

- issue Concluding Observations, which give the Committee's determination on the extent to which the country has met its obligations and what it must do to meet the full extent of those obligations. States are expected to meet these recommendations in time for the next examination (usually every five years) or to have very sound explanations as to why it has not met those recommendations.

In addition, some of the human rights treaties have a mechanism, which allows individuals to petition the Committee if he or she believes his or her rights have been violated. This mechanism has been included in the treaties by way of an addition to the treaty itself. Such additions are known as Optional Protocols. As well as the right to individual petition, Optional Protocols might contain additional rights that were not included at the time of the drafting of that particular treaty. An individual must exhaust all domestic remedies before he or she can take a complaint to the examining Committee. The UK has only ratified this mechanism in the case of two treaties and these are identified in the table above. Despite this, the rulings of the Committees in cases involving other countries are an important source for this Manual as they give important guidance on the protection of human rights.

General Comments

As well as Concluding Observations, the expert bodies issue commentary on the Articles of the treaties they are mandated to monitor and examine. These General Comments illuminate further the nature of the right contained in that Article and the obligations on states. General Comments are fundamental to understanding the meaning of many human rights.

Concluding Observations, General Comments and rulings in individual complaints give authoritative interpretations of how States must protect, respect and fulfil their human rights obligations.

Special Rapporteurs

In addition to the expert bodies that monitor, examine and comment on compliance with a treaty, the UN Office of the High Commissioner for Human Rights appoints Special Rapporteurs. Special Rapporteurs are individual experts mandated to monitor, examine and comment on compliance with a particular right. So for example, there are Special Rapporteurs on the Right to Health and the Right to Freedom of Expression and Assembly. Special Rapporteurs visit countries and meet with a wide range of groups and individuals, including Government Ministers, civil society groups, independent experts and the national human rights institution. Only once this is completed, will a Special Rapporteur draft and issue his or her report outlining concerns or praise for the way in which the State Party is upholding that particular human right.

Non-treaty instruments (Soft law)

The UN has developed and adopted a number of Declarations, Codes, Rules, and Principles. These non-treaty instruments serve to expand and interpret the human rights obligations of Member States. They are not legally binding and are often, for this reason, known as 'soft law'. Non-treaty instruments will however serve as an important resource for NIPSO staff because they help clarify legally binding standards.

Those most relevant to the work of the NIPSO are:

Standard Minimum Rules for the Treatment of Prisoners

Declaration on the Rights of Disabled Persons

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

Standard Minimum Rules for the Administration of Juvenile Justice

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment

Declaration on the Elimination of Violence Against Women

Principles for Older Persons

Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care

The Council of Europe treaties

List of Council of Europe Treaties and examining bodies

Treaty name	Examining body	Report referred to Committee of Ministers
<i>Framework Convention for the Protection of National Minorities</i>	Advisory Committee	Yes
<i>Convention on Regional and Minority Languages</i>	Committee of Experts	Yes
<i>European Social Charter</i>	Committee on Social Rights	No

Expert Groups also monitor Council of Europe human rights treaties, but not the ECHR. However, some practices differ from one treaty expert body to another, as do their rules of governance.

State Parties are usually required to submit periodic reports to the expert body mandated to monitor and examine compliance. The expert body also encourages the submission of and takes account of parallel reports submitted by civil society groups and national human rights institutions.

Following this process, the examining body will then issue observations, recommendations or points of concern regarding the country it has examined. The Advisory Committee on the Framework Convention for the Protection of National Minorities adopts Opinions. These are sent to the Committee of Ministers. Following its consideration the Committee of Ministers adopts Recommendations. The Committee of Experts prepares an evaluation report for the Committee of Ministers, which may in turn

decide to make Recommendations to the State. The Committee of Social Rights of the European Social Charter adopts Conclusions.

Some expert bodies have adopted a practice of country visits, in order to arrive at their Opinion or Recommendation. During these visits, meetings will take place with State Party representatives, civil society groups and national human rights institutions.

The Committee of Social Rights also has a mechanism that considers complaints from bodies as opposed to individuals. The Committee will accept complaints, for example, from trade unions and some non-governmental organisations. Having considered the complaint the Committee will issue its judgement upholding it or otherwise. The UK has not accepted this mechanism and therefore such groups operating in the UK cannot take complaints to the Committee. However, as with the UN system of individual complaints, decisions of the Committee on Social Rights are an important source for this Manual and referred to where appropriate.

The European Committee for the Prevention of Torture

The core working method of the European Committee for the Prevention of Torture (ECPT) is country visits during which they will visit places of detention. Countries must be notified when the ECPT intends to conduct a visit. Once in a country the ECPT may however visit any place where persons might be deprived of their liberty and at any time. Following its visit the ECPT will send a report of its findings to the country. The ECPT can only publish the report with the country's permission. The UK however, has never refused permission. For the NIPSO's purposes, it is important to be aware

of the ECPT Standards, which it has published in order to give State parties an understanding of how people deprived of their liberty should be treated.

These Standards can be found at:

<http://www.cpt.coe.int/en/docsstandards.htm>

The European Court of Human Rights

The notable exception in the Council of Europe system is the *ECHR* under which individuals, having exhausted domestic remedies, can take their case to a regional court. The ECtHR can order a State Party to take remedial action where a violation of rights has been found and order a compensation payment. The judgements of the ECtHR are a key source for this Manual.

The Human Rights Act 1998

The Human Rights Act 1998 brought into domestic effect many of the rights contained in the ECHR. This means a person who believes their rights under the ECHR are violated can take a case to a UK court. This does not mean however, that there is no role for the NIPSO in investigating and commenting on the extent to which a body in jurisdiction has shown regard for someone's rights under the ECHR. UK jurisprudence has established that in determining human rights cases the courts are almost exclusively concerned with the outcome for the individual. (*Belfast City Council (Appellants) v. Miss Behavin' Limited (Respondents) (Northern Ireland) [2007] UKHL 19* and *R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants) [2006] UKHL 15*). The Ombudsman however, as part of the administrative justice system is

concerned with the decision-making process and the impact of those decisions and subsequent actions which affect people. As such the role of the Ombudsman in examining whether a body in jurisdiction has shown regard for someone's rights complements the role of the courts. Bodies in jurisdiction also benefit from the Ombudsman's approach to bringing bodies to account where they have failed to show regard for the human rights of the public they serve. This is because where administrative processes evidence regard for human rights the courts are less likely to rule that the outcome was a violation of ECHR rights. As Lord Bingham stated in his judgement in the Denbigh High School case "If in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder".

As with many complaints that come to the NIPSO, there may be an alternative legal remedy. However, validating officers must consider the remedy that is sought by the complainant and the extent to which it is reasonable to expect the complainant to seek a remedy through the courts. The cost, remoteness of the legal process and the nature of the remedy sought are all currently factors that the validating officer must consider. This remains unchanged with complaints that raise – according to the complainant, or in the validating officer's assessment – human rights concerns. For further clarification IOs should refer to the NIPSO's Alternative Legal Remedy Practice Note

When primary or secondary legislation is introduced the relevant Minister must issue a declaration stating that the legislation is compatible with the Human Rights Act. However, a number of legal cases have found various pieces of legislation to lead to breaches of rights and therefore to be incompatible with the requirements of the

Human Rights Act. A UK court cannot ask a public authority to act outside of an Act of Parliament (primary legislation) even if following that law does breach someone's rights. In these circumstances it can only make a 'declaration of incompatibility' and ask that the Government amend or repeal the law. If however, it is secondary legislation such as a Regulation that is leading to someone's rights under the Human Rights Act to be breached, a UK court can ask the public authority to set aside or ignore the law.

Categories of rights

Broadly, there are three categories of human rights. These categories are:

Absolute rights – can never be limited or interfered with whatever the circumstances

Limited rights – can be limited in a number of defined and finite circumstances usually stated in the text of the treaty Article itself.

Qualified rights – interference with a qualified right may be lawful in certain circumstances. Any interference with a qualified right must be:

- In pursuance of a legitimate aim
- Necessary in a democratic society
- Proportionate.

The distinction between categories of rights is important for the NIPSO both in considering the complaint itself, deciding on appropriate redress and remedy and in making referrals to other bodies where appropriate. There is no hierarchy of rights. A failure to respect any of the rights may be a matter for the criminal law and require referral to another more appropriate authority for consideration. This is more likely to be the case with absolute rights but not exclusively so. Where an NIPSO investigation finds that an absolute right has not been sufficiently considered by a public authority there is also more likely to be public interest reasons for a more rigorous follow-up process with the body complained against in order to ensure recommendations are acted upon.

In the case of qualified rights IOs are likely to seek evidence showing how the body complained against balanced competing interests and ensured a proportionate response.

These issues are expanded upon in Sections 1 – 3.

Nature of obligations

As mentioned, all of the human rights instruments identified above impose a range of obligations on the State that has signed, ratified or incorporated them into its domestic law. This Section outlines the nature of those obligations on the UK. These are generic obligations and the next two Sections will provide further detail.

Respect – the UK must respect human rights. This means that it, through its public authorities must not undertake any action that is a violation of someone’s rights. Some examples of this include ensuring prison officers are not permitted to torture prisoners.

Protect – the UK must protect human rights. This means that it must prevent third parties from interfering with anyone’s rights. Ensuring that adequate laws and systems are in place that mean if those rights are interfered with by a third party, they are subject to some form of sanction or censure through criminal or civil law.

Fulfil – the UK must fulfil human rights. This means that it must undertake positive action for the betterment of people’s rights. This requires a pro-active approach to ensure that the human rights situation in the UK gets even better. For example, a public awareness campaign around domestic violence that educates people about the criminal justice systems robust response to domestic violence. This is an example of the State providing resources for individuals to prevent breaches of rights.

Progressive realisation

Progressive realisation is a concept applicable to the socio-economic rights discussed in Section 1. These rights are:

- the right to health
- the right to an adequate standard of living
- the right to education
- the right to social security.

Progressive realisation is the obligation on public authorities to take appropriate measures towards the full realisation of economic, social and cultural rights to the maximum of their available resources. The reference to “resource availability” reflects a recognition that the

realisation of these rights can be hampered by a lack of resources and can be achieved only over a period of time. Equally, it means that a State's compliance with its obligation to take appropriate measures is assessed in the light of the resources—financial and others—available to it.¹ As a minimum however, States must avoid deliberate retrogression of human rights protection. This means that States should not adopt measures aimed at reducing the level of protection that some rights have already gained unless the State can show this is absolutely unavoidable. Section 1 outlines in greater detail what IOs need to consider when socio-economic rights are involved in a complaint.

Incompatible legislation

Although unlikely, it may be that a body in jurisdiction 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 authority 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, during the course of an investigation by the NIPSO a public authority suggests that the legislation prevents it from respecting an aggrieved person's human rights the NIPSO might consider the following options:

- Refer the complainant to the Courts to seek a 'declaration of incompatibility' where the breach is of a right in the ECHR
- Refer the complainant to the individual petition mechanism if appropriate

- Refer the matter directly or via the NIHRC to the relevant treaty monitoring body
- Write directly to the Government Minister responsible for the legislation bringing the matter to his or her attention
- Refer to the alleged incompatibility in the Observations section of the NIPSO report if relevant.

The Charter of Fundamental Rights of the European Union

In addition to the UN and Council of Europe treaties, the Charter of Fundamental Rights of the European Union enshrines a wide array of both civil and political and socio-economic rights enjoyed by EU citizens and residents. The Charter has equal legal status with the EU Treaties, therefore if a piece of legislation infringes an individual's rights under the Charter the courts may rule that the Charter has primacy over the relevant domestic provisions.

Significantly, the rights contained within the Charter have supremacy over inconsistent national law or decisions of public authorities. It can be used by courts to interpret EU law and domestic measures implementing EU laws in cases where the meaning of a provision is unclear.²

1. "Frequently Asked Questions on Economic, Social and Cultural Rights" Fact Sheet No. 33, Office of the UN High Commissioner for Human Rights, December 2008

2. See for discussion European Scrutiny Committee - Forty-Third Report 'The application of the EU Charter of Fundamental Rights in the UK: a state of confusion' 26 March 2016

In contrast to the ECHR the Charter only applies domestically within the scope of EU law. As a result, it arguably has a narrower range of application than the ECHR. However, in the course of an investigation where a public authority suggests that legislation prevents it from respecting an aggrieved person's human rights the NIPSO might consider engaging the Charter in a similar way to the ECHR.

The European experience

Human rights are at the forefront of the considerations of many Ombudsmen in Europe. In many European countries such as Spain, Portugal and Finland the institutions of public services ombudsman and national human rights institution are combined. In these countries as in the UK, Ombudsmen serve as alternatives to litigation in the courts. The concept of Ombudsman ensuring bodies are accountable for human rights issues and have regard for human rights is therefore not unique globally

Further information

It is important for IOs to know that the interpretations and jurisprudence of the UN, Council of Europe and the domestic courts has and will continue to evolve over time as new situations are presented to the expert Committees and courts. Up-to-date information should always be sought by checking the relevant websites:

The latest UN information is available at the website of the Office of the High Commissioner for Human Rights: www.ohchr.org

The latest Council of Europe information is available at:
www.coe.int/aboutCoe/index.asp

IOs can access the text of full judgements of the ECtHR here:
<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#>

IOs can access the text of full judgements of the UK Courts here:
<http://www.bailii.org/>

These websites are best used if an IO knows exactly which case he or she is looking for.

A number of websites provide information on the latest ECtHR and the UK courts jurisprudence. These may be of more use to IOs. However, they should be used with some caution and it is advised that a number are checked to verify the commentary and interpretation.

The NIHR is also an important resource for the NIPSO and IOs should not hesitate to seek advice by contacting the Commission.

Human Rights

1

Human Rights



This Section explores those human rights that are most likely to be involved in complaints brought to the NIPSO. Each section is divided into the following:

1. A reference to the relevant treaties of the Article under discussion
2. A brief explanation of what the human right means.

Where it applies:

an outline of the types of circumstance and/or type of body to whom it applies.

Obligations:

a discussion of the nature of the obligations the right places on bodies in jurisdiction.

What to consider:

an outline of what an IO should aim to establish from the body complained of in order to assess if there has been maladministration. The extent to which the body's decisions and actions warrant

criticism, if at all, from the NIPSO will depend on a number of factors. Unfortunately, there are no prescribed answers here. IOs need to assess the evidence available case-by-case to establish the extent to which the body could have done more to show regard for the rights of the person concerned. The extent and nature of the injustice suffered by the aggrieved person because of the lack of regard for human rights is an important gauge.

The evidence (as found in correspondence, notes, the body's procedures, policies and guidance) should reveal whether the body is aware of its human rights obligations.

If the body demonstrates awareness of, and has met all these obligations in respect of the aggrieved person, then it is unlikely to attract criticism from the NIPSO.

The following reasons for not meeting some or all of the human rights obligations are likely to warrant censure:

- Evidence suggesting a lack of leadership and commitment with respect to the human rights obligations
- Evidence showing the relevant policies or guidance were not put into practice at the operational level due to, for example, poor staff training and/ or poor review and internal check systems of staff actions
- Evidence indicating poor prioritisation of resources toward the most vulnerable
- Evidence showing a lack of understanding of human rights in practice.

Where there is a failure on the part of the body to evidence an awareness of its obligations in human rights terms, this is likely to warrant criticism in itself.

A human rights-based approach requires specific scrutiny of and attention to how a public authority has considered human rights and balanced competing rights. Public authorities should be able to evidence an awareness of the relevant human rights and justify their decisions accordingly.

The right to life

ECHR	Article 2
ICCPR	Article 6

The right to life is a limited right. The right to life can be relied on where someone believes the public authority is *failing* to protect their right to life and by relatives of a deceased person where they believe a body *has failed* to protect the right to life. It may be relevant where complainants are alleging an avoidable death in a hospital or institutionalised setting.

Where it applies

The right to life applies in relation to individual interaction with army or law enforcement officials such as the police or prison service. Hospitals, mental health institutions, residential and nursing homes all must protect the right to life. It applies with regard to the commissioning, regulation, procurement and supervision as well as the delivery of such services.

For the NIPSO's purposes this right is most likely to be involved in healthcare settings including the provision of healthcare to prisoners.

For the NIPSO the right to life is most likely to be involved in health complaints involving:

- The Northern Ireland Prison Service including the Young Offenders Centre at Hydebank Wood
- Health and Social Care Trusts – including GPs, hospitals and mental health institutions

- Woodlands Juvenile Justice Centre
- Nursing Homes where places are arranged by a Health and Social Care Trust.

Obligations

The right to life places both **positive** and **negative** obligations on public authorities.

The right to life requires that public authorities refrain from taking life arbitrarily. This requires adequate training and awareness-raising amongst law enforcement officers. This is particularly relevant in training officers in the use of firearms, TASERs, restraint techniques and in public order situations.

In human rights law, where the use of force by a public authority (such as the prison service, police or mental health institution) leads to someone's death, that public authority will have to show 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.

Positive Obligations

The right to life requires that public authorities adopt positive measures to protect individuals in the types of settings identified above. This can include, for example: the regulation of hospitals by inspecting bodies such as the RQIA; and actions to ensure that adequate systems, rules, personnel and policies are in place to protect the lives of patients and to mitigate risk.

States should take measures to prevent and punish deprivation of life by criminal acts through appropriate laws.

Life-saving medical treatment

In some cases the right to life extends to placing an obligation on the public authority to provide life-saving medical treatment but it is important to note that there is no right to such medical treatment in all circumstances. Nor is it required that life is prolonged in all circumstances. This was established in a *NHS Trust v D & Ors [2000] 2 FLR* where it was ruled that non-resuscitation of a 19 month old child with severe disabilities did not breach the right to life under the ECHR. In this case three consultant paediatricians advised that further resuscitation would lead to further distress and pain and that the child's medical condition was irreversible and worsening.

The case of *Burke v General Medical Council [2005] 2 FLR 1223* established that a competent adult may also request artificial nutrition and hydration to be provided when they lose capacity. The judgement of the Court of Appeal was clear however, that "autonomy and the right to self-determination do not entitle the patient to insist on receiving a particular medical treatment regardless of the nature of the treatment".

The principle established in *Burke v General Medical Council* may also apply in situations where the benefits of a particular medical treatment or course of treatment are doubtful. For example, when a treatment or medication may have little or no chance of leading to a patient's recovery, or where a baby is born very prematurely. In these cases the *best interests of the patient* need to be at the heart of the decision-making process.

A violation of the right to life does not automatically follow where life-prolonging treatment is withheld on the grounds of scarce resources. However, any decision to withhold treatment for economic reasons should be non-discriminatory and stand up to scrutiny. (*Herceptin case R v Swindon National Health Service Primary Care Trust and another [2006] EWCA Civ 392*)

In *Re B (Adult, refusal of medical treatment) [2002] 2 All ER 449* the Family Division Court confirmed that a seriously physically disabled patient, who was mentally competent, was entitled to refuse consent to life-sustaining medical treatment.

Preventive measures

The duty to take preventive measures in order to protect the right to life can extend to patients at risk of suicide. In the Supreme Court case of *Rabone v Pennine Care NHS Foundation Trust UKSC 2, (2012) MHLO 6* a voluntary patient hanged herself while on two days home leave from a hospital where she was undergoing treatment for a depressive disorder. The Supreme Court held that even though the deceased had been a voluntary patient she was in the care of the State. She had been admitted to hospital for treatment and in granting her home leave the health trust had failed to "do all that could reasonably have been expected to prevent the real and immediate risk of her suicide". The fact that she was a voluntary rather than detained patient was one of "form not substance".

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. The Human Rights Committee states that the

right to life cannot be “properly understood in a restrictive manner... The Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.” (**General Comment No. 6 - The right to life**). This General Comment is of particular relevance when considering the rights of Irish Travellers for example, where infant mortality rates are higher and life expectancy lower than the majority population.

In healthcare settings, protection of the right to life requires more than the provision of medical treatment. It is also reasonable for the NIPSO to consider and comment on the extent to which lives are put at risk through factors such as infection control or cleanliness in hospitals.

The right to life may impose a duty on doctors to take steps to prevent life-threatening conditions and a duty to inform the public, or individuals, of threats to their life. Where this would involve a breach of confidentiality this should be balanced against the right to life. The provision of important information to patients on health issues and health risks also falls within the scope of the right to life. (**LCB v UK (1998) 27 EHRR 212**)

Data sharing and safeguarding procedures within and across relevant agencies require particular attention. Assessing the extent to which procedures such as the Safeguarding Children and Vulnerable Adults Protocol have been followed will also be important in some social care investigations.

The right to an effective investigation

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 if the State has failed to protect life. The inquiry into Mid Staffordshire NHS Foundation Trust in 2013, for example, was conducted after the relatives of patients who had died in the hospital claimed their right to an effective investigation as an aspect of the right to life under Article 2 ECHR.

While the NIPSO receives and considers complaints regarding deceased persons and may reach a finding of avoidable death, it is not required to meet the criteria established by human rights law for an effective investigation. This is because the NIPSO investigates whether the death was preventable or avoidable and not whether it was lawful.

The criteria, established following the case of **Jordan v UK (2001)** at the ECtHR in 2001, are set out below:

- the inquiry must be on the initiative of the State
- it must be independent
- it must be capable of leading to a determination of whether any force used was justified, and to the identification and punishment of those responsible for the death
- it must be prompt and proceed with reasonable expedition

- it must be open to public scrutiny to a degree sufficient to ensure accountability; and,
- the next-of-kin of the deceased must be involved in the inquiry to the extent necessary to safeguard their legitimate interests.

Euthanasia

Euthanasia or assisted suicide has been considered in the context of the right to life by the ECtHR.

In the case of *Pretty v UK (2002)* it was argued before the ECtHR that the right to life under the ECHR did not prohibit an individual from choosing to end one's life. It was submitted that those who assist an individual's suicide should be immune from prosecution. The ECtHR has rejected this claim. A number of other cases have also been before the UK's courts relating to assisted suicide. These cases have relied on the right to privacy and family life under Article 8 ECHR but have also failed to secure a ruling that legalises euthanasia or assisted suicide.

What to consider

Where the right to life is considered relevant to a health complaint, IOs should, as is current practice, rely on Independent Professional Advice (IPA) in order to assess the reasonableness of the body's actions and decisions. Taking into account the will and preferences of the individual, the "best interests" of the patient should be at the heart of decision-making. However, in adopting a human rights-based approach IOs should give greater scrutiny to the way in which "best interests" are assessed and the factors taken into account by medical professionals in reaching decisions. IOs should

give particular attention to how potentially competing rights were balanced.

The NIPSO already uses the British Medical Association's own guidance as a benchmark. It is worth noting therefore that the BMA advises³:

"1. The patient's right to life under Article 2 (ECHR the right to life) should be specifically considered in any decision to withhold or withdraw life-prolonging treatment but this does not mean that treatment must always be provided. Treatment may be withdrawn if:

"providing treatment would not be in the patient's best interests; the treatment is considered futile; or, the patient has effectively waived his or her right to have life prolonged by making an informed refusal of life-prolonging treatment."

Where the right to life is considered relevant, IOs should aim to establish the following:

- The nature of the body's obligations toward the person aggrieved. These may include positive obligations, for example to provide treatment, delay discharge from a hospital or mental health institution; provide information regarding risks to health. These may also include negative obligations to refrain from a certain course of action
- Any positive steps taken to meet these obligations – e.g. the provision of life-saving treatment; the provision of relevant information regarding health risks; the availability and provision of appropriate training for relevant staff

- Any positive steps that could have been but were not taken to protect life and the reasons for this e.g. resource constraints, poor clinical judgement according to IPA, poor practice according to IPA
- Whether the aggrieved persons' wishes were ascertained and respected
- In the case of children, whether the parent's wishes were ascertained and respected
- How the best interests of the person aggrieved were documented and assessed in light of the information above.

Institutions should be able to evidence an awareness of the right to life being relevant in the circumstances and justify their decisions or actions accordingly. Where that evidence is not available through the course of the investigation, it is likely to warrant specific comment in the investigation report.

Special procedures

Complaints might also be received that explicitly claim 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, an investigation might begin to uncover that life is at risk. In investigating such complaints there is an acute duty on the NIPSO to report its concerns to the relevant authorities in the public interest.

The right to be free from torture or cruel, inhuman or degrading treatment or punishment

ECHR	Article 3
ICCPR	Article 7
UNCAT	

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 their dignity was not respected, IOs should consider the applicability of the right to be free from torture and cruel, inhuman or degrading treatment or punishment. This right may be linked to the FREDA values of Dignity and Respect.

Definitions

Torture

'Torture' has been defined in the UN Convention Against Torture as "any act by which severe pain or *suffering*, whether physical or mental, is *intentionally inflicted* on a person for such purposes as:

1. Obtaining from him or a third person information or a confession
2. Punishing him for an act he or a third person has committed or is suspected of having committed

3. Intimidating or coercing him or a third person or
4. For any reason based on discrimination of any kind.

Given the definition set out in UNCAT it is unlikely that the NIPSO will uncover instances of torture. However, where an IO through the course of an investigation 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.

This section will focus on the right to be free from inhuman or degrading treatment.

Inhuman and degrading

For treatment to be considered 'cruel, inhuman or degrading' it need not be intentionally inflicted. Treatment has been defined as 'inhuman' by the ECtHR when it has been "applied for hours at a stretch and caused either actual or bodily injury or intense physical and mental suffering". 'Degrading' treatment has been found when it has aroused in the victim "feelings of fear, anguish and inferiority, capable of humiliating and debasing". (*T and V v UK (1999)*). 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 NIPSO's conclusions therefore should take account of these definitions and distinctions.

Where it applies

A person might be subject to cruel, inhuman or degrading treatment in a range of settings. The Human Rights Committee has established that the right to be free from torture and cruel, inhuman or degrading treatment or punishment protects, “in particular, children, pupils and patients in teaching and medical institutions”.

(General Comment No. 20 – Prohibition of torture or other cruel, inhuman or degrading treatment or punishment)

Degrading treatment can be the result of a neglect of duties as well as the way that professionals and support staff actively carry out their duties.

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

Discrimination on grounds of race may also amount to degrading treatment. The ECtHR has stated that if a difference of treatment were to “denote contempt or lack of respect for the personality” or be designed to... humiliate or debase” it could be considered degrading. ***(Abdulaziz, Cabales and Balkandai v UK (1985))***.

Social isolation

Inhuman and degrading treatment can involve social isolation, lack of meaningful activity and lack of access to fresh air. In a case involving the solitary confinement of a prisoner the ECtHR commented “that complete sensory isolation coupled with total social isolation can destroy the personality and constitute a form of inhuman treatment which cannot be justified by the requirements of security or any other reason”.

In this case the Court found “there has been a violation of Article 3 of the Convention in that the applicant was kept in solitary confinement for an excessive and unnecessarily protracted period, that he was kept for at least seven months in a cell that failed to offer adequate protection against the elements, and that he was kept in a location from which he could not gain access to outdoor exercise and fresh air without unnecessary and avoidable physical suffering”. ***(Mathew v the Netherlands, (2005))***

Destitution

Destitution has been found by the House of Lords to constitute inhuman and degrading treatment where the Government knew that refusal of State support was likely to force individuals into destitution and denied the applicants any other lawful form of sustenance by refusing them the right to take up paid employment ***(Regina v. Secretary of State for the Home Department (Appellant) ex parte Adam (FC) (Respondent) Regina v. Secretary of State for the Home Department (Appellant) ex parte Limbuela (FC) (Respondent) Regina v. Secretary of State for the Home Department (Appellant) ex parte Tesema (FC) (Respondent) (Conjoined Appeals) [2005] UKHL 66)***

Medical treatment

A determination of inhuman and degrading treatment has been reached in the UK’s attempt to send an individual to their home country where they would not receive adequate healthcare to help them in the terminal stages of their illness. This particular case indicates the link between inhuman and degrading treatment and access to certain types of healthcare in certain situations. Withholding appropriate medical care where someone is suffering

from a serious illness could in certain circumstances amount to inhuman and degrading treatment.

Where treatment cannot be provided in the UK, patients have the right to seek treatment in another Council of Europe member state and receive reimbursement of cost from the NHS. However, the patient's medical condition and degree of pain must reach the threshold of gravity set in determining inhuman and degrading treatment. (*R (on the application of Yvonne Watts v (1) Bedford Primary Care Trust (2) Secretary of State for Health [2003] EWHC 2228*)

In certain extreme circumstances non-consensual medical treatment can also involve the right to be free from inhuman or degrading treatment. The ECtHR has ruled that the administration of drugs to a suspected drug dealer that forced him to regurgitate cocaine constituted a "grave interference with his physical and mental integrity against his will". The Court commented that there were no therapeutic reasons for the forced administration and that the evidence could have been retrieved through less intrusive means. (*Jalloh v Germany (2007)*)

The UN Human Rights Committee states that the right to be free from inhuman or degrading treatment "expressly prohibits medical or scientific experimentation without the free consent of the person concerned". (*General Comment No. 20*).

Providing medical treatment against the wishes of a competent patient or providing medical treatment to an incompetent patient when it is known that he or she would have refused the treatment might also be considered inhuman or degrading treatment.

The ECtHR has held that a measure which is medically necessary from the point of view of the ordinary principles of medicine cannot in principle be regarded as inhuman or degrading. (*Herczegfalvy v Austria (1992)* and *Jalloh v Germany 2007*) However, the medical need must be convincingly demonstrated. (*Nevmerzhitsky v Ukraine (2005)*)

"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. A healthcare team sought approval to withhold artificial ventilation from a baby boy against the wishes of the parents. The judge in the case was of the view there could be no infringement of the right to life because it was in the best interests of the child to withhold the ventilation as doing so respected his right to be free from inhuman or degrading treatment. (*A National Health Service Trust v D & Ors [2000] 2 FLR 677*).

Care settings

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. (*See R (on the application of A, B, X and Y) V East Sussex Council and the Disability Rights Commission [2003] EWHC 167, para 114*)

Restraint

The persistent use of bed cages in psychiatric establishments has been found to be inhuman and degrading. IOs should consider this finding in light of the use of, for example, bed rails in healthcare settings such as hospitals and nursing homes. (*Concluding*

Observations, Human Rights Committee, Croatia, 2009, CCPR/C/HRV/CO/2)

The Court of Appeal has established that the use of restraint in secure training centres for the purposes of good order and discipline, rather than safety, was a breach of the right to be free from inhuman or degrading treatment under the ECHR. **(R. (C) v Secretary of State for Justice [2008] EWCA Civ 882.)**

Restraint techniques are used in non-custodial settings also such as mental health institutions and nursing homes. In using forms of restraint public authorities must follow a clear set of prescribed rules established by human rights law. Restraint should only be used where the individual concerned is at risk of imminent harm or is likely to cause harm to a third person. The risk of damage to property or to control challenging behaviour is not an acceptable reason to employ any form of restraint.

The Standards of the European Committee for the Prevention of Torture state that when restraint is or might be used it is necessary that:

- the use of restraint techniques are governed by clearly defined policies and procedures
- initial attempts of restraint should as far as possible be non-physical
- physical restraint should in principle be limited to manual control
- staff receive training on the use of non-physical and manual restraint

Any form of restraint that is used must be clearly recorded in a specific register and in the person's file.

Where restraint is being used over a period of time, for example, chemical restraint (such as sleeping pills or sedatives) they must be subject to regular periodic review and the reasons for continuation clearly recorded.

Domestic violence

The failure of public authorities to protect people from abuse in their own homes has been ruled to be a violation of the right to be free from inhuman or degrading treatment. Cases have involved women suffering from domestic violence and children neglected and mistreated by their parents. A Government has been found in violation of its duties under this right where its police service failed to protect a woman from domestic violence. In this ECtHR case the victim's injuries, as a result of which a protection order had been granted, and the anxiety caused by her fear of future attacks, amounted to inhuman treatment under Article 3 and the authorities' failure to take measures in relation to this inhuman treatment amounted to a breach of the state's positive obligations under Article 3. Specifically, despite the authorities being aware of the husband's violent behaviour and of the fact that the victim was in a particularly vulnerable position, the actions taken by the authorities were not effective or decisive. **(Opuz v Turkey (2009))** and **(Z and others v UK (2001))**

Prisoners' health

A number of cases have established a violation of the right to be free from inhuman or degrading treatment in the context of prisoner's

health. In *Dybeku v Albania (2008)* a violation of Article 3 ECHR was found where a prisoner suffering from paranoid schizophrenia was placed in a normal prison and treated as an ordinary prisoner. The ECtHR held that the prisoner's psychological condition made him more vulnerable than the average detainee and that his detention might have exacerbated his feelings of distress, anguish and fear. In its ruling the ECtHR referred specifically to Albania's failure to comply with the Council of Europe's recommendations on dealing with prisoners with mental illnesses.

In *Raffrey Taddei v France (2010)* the applicant suffered from anorexia and a number of other medical conditions and complained about her continued detention and a failure to provide her with appropriate health treatment. The Court found a violation of Article 3 ECHR holding that the State's failure to take into account the applicant's medical needs taken with the uncertainty around her requests for deferment were capable of causing distress that exceeded the unavoidable suffering inherent in detention.

A number of other cases have similarly ruled a violation of Article 3 ECHR where the relevant authorities have failed to provide adequate medical assistance to prisoners suffering from serious physical illnesses including HIV: *Khudobin v Russia (2007)*; *Logvinenko v Ukraine (2011)*; *Gulay Cetin v Turkey (2013)*.

Obligations

As with other rights, negative and positive obligations follow from the right to be free from torture or cruel, inhuman or degrading treatment or punishment. The right requires public authorities to refrain from action and requires provision of certain amenities. This can include such basics as food, water, shelter from the elements, fresh air and opportunities for social interaction. It can also encompass the duty to provide physical and emotional safety to individuals, including when threats to that safety arise from private actors.

The State has a duty to ensure its agency personnel refrain from action that might constitute torture or inhuman or degrading treatment. This includes taking positive measures to protect individuals in situations that are or might become inhuman or degrading whether through action or inaction.

As a foundation, an adequate legislative, administrative and judicial framework is required to ensure that individuals are protected from treatment that is potentially inhuman or degrading whatever the establishment. ***(General Comment No. 20)***

However, a legislative framework alone is not sufficient. The Government must have in place adequate means of communicating and raising awareness of the legislative framework to relevant staff to ensure there is an understanding of the concepts of cruel, inhuman and degrading treatment. This might include, but is not limited to; policies, guidance and training. ***(General Comment No. 20)*** This General Comment is particularly relevant in healthcare settings where staff might often claim pressures on their time or lack of resources are a reason for neglect of patients or residents. Given

the absolute nature of the right under discussion such considerations can never justify subjecting individuals to treatment that is cruel, inhuman or degrading.

What to consider

The criteria for establishing torture or cruel, inhuman or degrading treatment or punishment are not absolute as they have evolved over time. They are also not objective. The impact of the treatment on the individual concerned is crucial to establishing whether the treatment was cruel, inhuman or degrading. As shown above, jurisprudence has established that a wide range of actions or inactions can constitute treatment that is cruel, inhuman or degrading. However, the courts have set a high threshold for what is to be considered cruel, inhuman or degrading and a minimum level of severity must be reached before a violation is found by the domestic courts and the ECtHR. Similarly, the NIPSO should take into account the level of severity before using phrases such as 'cruel', 'inhuman' or 'degrading'.

The right is an absolute one. In evidencing that it has shown regard for this right the public authority's balancing of other rights or interests is irrelevant. Limited resources whether that be in terms of staff numbers or economic resources cannot be considered mitigating factors. In short there can be no legitimate reason for interfering with the right to be free from torture or cruel, inhuman or degrading treatment.

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

- The nature of the body's obligations toward the person aggrieved. For example was it the body's duty to make certain provision for the person aggrieved in the form of care or treatment. Or was it its duty to refrain from certain action such as using restraining techniques.
- Once the nature of the obligations has been established IOs should seek to pursue the extent to which these obligations were met by the body. Where there was a failure to meet the obligations was this intentional or was it a result of neglect.
- The impact of the treatment on the person aggrieved taking into account the sex, age and health status of the individual. Particular groups such as older people, children or people with disabilities are more vulnerable and require particular attention. Treatment or punishment that is cruel and inhuman would have been "applied for hours at a stretch and caused either actual or bodily injury or intense physical and mental suffering". Degrading treatment would have aroused in the victim "feelings of fear, anguish and inferiority, capable of humiliating and debasing".
- Other relevant factors including: the length of time the individual was subjected to the treatment; the cumulative effect of different types of treatment on the individual.
- Intent – a finding of torture requires a finding of deliberate intent. Inhuman or degrading treatment can be found even if it was not the intention.

- Where it is felt that the minimum threshold has not been met but that the impact on the person aggrieved is significant, the applicability of the right to respect for private and family should also be considered as these are often closely related in human rights jurisprudence. (See section '*The right to respect for private and family life*').

Soft law

There are a number of soft law standards specific to conditions of detention:

Body of principles for the protection of all persons under any form of detention or imprisonment

Standard Minimum Rules for the Treatment of Prisoners

UN Rules for the Protection of Juveniles Deprived of Their Liberty

UN Standard Minimum Rules for the Administration of Juvenile Justice

Standards of the European Committee for the Prevention of Torture (CPT Standards)

Council of Europe recommendations on dealing with prisoners with mental illnesses

The right to liberty and security of person

ECHR	Article 5
ICCPR	Article 9

The right to liberty and security of person is a limited right. The circumstances under which the right can be limited are clearly set out in the text of Article 5 ECHR and Article 9 ICCPR. Deprivation of liberty is only permissible when it takes place on such grounds and in accordance with procedures prescribed by law. The right guarantees freedom from arbitrary arrest or detention. Where a person is deprived of their liberty or where it is restricted over prolonged periods it could also involve the right to be free from cruel, inhuman or degrading treatment or punishment.

The ECtHR has stated that the notion of security of person under Article 5 ECHR is not to be given any independent meaning from the right to liberty. The primary concern of Article 5 ECHR is the protection from the arbitrary deprivation of liberty. In *Altun v Turkey (2004)* the applicant claimed that he was forced to abandon his home and village in breach of his right to the exercise of liberty and security of person. The Court found that the applicant's insecure personal circumstances arising from the loss of his home did not fall within the scope of "security of person" under Article 5 ECHR.⁴

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

Definitions

Definitions of some of the terms in the text of Article 5 ECHR are provided below:

Detention of persons of 'unsound mind'

In the case of *Winterwerp v The Netherlands (1979)*, the ECtHR stated that the meaning of 'unsound mind' is evolving as research in psychiatry progresses, increasing flexibility in treatment is developing and society's attitude to mental illness changes. Indeed, the UN Convention on the Rights of Person with Disabilities (UNCPRD) itself has sought to challenge conventional attitudes and understandings of people with mental disabilities as well as physical. The UNCPRD's commentary and jurisprudence is discussed separately in Section 2. Issues around what is now termed mental capacity or fluctuating capacity and the circumstances under which a person can be detained are important for the NIPSO as it has jurisdiction over Mental Health Tribunals.

'Alcoholics' and 'drug addicts'

As can be seen from the text of Article 5 ECHR, the detention of alcoholics is also permitted. The case of *Litwa v Poland (2000)* established that this term is not restricted to persons addicted to alcohol or medically diagnosed alcoholics. It includes persons whose conduct under the influence of alcohol, poses a threat to public order or themselves. The same principle would apply in relation to 'drug addicts'.

'Vagrant'

The term 'vagrant' as used in the ECHR is to mean persons with no fixed abode, no means of subsistence and no regular trade or profession. (*De Wilde, Ooms and Versyp v Belgium (1971)*)

4. The jurisprudence of the ECtHR differs somewhat to that of the UN Human Rights Committee. The UN Human Rights Committee states that there are two aspects of this right. The first being freedom from arbitrary deprivation of liberty and the second being security of person. The UN Human Rights Committee states that the right to security of person extends to detained and non-detained persons and concerns freedom from injury to the body, or bodily integrity. (Draft General Comment No.35). This aspect of the right therefore links it closely to the right to be free from cruel, inhuman or degrading treatment or punishment and the right to private and family life.

Where it applies

The right to liberty and freedom from arbitrary arrest or detention applies in cases of sectioning under mental health legislation. It also applies to persons detained in the context of criminal justice settings and immigration control.

For the detention to comply with human rights standards, it must follow a procedure prescribed by law. The detention must have been authorised on one of the following grounds:

- Conviction by a competent court
- Non-compliance with the lawful order of a court
- For the purposes of bringing the person before a competent legal authority on reasonable suspicion of having committed an offence or to prevent an offence or him fleeing after having done so
- In the case of a minor for educational supervision or bringing him before a competent legal authority
- For the prevention of spreading of infectious disease
- For persons of unsound mind, alcoholics or drug addicts or vagrants
- To prevent a person from unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition

These grounds are exhaustive and no other basis of detention is lawful under the ECHR.

The ECHR permits a deprivation of liberty not only where a person is dangerous to public safety, but also where their 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, detention of someone with a mental illness must be in a therapeutic environment. In the case of *Aerts v Belgium (1998)*, the ECtHR held that detention of a person, as a mental health patient was only lawful under the ECHR if carried out in a hospital, clinic or other such institution. The psychiatric wing of the prison in which the person was held was not considered therapeutic.

Restriction of liberty

There is an important distinction between deprivation of liberty and restriction of liberty. Forms of restraint whether physical or chemical when used improperly, are more likely to constitute a restriction rather than deprivation of liberty. That being the case restraint can involve the right to bodily integrity as an aspect of the right to security of person and separately the right to be free from inhuman or degrading treatment. Public authorities must protect individuals against wrongful deprivation of liberty by lawful organisations, such as employers, schools and hospitals. In the case of *Storck v Germany (2005)*, the ECtHR has defined a deprivation of liberty as the “confinement in a particular restricted space for a not negligible length of time” combined with the absence of valid consent of the individual in question.

Obligations

For the NIPSO's purposes, consideration of this right is most relevant to complaints involving people with mental illnesses or drug and alcohol problems. Public authorities have, for example, a number of obligations when a person is detained to prevent him or her from self-harming. The public authority must show:

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

A number of what are known as 'procedural obligations' then follow:

1. detention for such purposes must be kept under periodic review in order to ensure that it continues to be justified throughout its duration. This requirement is clearly stated in Article 5 (4) ECHR and Article 9 (4) ICCPR
2. the review procedure must be prompt, accessible and effective. It must be undertaken by a competent court that is impartial. The review proceedings must ensure equality of arms between the parties. The detained person having the right to be present and heard, with legal representation if necessary. The burden of proof in such proceedings rests with

the authorities seeking the continued detention. In the case of *Hutchinson Reid v the UK (2003)*, a case involving detention on mental health grounds, the ECtHR held that it was for the authorities to prove that an individual satisfies the conditions for compulsory detention.

3. where there is evidence that the detained person is no longer a risk to him or herself or to others they must be released immediately. It is important to note that a detention that may have originally been lawful for the purposes of human rights law could become unlawful if the original grounds justifying the detention have changed.
4. release does not preclude the imposition of certain conditions or safeguards such as continued treatment and supervision in the community. Where the community does not have the capability to provide such supervision and treatment an immediate release may not be required. (*Kolanis v the UK (2005)*)
5. the requirements of this right extend to an expectation that the domestic laws and policies governing detention are of themselves sufficient quality. Thus, the law itself must not be arbitrary; it must be sufficiently accessible, precise and foreseeable as to its effects. (*Amuur v France (1996)*)
6. the institution in which persons are detained must have an adequate and reliable recording system regarding those being detained. (*Ahmet Ozkan and others v Turkey (2004)*)

What to consider

Where the right to liberty and security of person is considered relevant to a complaint, IOs 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. IOs should aim to establish the following:

- whether expert medical advice was sought prior to detention and in subsequent reviews regarding the need for continuing with the detention. The quality of such advice can be checked with the assistance of IPAs where appropriate
- the opportunities available to the detainee to challenge the detention initially and subsequently. IOs should focus on the promptness and accessibility of such opportunities. For example, the accessibility of the Mental Health Tribunal given the specific needs of the individual is important. Accessibility has to be meaningful taking into account the abilities or disabilities of the person requiring access.
- if less restrictive means were considered and the reasons for those not being deemed more appropriate.

'De facto' detention

Certain establishments may take action that deprives persons of their liberty at certain times of the day. For example, a children's care home or a care home for older people might lock rooms at night-time to prevent residents from leaving the home or setting off alarms in the building.

It is also important for IOs 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. Under such circumstances, it is important not to conflate the different aspects of this right and the duties that follow from it. As noted above and elsewhere in this Manual, human rights law has developed 'soft law' that must be followed in relation to people deprived of their liberty. Some 'soft law' is relevant to people who are in institutions on a voluntary basis (see for example sections relating to restraint) and IOs should consider their applicability in such circumstances. The relevant standards are listed below.

Soft law standards

Body of principles for the protection of all persons under any form of detention or imprisonment

Standard Minimum Rules for the Treatment of Prisoners

UN Rules for the Protection of Juveniles Deprived of Their Liberty

UN Standard Minimum Rules for the Administration of Juvenile Justice

Standards of the European Committee for the Prevention of Torture (CPT Standards)

Council of Europe recommendations on dealing with prisoners with mental illnesses

The right to a fair hearing

ECHR	Article 6
ICCPR	Article 14

Everyone has the right to a fair hearing in the determination of civil rights and in civil and criminal proceedings. The right to a fair hearing may be linked to the FREDA value of Fairness.

Definitions

'Civil rights'

The right to a fair hearing is worded slightly differently in the ICCPR than the ECHR. The term, "determination of civil rights", is used only in the ECHR while the ICCPR refers more broadly to "rights". What constitutes a civil right for the purposes of the ECHR is itself the subject of case law and continues to evolve. However the jurisprudence of the ECtHR has established that the legal relations between private persons will be considered as "civil". This includes

- Claims for personal injury
- Defamation
- Alleged breaches of contractual obligations
- Financial disputes following a divorce

The ECtHR has also ruled the right to a fair hearing to be applicable in the following types of cases:

- Compensation claims following unlawful detention
- Compensation claims following alleged torture
- Decisions regarding taking of children into care and parental access (*Olsson v Sweden, 1992*)
- Withdrawal of an authority to run a medical clinic
- The revoking of a licence to operate a taxi
- Disputes arising from social security entitlements such as pensions and benefits including non-contributory types of social assistance such as income support (*Salesi v Italy, (1993)*)
- Property rights encompassing planning and conservation

As already stated this list is not exhaustive and the scope of applicability of the right to a fair hearing under Article 6 ECHR is subject to change. However, jurisprudence of the ECtHR has established that the requirements of Article 6 do not apply in taxation and immigration cases as these are not 'civil rights' for the purposes of the ECHR.

Where it applies

The NIPSO has jurisdiction over a number of bodies that must meet the legal requirements of Article 6 ECHR/ Article 14 ICCPR. The

section below explores what the right to a fair hearing means for bodies in jurisdiction

The right to a fair hearing imposes obligations on:

- Fair Employment and Industrial Tribunal
- Special Educational Needs Tribunal
- Expulsion and Suspension Tribunal
- The Northern Ireland Court Service
- Northern Ireland Legal Services Commission

Complaints received by the NIPSO are often about or raise concerns about a body's own internal complaints process. It is important to see the requirements of a fair hearing in the context of good practice for any organisation tasked with adjudication of complaints including the NIPSO itself. This includes internal disciplinary procedures for employees of any organisation. The Principles of Good Complaint Handling used by the NIPSO already contain many of the elements required in a fair hearing. For example, the Principles of openness, accountability, fairness and proportionality are themes which will be explored below. The Principles of Good Complaint Handling should continue to be used as the core benchmark for the NIPSO. Referring to the human right to a fair hearing as a good practice model in communications with bodies is encouraged. When commenting on internal complaints procedures, it is important however to be aware of the distinction between what good-practice is in human rights terms and what are legal requirements.

Planning decisions

Decisions around planning in Northern Ireland also fall within the scope of the right to a fair hearing. The seminal case in relation to planning is known as *Alconbury* and was decided by the House of Lords in 2001. (*Alconbury [2001] UKHL 23; [2001] 2 All ER 929*) The judgement in *Alconbury* concluded that the system of granting planning applications and appealing decisions in the UK was compatible with Article 6 (1) ECHR. In that case it was argued that the administrative body responsible for the appeal hearings was not sufficiently independent or impartial because it was within the control of the relevant Government Department. The House of Lords ruled however, that because these decisions could be appealed by way of Judicial Review the system was compatible with the requirements of the ECHR.

While the overall system has been declared compatible with human rights law, individual planning decisions may raise other concerns particularly in relation to the right to respect for privacy, family life, home and correspondence. This is discussed in more detail in the next section.

Obligations

There are a number of mechanisms through which a State can guarantee the right to a fair hearing. A mix of general and specialists courts and tribunals, as in the UK, is acceptable. However, these mechanisms when taken together, must, as a minimum, ensure the following:⁵

1. Access to a court

This involves the right of recourse to a tribunal with the jurisdiction to examine all questions of fact and law relevant to the dispute before it and to adopt a binding decision. A body that has the power to make recommendations only does not meet the requirements of a court or tribunal as established in the case of *Bentham v the Netherlands (1985)*

A) The tribunal must be established by law. Having functions other than judicial ones does not preclude a body from being considered a ‘tribunal’.

B) Legal certainty and effectiveness of court decisions – the right to a fair hearing requires that once a civil judgement or a criminal acquittal has become final and binding, there should not be any risk of it being overturned. In the case of *Van de Hurk v Netherlands (1994)* the ECtHR ruled that in order to be compliant with Article 6 ECHR it was necessary that the binding decision of the tribunal could not be overturned by a non-judicial authority.

C) Independence – the way in which members of a tribunal or court are appointed, terms of office and guarantees against outside pressures are important in determining the independence of the tribunal or court. The *appearance* of independence is also important in guaranteeing the right to a fair hearing.

D) Impartiality – this requirement is closely linked to the requirement of independence. Under impartiality any judge or tribunal member must him or herself be impartial in that personal convictions cannot influence their judgement. This is difficult to prove in any objective

sense and so personal impartiality can be presumed unless there is evidence to the contrary.

A more objective test for impartiality might be an examination of the previous involvement of adjudicators in the case that is currently before them. For example, in the case of *Hauschildt v Denmark (1989)* a violation of Article 6 (1) ECHR was found because the judge had previously taken decisions concerning the detention on remand of the accused in circumstances where he had to be convinced that there was a “particularly confirmed suspicion” that the accused had committed the crime. The ECtHR stated that because of the high degree of suspicion required in that particular case at the pre-trial stage, the impartiality of the judge was open to doubt.

However, in *Albert and Le Compte v Belgium (1983)* the participation of medical practitioners in a medical disciplinary tribunal who were members of a professional body which the defendant objected to joining was not considered an infringement of impartiality.

2. Procedural fairness

Procedural fairness is an integral aspect of the right to a fair hearing and requires:

A) Adversarial proceedings – in *Ruiz-Mateos v Spain (1993)* the ECtHR held that adversarial proceedings requires that both parties have the opportunity to know and comment on the others observations and evidence.

B) Equality of arms – the principle of equality of arms refers to procedural equality between the two parties. The right to a fair hearing does not guarantee legal aid or other financial assistance.

It requires that each party be able to put forward their case and under such conditions that do not place either at a disadvantage. It requires equal treatment of witnesses and access to all the relevant information. Preventing access to documents or denying the existence of them by one party has also been ruled to breach the principle of equality of arms (*McGinley and Egan v United Kingdom (1998)*).

C) Public hearing – the right to a public hearing as an aspect of the right to a fair hearing contains a number of elements. These are: the right to be present before the court; the right to effective participation; the right of the applicant to demand the presence of the public and the media during the court proceedings and the duty on the court to make its judgment public. For the NIPSO's purposes the right to effective participation requires particular attention particularly in proceedings involving children and/ or people with learning disabilities (e.g. in SEN and Mental Health Tribunals). The proceedings must be adapted to ensure that all parties understand and can participate fully.

Criminal proceedings must afford certain specific and additional guarantees under the right to a fair hearing. This is not however discussed any further, since they are outside the jurisdiction of the NIPSO.

3. Proportionate financial barriers

The Northern Ireland Legal Services Commission establishes codes and criteria for the provision of legal aid to individuals and therefore has an important role in guaranteeing the right to a fair hearing. It is legitimate for the State to make legal aid available for only

some types of proceedings. Whether legal aid should be available depends on the importance of what is at stake for the applicant in the proceedings, the complexity of the relevant law and procedure and the capacity of the applicant to represent him or herself.

The provision of legal aid alone is not sufficient and the relevant body must ensure the financial assistance secures a lawyer. In *Bertuzzi v France (2003)* a defendant in civil proceedings was granted legal aid. However, in this instance three lawyers had been assigned to the case but sought permission to withdraw because of personal links with the defendant. The applicant failed to get the president of the legal aid office to assign a new lawyer and was unable to issue the proceedings. The ECtHR concluded that the relevant authorities were obliged to arrange for a replacement who would provide the applicant with legal assistance.

It can be acceptable to require the payment of fees to civil courts. However, the fee should not place a disproportionate burden on the applicant. The disproportionateness depends on the circumstances of the applicant and the amount therefore should not impair the very essence of access to a court. (*Kreuz v Poland 2001*), (*Ciorap v Moldova 2007*)

What to consider

In establishing whether and how a body has shown regard for the right to a fair trial IOs should consider the three broad principles above: **access to a court, procedural fairness, financial barriers.**

Where the right to a fair hearing is considered relevant to a complaint, IOs should aim to establish the following:

- does the composition of the body ensure fairness and impartiality. No-one should be on the body that might have a vested interest in upholding one side's version of events. The perception here is almost as important as the reality as it is not only important that justice is done but also that justice is seen to be done. This ensures that the decisions of the body concerned are more likely to be respected in spirit and in practice. For the NIPSO a complainants *perception* of bias is worthy of investigation and comment.
- the extent to which both sides in any hearing had a fair chance of success before the respective body or Tribunal. As outlined above, the right to a fair hearing does not guarantee a right to legal aid or any other financial assistance from the State to individuals. However, there must be an equal chance of success for both parties. In the absence of legal aid being available to a litigant it is most likely that the department or agency of government is legally represented. To counter-balance such a situation the relevant Tribunal or disciplinary body may give the individual representing himself/herself extra time to prepare, expect the represented party to photocopy and index discloseable materials and taking time itself to ensure both parties understand the process at every stage. This is acceptable and in some cases to be encouraged. Such practices should not necessarily be seen as displays of bias.

The right to respect for private and family life, home and correspondence

ECHR	Article 8
ICCPR	Article 17

The right to private and family life is applicable in a wide range of settings and situations. Being a qualified right it is acceptable, in certain circumstances, for the right to be interfered with. However 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 UN Human Rights Committee has clarified that under the ICCPR, “the law itself must be in compliance with the provisions, aims and objectives of the Covenant. In addition, the terms “arbitrary interference” can also extend to interference provided for under the law.” (*General Comment No. 16 – The right to respect of privacy, family life, home and correspondence, and protection of honour and reputation*).

It is not uncommon for the right to private and family life to be considered along with the right to be free from inhuman or degrading treatment or punishment by the domestic courts and the ECtHR.

Where the threshold for inhuman or degrading is not met, it may be that there has been unlawful interference with the right to private and family life.

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

Definitions

The right to private and family life under the ECHR covers “rights of central importance to the individual’s identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community”. (*Connors v UK, 2004*)

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

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.

Home

The right to respect for home is not a right to housing but to enjoyment of the home that one already has. It can include a home that has been built in contravention of applicable town planning applications. This latter aspect of the right to home has been established in a number of cases involving Travellers. (*Buckley v the UK (1996)* and *Chapman v the UK (2001)*). The right to respect for one's home is therefore closely related to Article 1, Protocol 1 of the ECHR: the right to peaceful enjoyment of one's possession. 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.

Where it applies

The case of *Peck v UK (2003)* has established that the right to privacy must be respected in what might be considered 'public' places. The right to privacy is not restricted to an individual being at home or a private place but exists anywhere where there is a legitimate expectation of privacy. *Peck v UK* involved the case of a man attempting suicide in the street. The attempted suicide was captured on CCTV camera and images of the attempt were later displayed in a local newspaper advertising the benefits of CCTV. The ECtHR observed that, following the disclosure of the CCTV footage, the applicant's actions were seen to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly

have foreseen. The disclosure by the Council of the relevant footage therefore constituted a serious interference with Peck's right to respect for his private life.

The jurisprudence of the ECtHR and the UN has established that the right to privacy and family life encompasses a wide range of issues. It has been interpreted to include:

- Sexual orientation and gender issues
- The right to dress in a particular way
- The right to have access to official documents which contain information about you
- The right to refuse medical treatment in certain circumstances
- The right to enjoy one's home without being affected by noise or pollution
- The use of CCTV
- The collection and retention of DNA samples
- Planning decisions
- The right to independent living

This section looks in greater detail at those areas within the jurisdiction of the NIPSO, focusing on how the right to private and family life is involved in the context of **health, planning** and **access to information**.

Healthcare

Decisions and actions around healthcare and medical treatment have been the subject of a significant number of cases considering the scope and nature of obligations posed by the right to private and family life under the ECHR. Public authorities have a duty to take active steps to prevent breaches; to effectively deter conduct that would lead to a breach; and, to respond to breaches and provide information to rights holders as to the rights they have and any risks that exist to those rights.

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. The right to private and family life does not guarantee access to all types of medical treatment and care. It has been acknowledged by the domestic courts and the ECtHR that it would place too great a financial burden on States to impose such a blanket guarantee. However, the Courts have also acknowledged that the impact on some individual's private and family life where appropriate medical treatment or care is not made available might be such as to constitute a breach of their right to private and family life. In a case involving access to Herceptin a drug used to treat breast cancer, the applicant argued that her Trust's refusal to supply the drug breached her right to private and family life. The case was settled before it reached the Court of Appeal, but nonetheless demonstrates the types of settings in which the right may be used.

It has been confirmed in a recent case that 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. (*Csoma v Romania (2013)*). This case involved a woman in her sixteenth week of pregnancy undergoing a termination following the diagnosis of the foetus with hydrocephalus. Complications followed the termination. The woman was transferred from the Town hospital to the County hospital where doctors decided that a hysterectomy had to be performed in order to save the woman's life thus leaving her unable to bear children. In examining the case, the ECtHR noted that the doctor had failed prior to the procedure to obtain the applicant's informed written consent and fully explain the risks of the procedure. The applicant also claimed that there was no urgency in performing the termination and therefore there had been time to perform appropriate pre-operative checks. The ECtHR concluded: "by not involving the applicant in the choice of medical treatment and by not informing her properly of the risks involved in the medical procedure, the applicant suffered an infringement of her right to private life". The State was therefore found to be in violation of Article 8 ECHR (the right to private and family life)

In the field of healthcare, the right to private and family life entails positive obligations. Legislation itself may not prove sufficient in meeting positive obligations. Mechanisms to supervise and regulate activities, which risk interfering with rights, may also prove necessary. A violation of the right to private and family life was found in a case involving an attack by stray dogs on a woman in Romania which led to her hospitalisation and worsening health after discharge. The ECtHR ruled that notwithstanding legislation that had been adopted to address the issue of stray dogs, the Romanian Government had not been able to show any concrete measures it had taken to curtail the dangers of attacks by street dogs. (*Georgel and Georgeta Stoicescu v Romania (2011)*).

Physical and psychological integrity

An integral aspect of the right to privacy and family life is the right to protection of one's physical and psychological integrity. 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. In the case of *Storck v Germany (2005)*, the ECtHR recalled that "even a minor interference with the physical integrity of an individual must be regarded as an interference with the right to respect for private life under Article 8, if it is carried out against the individual's will".

In a complaint considered by the UN Human Rights Committee, a violation of the right to private and family life under Article 17 (1) ICCPR was ruled following a woman being forced to undergo a medical examination in order to assess whether she was capable of taking part in legal proceedings. The applicant claimed that there were no compelling reasons for the domestic court in this case to force her to undergo such an examination without her consent and that the court made the order without having heard or seen the applicant and assessing for itself her capability. The psychiatrist ordered by the domestic court to carry out the examination had been given a particularly wide discretion to "undertake all the examinations he deems necessary to assess the physical and mental state of the (applicant)". The Human Rights Committee was of the view that "to subject a person to an order to undergo medical treatment or examination without the consent or against the will of that person constitutes an interference with privacy, and may amount to an unlawful attack on his or her honour and reputation". The Human Rights Committee found that in this case the order of the court without having seen or heard the applicant was "disproportionate to the end sought and therefore arbitrary" and concluded that there

had been a violation of Article 17 ICCPR along with the applicant's right to a fair trial under Article 14 (1) ICCPR. (*M.G. v Germany; Communication: 1482/2006*)

Some medical treatment against a person's will may not amount to an unlawful interference because it is necessary and proportionate to pursuing a legitimate aim. For example, a Belgian law which required children to undergo an x-ray to prevent tuberculosis was ruled not to be a breach of the right to private and family life by the ECtHR. (*Acmanne v Belgium (1984)*).

Provision of facilities to disabled people

To date, the ECtHR has not ruled in favour of applicants claiming that the right to private and family life extends to public authorities providing medical aids for disabled people. In *Sentges v Netherlands (2003)*, for example, it was ruled that Article 8 ECHR did not extend to the State providing a robotic arm to a person suffering from muscular dystrophy. That is not to say that no right under the ECHR can be used to secure facilities for people with disabilities only that Article 8 ECHR has not, to date, been successfully upheld in the cases brought before the ECtHR. Indeed, the ECtHR has acknowledged that Article 8 applies and may impose a positive duty on states in this area. In the case of *Pentiacova v Moldova (2005)*, for example, the ECtHR stated, "While the Convention does not guarantee as such a right to free medical care, in a number of cases the Court has held that Article 8 is relevant to complaints about public funding to facilitate the mobility and quality of life of disabled applicants".

The ECtHR has also accepted that in some circumstances Article 8 ECHR does place a positive obligation to provide housing

assistance to a person suffering from a serious disease. In *Marzari v Italy (1999)* the Court considered that “although Article 8 does not guarantee the right to have one’s housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual. “The Court recalls in this respect that, while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the State to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by an applicant and the latter’s private life”.

As discussed under the “Right to Life” some attempts have been made to secure a judgment from the UK courts and ECtHR that would lead to the legalisation of assistance to end one’s life. In *Pretty v UK*, the ECtHR acknowledged that depriving the applicant of the possibility to end her life at a time of her own choosing, given her medical condition, interfered with her right to private life. However, the Court ruled that this interference was necessary because a ban on assisted suicide protected particularly vulnerable people and thus was a response to a pressing social need.

Reproductive rights

The right to privacy and family life incorporates the right to respect for decisions to become and not become a parent. (*Dickson v UK (2007) and Evans v UK (2007)*).

Sterilisation has been ruled to be in the best interests of a man with severe learning disabilities. In this case the court’s view was that sterilisation not only respected the individual’s desire not to have any more children but allowed him to resume a long term relationship with the mother of his first child and as a consequence restore his independence and autonomy, which he had lost following the birth of the first child. (*See A NHS Trust and DE EWHC 2562*).

Institutional settings

Hospitals, mental health institutions and care homes 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. These principles have been established in *McFeely v UK (1981)* and *McCotter v UK (1993)*. Both involved prisoners but the principle shows that the right to private and family life includes the right to establish, develop and maintain relationships with other human beings.

Planning decisions

Planning decisions have the potential to impact on the right to private and family life. Decisions that lead to residents being subject to excessive noise or pollution, for example, may be considered unlawful. The process of granting planning applications and appealing has been held compatible with the right to a fair hearing. Complaints around planning decisions must be considered on a

case by case basis. In the case of *Lough v. FSS [2004] 1WLR 2557* involving planning permission being granted for a 20 storey building, the judge commented “recognition must be given to the fact that Article 8 and Article 1 of the First Protocol are part of the law of England and Wales.... Article 8 should...normally be considered as an integral part of the decision maker’s approach to material considerations and not, as happened in this case, in effect as a footnote. The different approaches will often... produce the same answer but if true integration is to be achieved, the provisions of the Convention should inform the decision-maker’s approach to the entire issue. There will be cases where the jurisprudence under Article 8, and the standards it sets, will be an important factor in considering the legality of a planning decision or process.” The right to privacy and family life are therefore an integral aspect of planning decisions.

There have been a number of cases at the ECtHR involving the impact of noise and pollution on the right to private and family life. In these cases the relevant authority failed to regulate certain activity or granted licenses for businesses to operate without considering the impact on local residents.

Unregulated heavy traffic was the subject of *Dees v Hungary (2010)*. The ECtHR found a violation of the right to private and family life. It held that despite the authorities’ efforts to limit and reorganise the traffic affecting the street in which Mr Deés lived, he had suffered direct and serious nuisance because of the excessive noise to which he had been exposed over a substantial period. Consequently, he had not been able to enjoy his home and private life, in violation of Article 8.

In the case of *Mileva and Others v. Bulgaria (2010)* the applicants complained about suffering from excessive noise caused by an office, an electronic games club and a computer club operating from flats adjacent to theirs. The ECtHR found that the authorities had remained passive with regard to the applicants’ complaints. Although at some stage two prohibitions had been issued ordering the closing down of the clubs’ activities, those decisions had never been enforced. As a result, for a period of over four years, the applicants had endured noise and disturbance levels that had interfered with their private and family life, in violation of Article 8.

The right to private and family life is not absolute and a balance is required therefore between the competing rights and interests of all involved. 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)*)

Access to information, data retention and surveillance

There is no general right under the ECHR that guarantees access to public information. However, the ECtHR has ruled on a number of occasions that Article 8 ECHR does place an obligation on public authorities to make information available to individuals that is considered to be of special importance to that individual’s private life. For example, in *Gaskin v UK (1989)*, the authorities were required to release records to the applicant giving details of his foster care. In *Roche v UK (2005)* involving access to information concerning tests that had been carried out on the applicant using mustard nerve gas it was held that the State had not fulfilled its positive obligation

in respect of Article 8 ECHR. However, this positive obligation does not extend to a right to access information that does not concern a person's identity or personal history. The right to receive and impart information are important aspects of the right to freedom of expression and this is discussed in more detail below.

The Freedom of Information Act 2000 does afford additional guarantees in this regard and it is important to note that human rights are a *minimum* requirement, which do not preclude public authorities from offering additional protection or services. IOs should therefore continue to refer to the Fol Act 2000 as appropriate.

Powers and surveillance techniques available to the police might also interfere with a person's right to private and family life. While preventing and tackling crime is a legitimate aim of the State, the actions undertaken by its Departments and criminal justice agencies must be proportionate. Thus the retention of DNA samples and exercise of stop and search powers by the police are two issues that have been considered by the ECtHR. In the case of *S and Marper v UK (2008)*, it was ruled unlawful for the police to continue to hold the DNA samples of people, who subsequent to the samples being taken had charges dropped or been acquitted for an offence. In the case of *Gillan and Quinton v UK (2010)* it was ruled that section 44 of the Terrorism Act 2000 was too broad in the discretion it afforded the Secretary of State to authorise the stop and search of persons for the prevention of terrorism.

The UN Human Rights Committee states that the right to private and family life is engaged in the gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies. Where such files contain incorrect personal data or have been processed contrary to

the provisions of the law, every individual should have the right to request rectification or elimination. (*General Comment No. 16*)

Obligations

Negative obligations

In many ways the right to private and family life is about public authorities protecting what defines a person – their relationships, their lifestyle choices *and* who should have insight into and influence the choices and actions that person pursues. The obligations imposed on public authorities by the right to private and family life are both positive and negative. States must refrain from, and regulate activity that has the potential to interfere with people's privacy and family life. This can include surveillance techniques as well as the retention of data about individuals even if it has the purpose of tackling crime. The UN Human Rights Committee states, "the gathering and holding of personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law. Effective measures have to be taken by States to ensure that information concerning a person's private life does not reach the hands of persons who are not authorised by law to receive, process and use it, and is never used for purposes incompatible with the Covenant". (*General Comment No. 16*).

The use of CCTV footage even if used with the intention of protecting the public must also be regulated.

The right to private and family life requires public authorities to justify any interference with private and family life, home or correspondence.

Positive Obligations

The extent to which the right to private and family life imposes positive obligations on public authorities and the nature of those positive obligations are discussed in relation to the jurisprudence of the ECtHR under two separate headings below:

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 and ensuring access to certain information.

Interference by non-state bodies

In addition, States have a duty to protect individuals from third parties breaching the right to private and family life. Such positive obligations have been established in cases taken to the ECtHR involving environmental pollution by third parties. (see above for examples).

A positive duty to protect individuals from unlawful interference with their private and family life has been established by the ECtHR. Cases considered by the ECtHR have involved findings of a failure of the State to protect women from domestic violence, sexual assault and rape. (*X and Y v Netherlands (1985)*; *MC v Bulgaria (2003)*).

More recently, a number of individuals brought cases against the Metropolitan Police. The applicants argued, successfully that the police had failed to provide them with information about hacking of

their telephones and therefore breached their rights to private and family life under Article 8 ECHR.

Public authorities must be proactive in protecting the right to private and family life. This is particularly important in criminal justice settings and institutional care in hospitals, nursing homes and mental health hospitals. Decisions about choice of dress, daily activities, interactions and food are all an aspect of this right. Those responsible for delivering care and services in these institutions are expected to make every effort to ensure that choices are not only respected, but that effort is made to ascertain choices. It is not sufficient to use concerns around mental capacity as a reason for imposing choices on a patient or resident.

States must have in place the relative framework to ensure that everyone is free to enjoy the right to private and family unless there are compelling grounds for restricting or interfering with the right. The right should be construed broadly.

What to consider

As stated above, the right to private and family life is wide in scope and continues to evolve. It is not absolute and therefore it is recognised that some interference with it at times may not only be acceptable but necessary. The role for the NIPSO is to establish if there has been an interference with the right to private and family life and if so, what regard was given to the right by the body against which the complaint is made. The NIPSO should expect the body in jurisdiction to justify its actions through the reasoning process set out in the text of Article 8 ECHR. If there has been an interference, the body must show that it was:

- in accordance with the law,
- in pursuit of a legitimate aim – 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.
- proportionate.

The ‘legitimate aims’ expressly stated in the text are broad and it will not be difficult for the body to assert one of them in explaining the reasons for any interference. The key task for the IO will be to investigate, ascertain and comment on whether the action taken was proportionate.

The ECtHR has held that Article 8 ECHR (the right to private and family life) “cannot be considered applicable each time an individual’s everyday life is disrupted, but only in the exceptional cases where the State’s failure to adopt measures interferes with that individual’s right to personal development and his or her right to establish and maintain relations with other human beings and the outside world.” (*Sentges v Netherlands (2003)*).

When the aggrieved person is vulnerable due to disability or age, for example, particular attention is required to assess the impact of the body’s actions or inactions on that person.

With qualified rights, it is important for the NIPSO to demonstrate, in his communications with the parties concerned that he is aware of the qualifications and has considered and reasoned through these in arriving at his decision and commentary.

Complaints about health and social care

Institutional settings

The human rights framework recognises that the level of choice and autonomy individuals are able to exercise in their own home cannot be matched in institutional settings. Nor can the same level of privacy be afforded to individuals in institutional settings. For example, in a case alleging that by banning smoking in a high security hospital the State was breaching the right to private and family life under the Human Rights Act, the judgement declared “the degree to which a person may expect freedom to do as he pleases and engage in personal and private activity will vary according to the nature of the accommodation in which he lives”. The case concluded that a ban on smoking in one’s own home might engage the right to private and family life, the same ban in a high security hospital did not engage the same right. (*N, R (on the application of) v Secretary of State for Health, Court of Appeal - Civil Division, July 24, 2009, [2009] EWCA Civ 795*)

Conversely however, individuals in institutions are likely to be more vulnerable to abuse of rights. This places an extra level of responsibility on those responsible for such institutions to ensure that policies and practises recognise and respond to vulnerability appropriately.

Thus, the level of obligation on those responsible for the institution to show regard for and respect human rights is not any less. It is simply recognised that the experience of the rights-holder may be different. The types of ‘legitimate aims’ that institutions may claim in the context of health complaints and which IOs should consider are:

- 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 home
- having to make the best use of limited resources and in particular staffing arrangements

These can be legitimate aims but should not be taken at face value. The IO must then establish:

- the extent to which the legitimate aim was relevant in the circumstances of the individual case before him/her
- whether the interference with the right was proportionate
- were alternative approaches considered that would have met the same aim but involved less interference
- why were alternatives not considered appropriate

The Courts at the UK and European levels have recognised the strain on resources. It has been noted that, in relation to Article 8 ECHR, the courts are slower to require States to justify a failure to take protective measures, particularly those requiring the allocation of scarce resources.⁶ As stated above complaints involving vulnerable people require particular attention. Where it is revealed that what that individual is seeking is available to other individuals but denied to the vulnerable person it is more likely to demonstrate that due regard has not been given to the right to private and family life and possibly indicate discrimination.

Complaints about planning decisions

As outlined above, planning decisions often raise concerns about the impact of building extensions on a neighbour's privacy, family life and home. Many complaints received by the NIPSO raise issues of loss of sun and daylight, privacy, overbearing or crowding, loss of view, noise, disturbance or smells. These can range from objections to a neighbour's extension to objections to major commercial enterprises in a neighbourhood. Inaction of the State is also a concern in terms of lack of enforcement action when building extensions or activity has gone ahead in advance of the necessary permission being granted. However, a minimum level of severity must be reached before an unlawful interference with the right to privacy has been found by the domestic courts and ECtHR. The impact of such activity must go beyond inconvenience or a mere aesthetic impact and in most cases have had a significant detrimental effect on the applicant's physical or mental health.

The wider economic well-being of the town, city or nation is considered by the Courts to be a legitimate aim of the relevant authorities in planning decisions. However, the duty remains to consider that interest with those rights of individuals and whether the action was proportionate. In *Lopez-Ostra v Spain (1994)*, the economic benefits of a waste treatment plant did not outweigh the adverse impact to an individual who suffered severe health problems because of the gas emissions that exceeded the national permitted level.

Complaints involving planning decisions relating to Irish Travellers require particular attention. In a Judicial Review brought by an Irish Traveller, John Boswell, of a decision of the Planning Appeals Commission, Justice Weatherup ruled that there was a positive

obligation on the State to protect the Traveller way of life and this included an obligation on the planning framework. (*High Court of Justice in Northern Ireland, Queen's Bench Division (Judicial Review) Boswell's Application [2009] NIQB 95*) Further information on the rights of Travellers is found in Section 2.

Human rights considerations should be an integral part of the process of making planning decisions and therefore should be documented as such in the decision makers' records. The NIPSO should seek those records and look for specific evidence on whether a human rights impact did form part of the decision-making process. However, where the impact of decisions has not been detrimental to health or has not caused distress and suffering of the nature described in the above sections it may not be appropriate for the NIPSO to use the language of human rights in articulating the injustice suffered by the complainant. This does not however, preclude the NIPSO from making a finding of maladministration based on the other Principles of Good Administration.

Access to information, data retention and surveillance

The NIPSO receives a number of complaints that raise issues of data protection and freedom of information. IOs should continue to refer complaints or aspects of it to the Information Commissioner where that is the correct avenue.

The right to freedom of thought, conscience and religion

ECHR	Article 8
ICCPR	Article 18

The right to freedom of religion may be linked to the FREDA principles of Equality and Respect. There are two aspects of this right as expressly stated in the texts of Article 9 ECHR and Article 18 ICCPR respectively. The first aspect is the right to hold religious or other beliefs. This right is absolute. The UN Human Rights Committee has stated categorically that Article 18 “does not permit any limitations whatsoever on the right to freedom of thought and conscience or on the freedom to have or adopt a religion or belief of one’s choice”. (*General Comment No. 22 – The right to freedom of thought, conscience and religion*). However, the second aspect is the right to manifest one’s religion or belief and this is a qualified right which may therefore be interfered with in certain circumstances. Although the two aspects may be intrinsically bound together, the distinction is important given the absolute nature of one. 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
- 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.

The right to freedom of thought, conscience and religion is closely linked to the right to freedom of expression (an integral aspect of which are the rights to receive and impart information) and indeed the non-discrimination clauses under Article 14 ECHR and Article 2 ICCPR.

Definitions

What qualifies as a religion, thought or conscience for the purposes of human rights protection is important in looking at this right more closely. The UN Human Rights Committee has clarified that under Article 18 ICCPR “the “terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions”. It goes on to state “The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or head-coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious

schools and the freedom to prepare and distribute religious texts or publications”. (*General Comment No. 22*).

Similarly, the jurisprudence of the ECtHR gives some guidance as to what constitutes a religious belief and therefore is to be accorded protection under the ECHR. In the case of *Campbell and Cossans v UK (1982)*, the ECtHR commented that in order for a belief to amount to a conviction, and therefore the protection of Article 9, it had to “attain a certain level of cogency, seriousness, cohesion and importance.”⁷ In a domestic case the House of Lords, explored what standards should apply to those beliefs whose manifestations are to be protected under the ECHR. “When questions of ‘manifestation’ arise... a belief must satisfy some modest, objective minimum requirements. The belief must be consistent with basic standards of human dignity and integrity... The belief must possess an adequate degree of seriousness and importance... it must be a belief on a fundamental problem. With religious belief this requisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood. But, again, too much should not be demanded in this regard. Typically, religion involves belief in the supernatural. It is not always susceptible to lucid exposition or, still less, rational justification... Overall, these threshold requirements should not be set at a level which would deprive minority beliefs of the protection they are intended to have under the convention [ECHR]”. (*R. (Williamson) v Secretary of State for Education and Skills [UKHL 15 2005] 2 AC 246*).

The right is not limited to manifest one’s religion but also includes manifestation of thought and conscience. The ECtHR has accepted that Article 9 ECHR is applicable to such philosophical beliefs as atheism, environmentalism, pacifism and veganism. Hunting

however, was deemed to be outside Article 9 ECHR by the Court of Appeal. In that case, the applicant asserted that the ban on hunting was an unjustified interference with the manifestation of his beliefs. (*R (on the application of the Countryside Alliance and others) v the Attorney General and Another [2007] UKHL 52*)

Where it applies

The ECtHR has stated the right to freedom of thought, conscience and religion “does not protect every act motivated or inspired by a religion or belief. Moreover in exercising his freedom to manifest his religion, an individual may need to take his specific situation into account” (*Sahin v Turkey (2005)*). In the case of *Sahin v Turkey* it was ruled that a University’s policy to ban the wearing of the Muslim headscarf (the hijab) on the University campus and to refuse the applicant from sitting her University exams while wearing the hijab was not an unlawful interference with her right to manifest her religious beliefs. The ECtHR ruled that the University wanting to promote a secular ethos was a legitimate aim for the purposes of Article 9 ECHR.

The UN Human Rights Committee, the ECtHR and the domestic courts have considered how religious freedom ought to be respected in healthcare, education and employment. Cases have also considered the extent to which the right protects conscientious objectors i.e. can individuals refuse to carry out certain duties and/or encourage others to do so because of their religious beliefs or philosophical convictions without facing sanction from their employers or indeed the criminal justice system.

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. Under the ECHR this right is protected separately under Article 2, Protocol 1 and under the ICCPR it is protected as part of Article 18 under para 4. This section will draw attention to case law which has considered this right also.

The UN Human Rights Committee has stated that the right under Article 18 does not prohibit compulsory school instruction on issues of religion and philosophies of life, provided that the instruction is given in a neutral and objective way. (*General Comment No. 22*).

However, it is important to note that the UK has entered into a reservation with respect to Article 2, Protocol 1. The reservation made at the time of the signing of the ECHR in 1951 states: “At the time of signing the present (First) Protocol, I declare that, in view of certain provisions of the Education Acts in the United Kingdom, the principle affirmed in the second sentence of Article 2 is accepted by the United Kingdom only so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure”. This reservation continues to be in place and therefore in the UK’s view it does not carry a positive duty to provide separate religious schools on demand.

The ECtHR and the UN Human Rights Committee have considered a number of cases involving religious education in schools. In Norway, a primary school changed its curriculum from two separate subjects Christianity and philosophy of life to one single subject covering Christianity, religion and philosophy. A group of parents

requested exemption for their children from the subject arguing as members of the Norwegian Humanist Association, the refusal to grant full exemption amounted to a violation of their right to freedom of religion and their right to have their children educated in conformity with their religious beliefs. The ECtHR found a violation of Article 2, Protocol 1 holding that the revised curriculum gave preponderant weight to Christianity (*Folgerø and Others v. Norway (2007)*). The Court went on to state that simply an option of having children exempted from certain parts of the curriculum was not sufficient because it was capable of subjecting the parents concerned to a heavy burden with a risk of undue exposure to their private life. A similar case was decided by the UN Human Rights Committee also concerning the change in curriculum in Norway. Likewise the UN Human Rights Committee found Norway to be in violation of Article 18 (4) (*Ms. and Mr. Unn and Ben Leirvåg, and their daughter Guro and others v Norway (Communication No. 1155/2003)*)

In *Dojan and others v Germany (2011)* five married couples complained that the authorities’ refusal to exempt their children from mandatory sex education classes and other school activities which they alleged had constituted a disproportionate restriction of their right to educate their children in conformity with their religious convictions. The ECtHR ruled the complaint inadmissible. It held that there was no indication that the classes and activities at issue had put into question the parents’ sexual education of their children based on their religious convictions. Neither had the authorities manifested a preference for a particular religion or belief within those activities.

In a House of Lords case, a Muslim pupil would not attend her secondary school unless she was permitted to wear a full overcoat

(jilbab) claiming that the school's refusal to allow her to attend unless she wore the prescribed uniform was an interference with her right to manifest her religion. The House of Lords ruled however that the school's refusal did not amount to an interference with her right to manifest her religion.

Lord Hoffman, in his judgement stated that Article 9 ECHR did not require that one should be allowed to manifest one's religion at any time and place of one's own choosing. However, Lord Bingham in his judgment also emphasised that the judgement was specific to the circumstances of that pupil at that time. He stated the case concerned a particular pupil and a particular school in a particular place at a particular time. (*R (on the application of Begum (by her litigation friend, Rahman)) (Respondent) v. Headteacher and Governors of Denbigh High School (Appellants) [2006] UKHL 15*)

It is also important to be aware of the strong and very specific legislative framework around religious discrimination and equality in Northern Ireland. IOs should be mindful of this framework, which in many ways offers further protections than the minimum requirements of human rights law.

Health

Healthcare institutions must also protect the right to manifest religious beliefs or philosophical convictions. 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, Halal or Kosher being made available in institutions where people are likely to be placed for a prolonged

period. IOs 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 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.

Obligations

Religious freedom requires more than allowing individuals to attend their place of worship or observe their religion at home or other private places. The right to religious freedom might require States to accommodate religious beliefs in a number of areas including education, healthcare, employment and the criminal justice system. Cases involving religious freedom for example, make clear that it is the State's duty to ensure that third parties also respect the right to manifest one's religious beliefs, thought or conscience. This right is guaranteed through domestic legislation and policy. In a recent case involving a British Airways employee, the ECtHR ruled that the company's refusal to allow the applicant to wear a necklace displaying a crucifix did amount to an unlawful interference with her right to manifest her religious beliefs. However, the judgement made clear that it was the UK's domestic legal order that had allowed such a situation to arise in that Ms Eweida was not given sufficient protection. (*Eweida and others v UK (2013)*)

What to consider

It is difficult to read patterns and general trends from the case law as each case is context-and-fact specific. For example, on the issue of wearing a crucifix to the workplace, the ECtHR has reached

different conclusions because of the specific circumstances of each case. British Airway's refusal to allow an employee to wear a crucifix was considered a violation of Article 9 ECHR by the ECtHR while a similar refusal to a geriatric nurse was not ruled to be a violation. In the latter case, health and safety considerations trumped the nurse's right to manifest her religion by wearing a crucifix.

However, there are a number of stages to be followed when considering complaints that raise issues of restrictions of or interferences with religious freedom. These include:

- ascertaining whether the belief is of sufficient "cogency, seriousness, cohesion and importance" to amount to a conviction and qualify for the protection of the right.
- the question of manifestation. It is important to discern whether the activity that is being considered is properly understood to be a manifestation of such beliefs
- determining, if there has been an interference with the manifestation of the belief, whether that interference was justified (in pursuance of a legitimate aim). As with other qualified rights the 'legitimate' aims expressly stated in the text of Article 9 ECHR are broad. When such an aim is invoked by the body complained of the key question for the NIPSO will be whether the interference was proportionate.

In the areas of health, education or employment, complainants may feel that adjustments are not being made to accommodate their religious beliefs. The Principles of Good Administration offer some important guidance in this regard. They explicitly state that

following a policy too rigidly can also lead to maladministration and injustice. The body complained of should be able to evidence that it made every reasonable effort to accommodate a person's religious convictions and beliefs rather than starting from a default position that no accommodation will be made.

The right to freedom of expression

ECHR	Article 10
ICCPR	Article 19

The ECtHR recognises the centrality of the right to freedom of expression (Article 10, ECHR) to the realisation of human rights in and of itself but also emphasises the link between freedom of expression and the achievement of other human rights. Human rights law sees an interrelationship between freedom of expression and democracy. Freedom of expression, including and in particular that of the press is an important way of bringing attention to the human rights that people have and helping to ensure that violations when they occur are not overlooked.

The right to freedom of expression is a qualified right and therefore may be interfered with if the 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

- For the protection of 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 and it will not be difficult for a body to claim it was pursuing one of them.

Under Article 19 (3) ICCPR the right to freedom of expression can be restricted for the same reasons.

Where it 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.

The UN Human Rights Committee has made clear that the right to freedom of expression allows people to express views that others may find “deeply offensive”. (*General Comment No. 34 – Freedoms of opinion and expression*)

The approach of the ECtHR is found in the judgement of *Handyside v UK (1976)* where the Court stated that the right to freedom of

expression “is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”. However, both the ECtHR and the UN Human Rights Committee agree that where that expression incites violence or hatred against others this is not acceptable and an interference with the form of expression may be justified.

Civil service

A number of cases have been considered by the ECtHR involving the right of certain categories of employees to freedom of expression. The ECtHR has recognised that the situation of civil servants carries duties and responsibilities as expressly stated in Article 10 (2). In *Vogt v Germany (1995)*, a civil servant was dismissed from her post as a teacher because she refused to take an oath of loyalty to the Constitution. The ECtHR commented “the Court will bear in mind that whenever civil servants’ rights to freedom of expression is in issue, the ‘duties and responsibilities’ referred to in Article 10, para 2 assumes a special importance, which justifies leaving to the national authorities a certain margin of appreciation in determining whether the impugned interference is proportionate to the above aim”.

The right to receive and impart information

Article 19 (2) ICCPR expressly enshrines the right to receive and impart information. The jurisprudence of the ECtHR has established that this right also exists as an aspect of Article 10 ECHR. Complaints raising issues around freedom of information however,

are more likely to require advice and referral to the Information Commissioner’s Office. IOs should continue with this procedure where appropriate.

Politicians

In deciding if any interference has been legitimate, the ECtHR has considered the employment or public position of the person expressing their views as well as the person to whom the views have been expressed. For example, restrictions on exchanges between politicians and about politicians even when they have been highly critical and personal have been ruled incompatible with the right to freedom of expression by the ECtHR (*Lingens v Austria (1986)*; *Roseiro Bento v Portugal (2006)*)

Obligations

The duties resulting from the right to freedom of expression are largely negative and at the ECtHR the approach has been to place the evidential burden on the State. This means that the duty is on the State not to interfere with the right to freedom of expression and to justify any interference when it does occur. However, there are some positive obligations on the State to protect the right. This includes protecting the right from threat by private persons such as private employers. It also might require the enactment of legislation that protects freedom of expression including access to information. In *Ozgur Gunden v Turkey (2000)* the ECtHR held that effective exercise of freedom of expression “does not depend merely on the State’s duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals. The duty is on the State to ensure a fair balance is struck between the general interest of the community and the interests of the individual.

What to consider

Where the right to freedom of expression is considered relevant to a complaint, the NIPSO 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 people feeling excluded from that place. This could be a hospital or school that is responsible for delivering services and therefore respecting, protecting and fulfilling the rights of all. The expression (racist, sectarian or homophobic) may not be of a severity that it incites hatred or violence but may nonetheless exclude certain people or groups of people from exercising their rights. Such a situation may attract criticism from the NIPSO.

The right to health

ICESCR	Article 12
European Social Charter	Article 11, Article 13

The focus of this section is the right to health as it is enshrined in ICESCR and the European Social Charter (ESC). ICESCR enshrines the right to the highest attainable standard of physical and mental health. The ESC enshrines the right to the protection of health and contains specific provisions relating to children and young people, older people and pregnant women. Certain aspects of the right to health as it is explicitly enshrined in the UN and Council of Europe treaties are subject to *progressive realisation*.

As with many socio-economic rights, the right to health is non-justiciable, meaning that it cannot be claimed in domestic courts or at the ECtHR. However as other sections show, *the right to life*, *the right to be free from inhuman or degrading treatment or punishment* and *the right to private and family life* have been used, in some cases with success to secure provision in the field of healthcare. In addition, the Social Rights Committee of the European Social Charter accepts complaints from certain listed organisations including trade unions and has built up a body of jurisprudence relating to the collective rights. It does not accept complaints from individuals. The right to health as it is enshrined in the ICESCR complements and is interrelated to the civil and political rights in the ECHR and ICCPR.

Where it applies

Health complaints are most likely to engage those bodies in jurisdiction that provide health services, such as GPs, Health and

Social Care Trusts and social care providers. However, the right to health places broad duties on public authorities. As can be seen from other sections, planning decisions and enforcement of them should also take into account the impact on people's health.

The right to health is more than a right to medicines or medical treatment. Conversely, it does not equate to a right to all medicines or medical treatment that is available at any moment in time. Commentary from the UN Committee on Economic, Social and Cultural Rights as well as the Secretariat of the European Social Charter state that the right to health can be claimed in a range of settings other than institutions that explicitly provide healthcare. The right to health applies in relation to working conditions, the physical environment, the education system and housing.

The right to health does include the right to control of one's own health and body and therefore is inextricably linked to the *right to private and family life* that guarantees physical and psychological integrity and prohibits non-consensual medical treatment.

Mental health

The UN Committee on Economic, Social and Cultural Rights places great emphasis on the rights of people with mental health problems and the need for them to be involved in decision-making. In the area of mental health, the right requires particular attention around regular reviews of patients who have mental health problems. Reviews should ensure that care and treatment, including all forms of medication, continues to be appropriate and is not being administered against the wishes of the individual concerned. The purpose of such reviews should be maximising decision-making capacity.

Older people

Recognising the vulnerability of older people in healthcare, the UN Committee has dedicated a General Comment on Economic, Social and Cultural Rights for Older People. **General Comment No. 6 – The economic, social and cultural rights of older persons** affirms that healthcare for older people should be aimed at maintaining the functionality and autonomy of older people. The General comment also stresses the importance of an integrated approach to health for older people, combining elements of prevention, cure and rehabilitation

Obligations

As a minimum, all States are expected to provide emergency healthcare to those in its territory. In addition, the UN Committee on Economic, Social and Cultural Rights has stated that healthcare needs to meet the following criteria:

- Availability and accessibility: In Northern Ireland this might require health professionals travelling out to people who cannot easily leave their homes to get to a GP or hospital. This is a particular issue for older people in nursing homes, for example. Healthcare must also be accessible to all without discrimination and therefore adapted to meet cultural and religious needs.
- Provision of facilities that are conducive to good health such as food and nutrition, adequate housing and a clean environment. Again, in the context of Northern Ireland this means that hospitals or nursing homes need to ensure their patients or residents have access to adequate food and water. Simple measures ensuring the food and water is placed within reach of

people with limited mobility should always be taken. Food and water should be available to people when they require it rather than only when it is convenient for the institutions to provide it, at set meal times for example.

- A focus on prevention, cure and rehabilitation. In Northern Ireland, this requires ensuring access to a wide range of health professionals at the primary and specialist level, including, for example, podiatrists, dentists and physiotherapists. In focusing on prevention, there is a duty to provide appropriate vaccination programmes and to raise awareness around the importance of uptake of such programmes. The Council of Europe Committee on Social Rights has stated that “health education must be provided throughout school life and form part of school curricula”. It has also stated that free medical checks should be carried out throughout the period of schooling and that there should be screening, preferably systematic, for all the diseases that constitute the principle causes of death. (*The Right to Health and the European Social Charter, March 2009, Information Document prepared by the secretariat of the ESC*).

What to consider

In determining whether the body in jurisdiction has shown due regard for the aggrieved person’s right to health, the NIPSO must be cognisant of the concept of progressive realisation. Progressive realisation does not mean however, that whenever a lack of resources is cited by the body in jurisdiction as the reason for a failure this is taken at face value. IOs should aim to establish if the body in jurisdiction is aware of its duties in human rights terms towards the complainant and what active steps it has taken to fulfil these. Every individual has a right to the highest attainable standard

of physical and mental health. The duty on the body in jurisdiction is to progressively realise that right within the maximum available resources. As a minimum core obligation however, the body must respect and promote equality and prioritise the needs of the most vulnerable in society. Where the right to health is considered relevant, IOs should aim to establish:

- Is there any evidence of discrimination against the aggrieved person on one or more of the protected grounds?
- Did the organisation take steps to accommodate the aggrieved person's needs relating to their age, religion, gender, disability?
- Is there evidence showing when and how the organisation prioritises the needs of the most vulnerable and marginalised? Is this reflected in policy as well as practice?
- Where there are waiting lists for services, medicines or treatment how are these managed?

The onus is on the body in jurisdiction to show what steps it is taking to progress the realisation of the right to the highest attainable standard in those areas where a lack of resources might hamper the realisation of the right.

While budgets are ultimately determined by the Northern Ireland Executive and Westminster Governments the body in jurisdiction should indicate how it is using the maximum resources available to it for the realisation of the right to health. This does not mean that IOs are expected to analyse budgets. It does require disclosure and then analysis of policies and plans and whether these show evidence of the body's commitment to the realisation of rights

even if this is over a period of time. As a minimum those policies should refer explicitly to the right to health, show an understanding of the obligations that stem from it, and set out a clear plan of action in realising the right to health for all. At present where Independent Professional Advice (IPA) is sought, the emphasis is on establishing if the action of the body or individual health professional was reasonable. IPAs might also be asked to comment on the reasonableness of the actions of the body complained of against the benchmark of what was the highest attainable standard within the maximum resources available to the health establishment.

The right to health should not be considered in isolation as in some cases the impact of the body's actions may be of such a nature that they have led to an interference with the right to private and family life, the right to be free from inhuman or degrading treatment or punishment or the right to life. These rights are not subject to progressive realisation.

The right to an adequate standard of living

ICESCR	Article 11
European Social Charter	Article 16, Article 17

Under the ICESCR, the right to an adequate standard of living encompasses the right to adequate food and water and the right to adequate housing. The European Social Charter enshrines the same rights under a number of different articles. The right to an adequate standard of living complements and is inextricably linked to the right to the highest attainable standard of physical and mental health.

Where it applies

The two distinct but interrelated aspects of the right to an adequate standard of living (housing and food/water) might engage complaints against the NI Housing Executive and institutional settings such as hospitals, mental health institutions, residential homes and care homes.

Obligations

Adequate housing

The right to adequate housing is enshrined in the ICESCR as an aspect of the right to an adequate standard of living under Article 11 ICESCR. The European Social Charter enshrines the right to family housing as an aspect of the right of the family to social, legal and economic protection under Article 16.

There are certain minimum requirements that must be met for housing to be considered adequate under the ICESCR. These are:

- Legal security of tenure – forced evictions are considered a violation of the right to adequate housing
- Adequate lighting, heating and sanitation
- Habitable
- Location – the location of allocated housing is important. Individuals need to be able to access other services such as health and housing from where they are expected to live. It is important to remember that individuals also have rights to health and education and public authorities must ensure that these are accessible. Where someone is reliant on social housing the housing provider should ensure that health and education are accessible from where the individuals are being housed. This includes a duty on the State to ensure there is adequate infrastructure that facilitates such access.
- Culturally Adequate – the right to adequate housing requires that the housing that is provided must be culturally adequate. This issue arises consistently and regularly in the Concluding Observations of the UN Committee on Economic, Social and Cultural Rights. The Committee has criticised the UK for failing to meet the housing needs of Irish Travellers and Gypsies. In particular, the Committee expressed concern at the lack of culturally serviced transit sites for Travellers who wish to be nomadic, in its [*Concluding Observations on the UK in 2009*](#).

The right to adequate food and water

The UN Committee on Economic, Social and Cultural Rights has issued a *General Comment on the Right to Food (General Comment No. 12)* and a *General Comment on the Right to Water (General Comment No. 15)*. In a developed country such as the UK, the relevance of these rights may not be easily apparent. However, General Comment No. 12 states, “the right to adequate food shall therefore not be interpreted in a narrow or restrictive manner which equates it with a minimum package of calories, proteins and other specific nutrients”. Cultural acceptability, for example, is a core element of the right to food. In institutional settings such as hospitals, nursing homes, mental health institutions or prisons a duty to provide culturally adequate food such as Halal, Kosher or vegetarian options should be recognised.

In the case of vulnerable patients or residents such as older or disabled people it is important for the institution to ensure that practical assistance is given to those that require it. Similarly, it is important that food and water is administered not at the convenience of the hospital or nursing home staff but is made available throughout the night and day. Simple yet fundamentally important measures such as ensuring that clean drinking water is left within reach of a patient or resident with physical disabilities are all part of respecting and protecting the right to adequate food and water. Similarly, where pureed diets are required for medical reasons this may also involve the right to food as well as the right to health.

What to consider

Housing

When dealing with complaints involving the right to adequate housing, IOs should be alert to the minimum core obligations cited above. Housing, where it is provided by the State must meet the criteria listed in the section above. A forced eviction, for example, is a violation of the right to adequate housing.

The NIPSO may also receive complaints relating to the way in which social housing is allocated. Human rights require that when resources are scarce, the needs of the most vulnerable be prioritised. The vulnerable might include disabled people, older people, a family, or individual needing re-housed following a racist or sectarian attack on them or their home. Waiting lists that allocate housing based on priority need is one way in which the human rights of the most vulnerable might be met. However, this does not mean that the factors which are used to determine priority need are beyond scrutiny. An investigation may require further exploration of the determining factors and comment on whether a complainant was put in the right place on the waiting list. This may necessitate obtaining anonymised information on other individuals who were placed on the waiting list.

Adequate food and water

A number of health complaints received by the NIPSO raise concerns of weight loss and/or dehydration of patients or residents. Older people in particular are more likely to be at risk. Such complaints do potentially raise issues under the right to adequate food and water. IOs should probe into the steps taken by the

hospital or nursing home to provide adequate food and water to those in its care. Leaving residents or patients who require assistance with eating and drinking without that assistance connects to the right to adequate food and water.

Other problems such as a lack of choice in meals or mealtimes might also involve the right. It is the responsibility of institutions such as hospitals or care homes to ensure food and water is available and accessible throughout the night and day.

The right to education

ICESCR	Article 13
ECHR	Article 2, Protocol 1
ICCPR	Article 18 (4)

Under the ECHR and ICCPR, the right to education includes the right to have one's children educated in conformity with one's religious beliefs and philosophical convictions. This latter aspect of the right as it is expressly stated in Article 18 (4) ICCPR and Article 2, Protocol 1 ECHR has been addressed separately under the section, the ***Right to Freedom of Thought, Conscience and Religion***. This section focuses on the right as it is encompassed by the ICESCR under Article 13. It is also important to note that the UK has entered into a reservation with respect to Article 2, Protocol 1 ECHR.

Where it applies

The right to education covers primary, secondary and tertiary education. Article 13 (1) ICESCR states "education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms". It goes on to state that education should promote "understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups..." Thus, the content of education curricula, a school's ethos and relevant policies as well as accessibility to an education system are also human rights concerns.

Obligations

Inclusive education

The right to free and compulsory primary education is not subject to progressive realisation and is therefore considered immediately realisable. In Northern Ireland, free primary education is compulsory for all children of school age. However, Concluding Observations for the UN Committee on Economic, Social and Cultural Rights have established that the obligation under ICESCR places positive duties on the State to ensure that children from all sections of society are participating in the education system. The right to education then can also extend to a duty to ensure that appropriate provisions are made for children with physical or mental disabilities or with linguistic needs. The preference in human rights terms is for integrated education that meets the needs of disabled children.

There is a low take-up of primary education for Irish Traveller children in Northern Ireland and the UN Committee on Economic, Social and Cultural Rights in its Concluding Observations of 2009 expressed concern that "significant disparities in terms of school performance and dropout rates continue to exist between pupils belonging to ethnic, religious or national minorities, in particular Roma/Gypsies, Irish Travellers, and other students, in spite of the efforts undertaken by the State party to address the social and economic inequalities existing in the field of education (arts. 13 and 2, para. 2) (***E/C.12/GBR/CO/5 12 June 2009***). In 2008, the UN Committee on the Rights of the Child recommended that the UK "invest considerable additional resources in order to ensure the right of all children to a truly inclusive education which ensures the

full enjoyment to children from all disadvantaged, marginalized and school-distant children”. *(CRC/C/GBR/CO/4 20 October 2008)*

This low take-up places a corresponding duty on the Education and Library Boards to ascertain the reasons for it and to address those reasons. Bullying of Irish Traveller children in schools and a lack of culturally appropriate education for them are two reasons that have been identified as the reasons for poor school attendance.

The same principle applies in relation to children with special educational needs. ELBs have a duty to ensure that children with special educational needs are not effectively excluded from schools because adequate assessment and provisions are not being made that would facilitate their inclusion.

Education at the secondary level in Northern Ireland is also free and compulsory but the same general principle applies as with primary education. A pro-active approach is needed by relevant public authorities to ensure there is uptake across all sections of the community. Where that is not happening, efforts need to be made to ascertain the reasons and positively address these.

For many years tertiary (university) education was free in Northern Ireland. The introduction of university fees and the rise in those fees has been a subject of concern for the UN Committee on Economic, Social and Cultural Rights. In its 2009 Concluding Observations on the UK, the Committee stated: “In line with general comment no. 13 (1999) on the right to education, the Committee encourages the State party to review its policy on tuition fees for tertiary education with a view to implementing article 13 of the Covenant, which provides for the progressive introduction of free education at all levels. It also recommends that the State party eliminate the unequal

treatment between European Union member State nationals and nationals of other States regarding the reduction of university fees and the allocation of financial assistance”. The obligation with respect to this Concluding Observations rests with the NI Executive and ultimately the UK Government. *(E/C.12/GBR/CO/5 12 June 2009)*

On occasion, the NIPSO has received complaints against Education and Library Boards with respect to financial assistance for the payment of university fees. These complaints raise slightly different issues to the human rights duty to progressively realise the provision of free tertiary education. Education and Library Boards do not have the power or authority to protect the right to free tertiary education. Complaints around financial assistance may raise human rights issues but are more likely to warrant investigation into whether the criteria is objectively applied and in a manner that is non-discriminatory.

What to consider

It is important that IOs are aware of the respective responsibilities of Department of Education/NI Executive and individual Education and Library Boards. In terms of progressively realising the right to education this is likely to fall to the Department of Education and is not likely to be an issue the NIPSO can investigate.

Complaints against Education and Library Boards often concern a child not being granted a place in the school of first choice. In such complaints, IOs need to consider the impact on the child. If it is simply a matter of preference and convenience, human rights are not likely to be an issue. However, where the impact is such that it presents an obstacle to the child’s education, human rights need to

be considered. In particular, IOs should establish the suitability of the allocated school place:

- Is the location of the school such that there will be real difficulties in getting to the school?
- Are there sufficient public and/or affordable transport services to overcome those difficulties?
- Are there real concerns of the allocated school affecting the child's educational experience? In particular, thinking about any special needs the child may have in terms of physical or learning disability, linguistic needs or religious needs that the school may not be able to meet.
- Is there any evidence of discriminatory practices? It may be necessary to seek information on the selection criteria and how other children of the same protected characteristics have been treated by the school's Board and/or the Education and Library Board.

In terms of inclusive education, complaints may involve a schools or ELBs failure to facilitate a child's participation. This may be a failure to make a special educational needs assessments or an alleged discrepancy in the assessment. Here the NIPSO should:

- consider the promptness with which the ELB has sought to make the assessment or the provision;

- where the delays or inadequacy has led to a child being unable to participate in the education system for a significant period of time this may indicate a failure to show regard for the child's right to education.

In engaging the school and/or Education and Library Board, it is important that IOs are clear about the core obligations as identified above.

The right to social security

ICESCR	Article 9
European Social Charter	Article 13, Article 14

The right to social security is enshrined in Article 9 of ICESCR and Article 12 of the European Social Charter. In addition, Article 13 of the European Social Charter enshrines the right to social and medical assistance and Article 14 the right to benefit from social welfare services.

Where it applies

The Department for Social Development decides the financial amounts available for different social security payments and on the eligibility criteria for receiving them. Under both the ICESCR and the European Social Charter, there is a duty to progressively realise the right to social security. The European Social Charter states that Contracting parties undertake “to endeavour to raise progressively the system of social security to a higher level”.

The UN Committee on Economic, Social and Cultural Rights has stated that as a minimum, social security should cover the following situations: healthcare; sickness; old age; unemployment; employment injury; family and child support; maternity; disability; survivors and orphans. It also states that there should be transparent eligibility criteria.

At the operational level, the Social Security Agency including individual Social Security Offices have responsibility for applying that eligibility criteria by processing and assessing social security claims

in accordance with the legislative framework. The jurisprudence of the ECtHR has established that social security is to be considered ‘possessions’ for the purposes of Article 1, Protocol 1 ECHR. In the case of *Kjartan Asmundsson v Iceland (2004)* it was ruled that the pension fund to which the applicant had contributed over a 12 year period was his possession under Article 1, Protocol 1. The ECtHR went on to rule that the sudden and complete withdrawal of the pension amounted to an unlawful interference with the applicant’s right to peaceful enjoyment of his possessions.

In its admissibility decision in *Stec v UK (2005)*, the Grand Chamber of the ECtHR stated “If ... a Contracting State has in force legislation providing for the payment as of right of a welfare benefit — whether conditional or not on the prior payment of contributions — that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No. 1 for persons satisfying its requirements.”

Obligations

General Comment No. 19 – The right to social security explains the nature of the obligations that the right to social security imposes on States.

- States must have a social security system in place that is responsible for administering the social security.
- The social security that is available must be adequate in its fiscal amount and the period of time it is available to ensure an adequate standard of living and adequate access to healthcare.

- The social security arrangements must be accessible ensuring that all persons are covered and in particular, individuals belonging to the most disadvantaged and marginalised groups.

The eligibility criteria must be reasonable, proportionate and transparent.

Beneficiaries of social security should be able to seek, receive and impart information on all social security entitlements in a clear and transparent manner.

What to consider

There is limited scope for the NIPSO to address the legislative framework that creates and governs the current social security arrangements in Northern Ireland. However, complaints relating to the way in which the eligibility criteria is applied and the way in which social security is administered may well raise human rights concerns.

In particular, IOs should seek to establish any evidence of discriminatory practice. Whether people who are eligible for social security are treated the same way; and, whether applications and requests for information are being dealt with within the same timeframes.

The jurisprudence around social security and the right to peaceful enjoyment of possessions is complex and evolving. It is also important to note that the right to enjoyment of possessions is not absolute and can be interfered with in certain circumstances. IOs should therefore probe into the whether those circumstances apply in the complaint they are investigating. For example, the right can

be interfered with if it is in the public interest and the interference is provided for by law. Here the NIPSO may need to balance the public interest with the impact of a withdrawal or cut in social security on the aggrieved person.

Jurisprudence has also established that where the State has allowed someone to fall into destitution this can amount to inhuman or degrading treatment. The right to be free from inhuman or degrading treatment is an absolute right and so the State must have discretionary and/or emergency payments available to assist individuals at risk of destitution. Where a complaint raises issues around the way in which the discretion has been exercised or the failure to make an emergency payment IOs should consider the potential applicability of the right to be free from inhuman or degrading treatment.

Equality and Non-discrimination

2

Equality and Non-discrimination

2

Equality and non-discrimination are key components of the human rights-based approach discussed earlier. Equality is also one of the five FREDA principles. We have discussed how the NIPSO might determine whether a body in jurisdiction has shown regard for a person's human rights. Similarly, an investigation may also reveal that a body in jurisdiction has not shown due regard for a person's human rights because it has failed to take account of, or

accommodate for, that person's distinct needs as provided for under human rights law. Human rights law promotes equality and prohibits discrimination on a number of grounds. Human rights treaties will have what is known as a 'non-discrimination' clause that explicitly states that all the rights enshrined in that treaty must be afforded to all regardless of an individual's race, sex, religion, political opinion, national origin and so on. This clause will usually list a number of such grounds and end with the phrase "or any other status". Article 14 ECHR, Article 2 ICCPR, and Article 2 ICESCR are some examples. This simply means that the preceding list is not exhaustive. For example, some of the earlier treaties do not explicitly mention disability, sexual orientation or age as grounds against which discrimination is prohibited. However, jurisprudence of the ECtHR and UN treaty monitoring

bodies have since then made it clear that discrimination on such grounds is not permitted under human rights law.

In addition to these non-discrimination clauses, certain groups are the subject of specialist treaties. This is because the particular circumstances of the lives of individuals in those groups may have previously been overlooked. In addition, some of the treaty-monitoring bodies have developed General Comments on the rights of particular groups that might be vulnerable and marginalised. Finally, case-law of the ECHR has also established that certain groups require special protection. These treaties, General Comments and legal cases reiterate the prohibition on discrimination cited above but also set out what additional pro-active steps, public authorities have to take in order to make equality and equal enjoyment of rights a reality.

Section 1 has detailed human rights and what obligations these place on bodies in jurisdiction. 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 bodies in jurisdiction in relation to these groups
- what IOs need to **consider** when investigating complaints where the aggrieved person belongs to one of these groups

These obligations also have implications for wider policies and procedures of the NIPSO. A separate advice paper is also provided to the NIPSO on those implications.

Children

Under human rights law, children are entitled to special care and protection and are the subject of a specialist treaty – the UN Convention on the Rights of the Child (UNCRC). Article 1 UNCRC defines “child” as “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”.

Obligations

The Committee on the Rights of the Child has stated “The concept of dignity requires that every child is recognized, respected and protected as a rights holder and as a unique and valuable human being with an individual personality, distinct needs, interests and privacy”. All the rights discussed in the previous Section apply equally to children. Many of these are expressly stated in the UNCRC. Public authorities however, may on occasion overlook the fact that children are themselves rights-holders. They are not an extension of their parents or legal guardians but must be empowered to claim rights themselves and to make their views known. In its **General Comment No. 5** the UN Committee on the Rights of the Child has identified the following articles as “general principles” that are basic to the implementation of all rights contained in the UNCRC:

1. Non-discrimination

The UNCRC protects children from discrimination on the basis of their own circumstances such as sex, race, religion and on the basis of the circumstances of their parents, legal guardians or other members of their families (Article 2 UNCRC). Bodies in jurisdiction

therefore must ensure that all children regardless of their own or their parent’s background are treated equally. Certain categories of children are considered particularly vulnerable and requiring attention: these are children in detention; children deprived of their family environment (for example children in care) street children (or homeless children) refugee children, unaccompanied children during repatriation and children with disabilities. It is right for bodies to distinguish on the basis of need and prioritise the needs of the most vulnerable. This is different from discriminatory practices, which are not permitted under human rights law.

2. Best interests

The best interests of the child should be a primary consideration in all actions concerning children undertaken by public or private bodies (Article 3 UNCRC). Health and education establishments, care homes, criminal justice agencies and the courts should all apply the best interests principle when undertaking actions that concern a child.

3. Life, survival and development

The UNCRC protects the child’s right to life as do other treaties such as ICCPR and ECHR. It also however, emphasises the right to a life which ensures the full physical, mental, spiritual, moral and social development of children (Article 6 UNCRC). This general principle places obligations on a range of public authorities and shows again how human rights are interrelated and inalienable. Some of these are discussed immediately below:

Freedom from violence

The Committee on the Rights of the Child has issued a **General Comment on the right of children to be free from all forms of violence** (General Comment No. 13). Violence for the purposes of the UNCRC is defined as: “all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse” under Article 19 UNCRC. State parties have an obligation to “assume their responsibilities towards children not only at the national level, but also at the provincial and municipal levels. These special obligations are due diligence and the obligation to prevent violence or violations of human rights, the obligation to protect child victims and witnesses from human rights violations, the obligation to investigate and to punish those responsible, and the obligation to provide access to redress human rights violations”.

Education

The Committee on the Rights of the Child has also commented that corporal punishment is incompatible with the UNCRC. The ECtHR has also condemned corporal punishment in a number of judgements: (*Tyrer v. UK (1978)*; *Campbell and Cossans v. UK (1982)*; *Costello-Roberts v. UK, (1993)* and *A v. UK (1998)*).

Article 29 (1) UNCRC further clarifies the purpose of education:

States Parties agree that the education of the child shall be directed to:

“(a) The development of the child’s personality, talents and mental and physical abilities to their fullest potential;

- (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the UN;
- (c) The development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
- (d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
- (e) The development of respect for the natural environment.”

School suspensions and expulsions for example may impact directly on the right to life, survival and development as well as the right to education itself.

Health

Health treatment, as discussed in the previous Section can have implications for a person’s right under the right to life, the right to be free from inhuman or degrading treatment, the right to respect for private and family life, the right to the highest attainable standard of physical and mental health and the right to equality. The relevant sections should be read closely with Article 6 UNCRC and considered along with the other three general principles in this section. The UN Committee on the Rights of the Child has also dedicated a General Comment to adolescent health, which

IOs should refer to when relevant. (*General Comment No: 4, Adolescent health and development in the context of the Convention on the Rights of the Child*)

4. Respect for views of the child

Children should be able to express their views and opinions freely. Those opinions should be listened to and given due weight in accordance with the age and maturity of the child in all matters affecting them (Article 12 UNCRC). This principle applies in relation to all decisions affecting the child including but not limited to health, education, custody and care arrangements. For this right to be meaningful there is an onus on the relevant authority to provide information to the child in an age-appropriate and accessible manner. It also means that efforts must be made to make environments accessible to children. This applies for example in courts, tribunals or complaint mechanisms more broadly.

What to consider

When investigating complaints relating to children, IOs should, of course, refer back to the previous Section. In addition however, the general principles stated above must also be considered. It is particularly important that IOs do not assume that where the aggrieved person is a child it was sufficient for the public authority to only ascertain the wishes of the parents or legal guardians. When providing a service to children, bodies in jurisdiction should be able to demonstrate to the NIPSO that:

- the best interests of the child were a primary consideration. Best interests do not have to be the only consideration but must be a primary one.

- they understand that with children a holistic approach needs to be taken to ensure the dignity of the child is respected at all times. This includes the full development of the child physically, mentally, morally and spiritually. IOs must also be alert to the particular vulnerability of children with regard to the right to be free from torture or inhuman or degrading treatment or punishment. This means that the threshold for considering what constitutes torture or inhuman or degrading treatment may be lower in the case of children.
- they have made efforts to ascertain the wishes and opinion of the child and given those opinions due weight.

These general principles should be evidenced in the process of decision-making through records of interaction with the child.

The NIPSO

The provisions of the UNCRC apply also to the NIPSO. The NIPSO must itself engage with children in a manner that respects the letter and spirit of the UNCRC. The NIPSO often receives complaints on issues where the aggrieved person is a child. The complainant however, is usually the parent or guardian of the child. In accordance with Article 12 UNCRC it is important that the NIPSO makes efforts to engage with the child directly in order to allow him/her to express his views and opinions as to the matter being complained of. This should be achieved through seeking parental consent to communicate directly with the child or young person. The primary purpose of this engagement is to understand the injustice suffered by the aggrieved person as a result of the public authority's actions and to ascertain what an appropriate remedy might be should the complaint be upheld.

Disabled people

The UN Convention on the Rights of Persons with Disabilities is the newest human rights treaty. It entered into force in 2009 and was ratified by the UK in the same year⁸.

The UNCRPD is founded on key principles that are essential to the implementation of the Convention as a whole. These are:

- Respect for inherent dignity, individual autonomy including freedom to make one's own choices, and independence of persons
- Non-discrimination
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- Equality of opportunity
- Accessibility
- Equality between men and women
- Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities

Obligations

The UN treaty system and the jurisprudence of the UK courts and the ECtHR have established that public authorities have a number of

positive obligations towards people with disabilities. These apply in the range of settings discussed in the previous Section such as, but not limited to, schools, hospitals and prisons.

Reasonable accommodation

The principle of reasonable adjustments or accommodation is very much part of Northern Ireland's disability discrimination legislation. Article 2 of the UNCRPD uses the phrase "reasonable accommodation" but the general principle is the same. Reasonable adjustments/reasonable accommodation are about ensuring that persons with disabilities can enjoy or exercise their human rights on an equal basis to all other human beings. They mean necessary and appropriate modification and adjustments that do not impose a disproportionate or undue burden on the public authority. Alternatively, in the case of equality law on private bodies as well. All public authorities, including schools, universities, hospitals, government departments and agencies have a duty to provide reasonable adjustments.

The Court of Appeal's judgement in *Burnip v Birmingham City Council* (*Burnip v Birmingham City Council and Anor [2012] EWCA Civ 629*) is important because it confirmed certain principles in terms of human rights and equality generally and disability more specifically. In this case, housing benefit rules for the private rented sector meant that housing benefit would be cut where there was considered to be no reason for the benefit to cover payment for a larger house in which there was an additional bedroom (the bedroom tax). The housing benefit rules, therefore, did not allow for a second bedroom to accommodate a carer for a severely disabled person who required a carer throughout the night. In a joined case, the

8. States that ratify the UNCRPD must also establish or designate existing organisation(s) as a monitoring mechanism. The purpose of the monitoring mechanism is to protect and monitor implementation of the UNCRPD (Article 33). In Northern Ireland, the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland have been jointly designated.

housing benefit rules required two girls who needed separate rooms because of disability to share a room. The Court of Appeal upheld the applicants claim that the housing benefit rules discriminated against them on the basis of disability. The Court concluded that the failure of the Council to provide for the extra room was not justified and that there had been a violation of Article 14 ECHR (the non-discrimination clause). Quoting a judgement of the ECtHR in *Thlimmenos v Greece (2003)*, the Court of Appeal's judgement read "The right not to be discriminated against in the enjoyment of the right guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different".

'Disproportionate' or 'undue' burden

An argument of disproportionate or undue burden only applies in the case of limited or qualified rights. It might also apply in the case of socio-economic rights. It cannot be made in the case of an absolute right such as freedom from torture or inhuman or degrading treatment or punishment.

As discussed previously the threshold for inhuman or degrading treatment depends on the age, health status and sex of the person. In the case of persons with disabilities, the ECtHR has established that public authorities including places of detention have an absolute duty, as with all other people, to ensure that conditions do not constitute torture or inhuman or degrading treatment. The case of *D.G. v Poland (2013)* involved a paraplegic confined to a wheelchair. The applicant complained that the care during his detention had been incompatible with his medical needs. For example, the prison facilities were not adapted to the

use of a wheelchair. This had resulted in problems of access to the toilet facilities. He had also not received a sufficient supply of incontinence pads. The ECtHR ruled that in view of the applicant's special needs and the material conditions of his detention there had been a violation of Article 3 (the right to be free from inhuman or degrading treatment or punishment).

Mental disability

People with mental disabilities might face even greater barriers to exercising autonomy than those with physical disabilities. Mental 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. The principle underpinning human rights thinking is that there should be supported decision-making. This means that people with mental health disabilities should be supported to make decisions about their lives and issues that impact on them. This is very different to substituted decision-making, whereby decisions are often made for people with mental disabilities. Substituted decision-making is not in-keeping with a human rights-based approach. The same human rights principles apply to people with mental or learning disabilities as they do to people with physical disabilities.

Planning

Planning authorities are also required to make reasonable accommodation for people with disabilities. In a case considered by the UN Committee on the Rights of Persons with Disabilities, the applicant was refused planning permission for a 63 square metre extension to her home in order to accommodate an indoor hydraulic

pool. Water therapy had been recommended by doctors for the applicant's chronic connective tissue disorder. The applicant claimed that the water therapy was her only hope of rehabilitation. She was ultimately refused planning permission because of the city's development plan under which building was not permitted on 45 square metres of the land on which the extension would be built. In deciding the case, the Committee commented that the authorities had not addressed the specific circumstances of the applicant's case and her particular disability-related needs. The Committee therefore considered that the decisions of the domestic authorities to refuse a departure from the development plan in order to allow the building of the hydrotherapy pool were disproportionate and produced a discriminatory effect that adversely affected the author's access, as a person with disabilities, to the healthcare and rehabilitation required for her specific health condition. The Committee concluded that the following rights of the applicant had been violated: health (Article 25 UNPRDP); habilitation and rehabilitation (Article 26 UNCRDP); and to equality and non-discrimination (Article 5 UNCRDP) (*H.M v Sweden, Communication No. 3/2011*)

What to consider

The NIPSO frequently receives complaints where the aggrieved person is a disabled person. These complaints can be about:

- care and treatment in a health setting
- special educational needs assessment or provision
- planning decisions impacting on the quality of life of a neighbouring disabled person.

In considering these complaints, IOs need to be aware of the principle of reasonable adjustments/ reasonable accommodation remembering that the onus is on the public authority to provide evidence that making the adjustment places a disproportionate burden on it. The starting point is that adjustments should be made for disabled people to enjoy their human rights. The onus is on the public authority 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.

This principle is most likely to be applicable in the area of socio-economic rights such as health, education, adequate housing and social security. It may also be that public authorities need to make reasonable adjustments to facilitate a disabled person's right to freedom of expression or freedom of religion. A detailed exploration of what protections disabled people have under the right to respect for private and family life is in Section 1.

The NIPSO

The NIPSO must of course itself make those reasonable adjustments for disabled people. As with children, it should aim to ensure that, its publicly available literature is accessible to people with disabilities, such as sensory impairments or learning disabilities. Where the aggrieved person is someone with a disability, the NIPSO must also make every effort to communicate with that person directly if they are not the complainant. This includes people with mental health or learning difficulties.

Women's rights

Human rights law recognises that persistent unequal power relations mean that women require special protection. In addition, there are particular circumstances of women's lives such as, for example, pregnancy and child rearing that require special protection. Women are also more likely than men to suffer domestic abuse and sexual violence. The UN Convention on the Elimination of All Forms of Discrimination Against Women defines "discrimination against women" as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" (Article 1).

Obligations

The previous section outlined how the right to be free from inhuman or degrading treatment and the right to private and family life places a positive duty on the State to protect women from domestic violence. The recent case of *Opuz v Turkey* was won on grounds of the right to be free from inhuman or degrading treatment, the right to private and family and the right to enjoyment of rights without discrimination. The judgement in that case explicitly acknowledged that while men can also be victims of domestic violence, it impacted disproportionately and differently upon women.

The UK was examined by the UN *Committee on the Elimination of Discrimination Against Women in July 2013. (CEDAW/C/GBR/CO/7)* The Committee expressed concern in a number of

areas regarding the UK's compliance with the UNCEDAW. For the NIPSO's purposes, the following general observations and recommendations should be considered by IOs in relevant complaints:

- The Committee recommended the adoption of targeted and culturally appropriate strategies and programmes, including preventive interventional programmes, to address mental health issues faced by women of different ethnic and minority communities
- The Committee expressed concern that women of Traveller communities experience high numbers of miscarriages and stillbirths, and have the highest maternal mortality rate among all ethnic groups and recommended that the UK adopt concrete measures, including adequate resources, to increase access to affordable health services, in particular prenatal, post-natal and obstetric services, as well as other medical and emergency services.

Women are also entitled to special care and assistance with pre-natal and post-natal care. Under Article 12 (2) of the UNCEDAW "...States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation". The ECtHR has also considered cases relating specifically to pregnancy and childbirth. The specific area of home birth has been considered in a number of cases. In the case of *Ternovsky v Hungary (2010)*, the applicant complained that she had been denied the opportunity to have a home birth. She argued that midwives or other health professionals were effectively

dissuaded by law, from assisting her because they risked being prosecuted. The ECtHR ruled that the applicant was not free to have a home birth because of the permanent threat of prosecution faced by health professionals and the absence of any specific legislation on the subject. It went on to rule that there had, therefore been a violation of the right to private and family life under ECHR.

What to consider

All public authorities 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 IOs should consider the circumstances under which women are entitled to special protection as enshrined in Article 12 (2) of UNCEDAW. Health institutions have specific obligations to provide appropriate care and treatment to women during pregnancy, childbirth and in the post-natal period. This includes, but is not limited to ante-natal and post-natal care and treatment. For example, where pregnant women require access to other services such as health or education, the relevant public authority must ensure that adjustments are made to ensure that access.

Gender-sensitivity in the treatment provided to women is important and this extends to social care settings as well as detention facilities. For the NIPSO's purposes, the latter would be relevant in the provision of health services to detained women such as prisoners.

Ethnic minorities, migrants and asylum seekers

Ethnic or racial minorities are afforded special protection under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM). Article 1 (1) of ICERD defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life". Article 27 of the ICCPR also proclaims, "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their religion, or to use their own language".

Individuals that are not nationals of the country in which they reside are recognised under human rights law as being in a vulnerable situation.

Obligations

Under human rights law, the position of migrants and asylum seekers is somewhat different to that of ethnic minorities that are nationals of the country they live in. In the case of non-nationals, certain differences in treatment are considered acceptable. For example, certain categories of non-nationals are not allowed to work, are not eligible for certain social security 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 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.

Corresponding to these obstacles then is a positive duty on public authorities to remove them. Health providers, education establishments and other public authorities need to have suitable translated materials available to those that may need it. Many bodies translate materials into the five or six most frequently identified first language 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 medical consultations.

Children in schools whose first language is not English should be offered Additional Educational Support.

What to 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. Where the aggrieved person in a complaint is from an ethnic minority, IOs should be alert to:

- the barriers and obstacles that people from ethnic minority communities may face i.e. linguistic, cultural and/or religious
- the situation of non-nationals. IOs should make themselves aware of the legal framework relevant to the complaint and whether it clearly excludes non-nationals from accessing a certain service. Where that is the case it is not within the NIPSO's powers to comment on the desirability or otherwise of that framework. Where there is a lack of clarity however, this may require investigation and comment.
- the fact that ethnicity can also be inextricably linked to culture and religion. It is important therefore that all these aspects of an individual's identity are considered. For example, a Sikh or Hindu patient of Indian origin may have particular dietary requirements because of their religion and linguistic requirements because of their national origin. Public authorities should, as far as possible take account of all these factors

- the fact that Irish Travellers are consistently singled out by the treaty monitoring bodies as requiring particular attention and positive action in almost all areas of life including planning, education, health and employment. IOs should also be alert to the consistent and severe disadvantage faced by Irish Travellers.

Conclusion

The categories discussed above are, of course, not mutually exclusive. Women for example can also be disabled and from minority communities. The NIPSO should be mindful of these multiple identities and the fact that they can increase the level of vulnerability of the individual. 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.

Assessing, Investigating and Reporting

3

Assessing, Investigating and Reporting

3

This section will now give some examples of how the human rights-based approach might operate in practice. The section is divided into three parts: Assessment, Investigation and Reporting. Each section examines Mr Jones's complaint and illustrates how the complaint might be assessed, investigated and reported following a human rights-based approach.

As IOs will be aware while there are guiding principles and procedures to be followed in complaint handling the specific approach taken and the timing of it can change from one complaint to another. However, it is important that IOs follow certain general principles in all investigations in which human rights have been identified as relevant. These are:

- the NIPSO should make the body/ bodies complained of explicitly aware of its obligations under human rights law and that it is investigating the extent to which the body showed regard for these.
- every reasonable effort should be made to communicate directly with the aggrieved person whenever possible.
- human rights should be explicitly referred to in the report, in the conclusion and recommendations if appropriate where they have not been shown regard.

This Section focuses specifically on exploring whether the bodies complained of showed regard for human rights. Where the Section provides examples of regard having been evidenced sufficiently this does not mean that a finding of maladministration could not be reached on grounds of one of the other Principles of Good Administration

Complaint: Ella Jones

Mr Jones is complaining about the care and treatment his 85 year-old mother, Ella Jones, received in hospital and then the nursing home to which she was discharged. Ella was in hospital following a fall which led to a broken arm. The complaint relates to the period of Oct to Nov 2008. Ella was in hospital for five days and in the nursing home for eight weeks. Mr Jones's issues of complaint are that Ella:

Hospital

- Was originally told she would be discharged to a rehabilitation facility but was then discharged to a nursing home
- Was left for several hours waiting for an ambulance to take her to the nursing home

Nursing home

- Had bed rails put on her bed without consultation or permission

- Was discouraged from walking and encouraged to become dependent on a wheelchair
- Did not receive the level of rehabilitation needed
- Was not offered any stimulating activity while in the nursing home

Overall, Mr Jones is unhappy with the decisions made around his mother's care. He describes how his mother's arm was left hanging which led to her physical health deteriorating. How this, the long wait in A&E for an ambulance to take her to the nursing home and the subsequent treatment in the nursing home, showed a lack of respect for his mother's age and her dignity. Mr Jones maintains that his mother should have been discharged to the rehabilitation facility and not the nursing home. He believes the decision was entirely driven by the need to go for the cheapest option rather than what was right for his mother's health.

Mr Jones has exhausted the Trust's complaint procedure and has made his complaint within time. He is also frustrated by, what he believes to be, the unsatisfactory answers and explanations he has received from the Trust to date. There is nothing in the complaint to suggest Ella has issues in terms of her mental capacity.

The nursing home provided care to Ella on behalf of the Trust through a Service Level Agreement. However, your investigation will require specific information from the nursing home which the Trust will provide.

Assessment

Taking the example outlined above, this section will look at how IOs might assess the complaint. There are a number of ways through which human rights might become part of the complaint:

- Complainants may themselves refer to very specific human rights in their complaints e.g. they may refer to a lack of respect for their right to private or family life.
- Complainants may refer to some of the FREDA values, e.g. a complainant may state that she did not feel she was treated in a very fair way or that her dignity was respected by the body in jurisdiction.
- The IO recognises that human rights are an issue at assessment or investigation stage.

IOs should familiarise themselves with the Manual. When a complaint is received, the Manual should be referred to in order to establish whether any of the rights are potentially involved. The Manual illustrates the types of situations each right might be relevant in. A complaint may involve more than one right. At the assessment stage, IOs may wish to reference the relevant sections/ pages of the Manual, in the relevant forms, to help explain why and how the

right is applicable in the complaint as it is articulated at that stage. The complaint will still have to meet all the statutory requirements in order to be passed for investigation.

‘Initial Assessment’

In assessing a complaint, IOs must not infer matters from the complainant but they should look for which of the Principles of Good Administration might not have been followed by the body complained of. This approach takes us back to one of the first Principles: “acting in accordance with the law and with regard for the rights of those concerned”. As with the other Principles, it is not reasonable to expect complainants to be able to identify these for themselves in their complaint form. Similarly, one would not expect a complainant to be able to identify which policy or regulation the body complained of had not followed. This is for the IO to identify, investigate and then comment on. At the assessment stage, IOs should aim to flag which human rights might potentially be involved and may also refer to FREDA values. Identifying human rights issues does not equate to drawing inferences from the complaint. It is identifying the policy framework which the body should have shown regard for. It is then for the body complained of to evidence if and how that regard was shown.

Identifying human rights at this very early stage may not always be possible. In some complaints however, the human rights issues may be easily apparent, because of the nature of the issues being complained of. Whenever possible it is important to flag human rights at this stage in order to ensure that they become a core part of the investigation if relevant. Moreover, where the right involved is one that has domestic effect, the complainant may have a remedy

by way of the courts. The NIPSO therefore may have to exercise his discretion in accepting the complaint for investigation and the reasoning in doing so should be clearly documented on the form: “Initial Assessment and Assessment”. For further clarification on this IOs should refer to the NIPSO’s *Alternative Legal Remedy Practice Note*

It may be that the complainant raises human rights but the IO does not consider these to be relevant.

The complainant’s assertion and the IOs own assessment should be inserted in the relevant sections.

In some cases, the complainant is not the aggrieved person or is not the only aggrieved person. The NIPSO can, exercising, his discretion, accept and investigate complaints from someone acting on behalf of the aggrieved person. There may be a number of reasons for this including:

- the aggrieved person is now deceased.
- the aggrieved person is very young – i.e. a baby or toddler
- it would be very difficult and/or stressful for the aggrieved person to bring the complaint because of issues around their physical or mental health or mental capacity
- the aggrieved person is not an adult. The complainant is their parent/ legal guardian and believes they are best placed to bring the complaint

In following a human rights-based approach, it is important that the NIPSO thinks carefully about its processes when someone other than the aggrieved person brings complaints. It may be that formulating and following through a complaint would cause difficulty and stress to the aggrieved person. The prospect of this alone might deter them from complaining about their situation at all. It therefore might be appropriate that the NIPSO would in such circumstances exercise his discretion and accept the complaint from someone acting on his or her behalf. In Section 2, we discussed the importance of the NIPSO seeking to communicate directly with, for example, children and young people and disabled people. Where the complainant is not from the aggrieved person, the IO should:

- state the reasons for this on the form – Initial Assessment and Assessment
- discuss with the complainant, the possibility that an IO may wish to communicate directly with the aggrieved person. The complainant may feel strongly that this is not appropriate or may indicate how best that communication might take place. For example should that communication be, in writing, via a telephone conversation or in person with the complainant present. Would any special measures such as an interpreter, signing etc. be required?
- assure the complainant that the purpose of this engagement is to insure the NIPSO has all the relevant information and that the experience of the aggrieved person remains at the core of the investigation and, if appropriate, the remedy that is proposed

- record the outcome of this discussion, highlighting any special requirements on the Case Analysis for Handover Form.

Case Analysis for Handover Form

In the form the IO will expand on their initial assessment at the assessment stage. Here, listing the human rights against the issues of complaint will be required. Again, a cross reference to the relevant section of the Manual might be helpful in explaining the reasons for your decision. If Letters of Enquiry are initiated by the ASSIST team it is not necessary to raise human rights concerns with the body in jurisdiction at this stage.

Where human rights have been explicitly mentioned by the complainant but are not considered relevant by the IO, the reasons for the IOs assessment should also be clearly stated on the Case Assessment form.

Below are examples of how the relevant forms might be completed: “Initial Assessment and Assessment” form and the “Case Analysis for Handover Form Team”.

In assessing the complaint for human rights issues, IOs may also find it helpful to refer to the human rights screening tool. See below

Human Rights Based Approach to Assessing Complaints Screening Tool

1. Does the complainant refer to specific rights?
(For example, the right to respect for private and family life, or the right to be free from inhuman or degrading treatment)
2. Does the complainant use phrases such as “respect, dignity, freedom”?
3. Does the complaint raise issues of human rights in terms of general/ overall treatment or impact e.g. “I felt degraded” “It was humiliating”
4. While not inferring matters, does the complaint raise any of the above in your own assessment?
5. Are there specific actions/decisions that raise issues of human rights?
(For example: specific types of treatment – use of equipment that restricts ability to move freely (even if used for person’s safety); disregard for person’s choices; failure to attempt to ascertain person’s choices)
6. Is it an issue of overall impact of a series of decisions/ actions/ inactions?
7. Does the complaint relate to a vulnerable person e.g. an older person, child, someone with a learning disability, someone in the care of the state?

If the answer to any of the above is ‘yes’, further human rights specific queries with the complainant and/or body is likely to be required.

But before proceeding:
8. Have you considered the rights of both the person aggrieved as well as the complainant?

INITIAL ASSESSMENT AND ASSESSMENT

Case Ref: 4321

Complainant: Mr T Jones

Body Complained Against: XXXX

Jurisdiction: NIPSO

Description of complaint:

Care and treatment

Date Received: Today

Initial Assessment		Yes	No
1.	Is the organisation within jurisdiction?	X	
2.	Is the subject of the complaint within jurisdiction?	X	
3.	Is the complainant statutorily barred?		X
4.	Is the complaint within the statutory time limit?	X	
5.	Has the organisation's formal complaints procedures been fully exhausted?	X	
	What date was local resolution completed? / /		
	If the complaint has been delayed in coming to us, have any reasons been provided for the delay?		
	Is the complainant complaining about the organisation's complaints handling?		

6.	Has, or had, the complainant a remedy by way of court action?		X
	Has the complainant mentioned court action? Please provide details		
	Has the complainant mentioned compensation?		
7.	Has, or had, the complainant recourse to a Tribunal?		X
	Who provides administrative support for this tribunal?		
8.	Is the complaint from someone else?	X	
	If yes please specify who is making the complaint:		
	What is their relationship to the complainant? Son		
	Has the person given their consent? (specify how)		
	Is there any evidence that the complainant is unable to act for themselves? Yes		
	Is the representative suitable to act on behalf of the complainant? Yes		
9.	Is there sufficient information for the complaint to be assessed?	X	

INITIAL ASSESSMENT CHECK- IO		Yes	No	N/A
1.	Initial Assessment by Casework Officer agreed?	X		
2.	Discretion to be exercised re aggrieved person?			X
3.	Discretion to be exercised re time limit?			X
	Investigating Officer: A N Other			
	Date: XX/xx/XX			

ASSESSMENT - IO		Yes	No	N/A
1.	Is an investigation appropriate and necessary? (proportionality)	X		
2.	Would an investigation directly bring about a solution or adequate remedy? (practical outcome)	X		
3.	Would investigating the issues of complaint be of potential benefit to the general public? (public interest)	X		
4.	<p>Does the complainant refer to specific human rights / FREDA values? Please provide details and any potential further action</p> <p>Dignity, Respect Right to highest attainable standard of health Right to be free from inhuman or degrading treatment Right to private and family life Equality / Discrimination Further enquiries to be made of body during investigation</p>	X		

OUTCOME OF ASSESSMENT - IO				
1.	Close Case			
2.	Settlement			
3.	Progress case for investigation			
	<p>Comments:</p> <p>Investigating Officer :</p> <p>Date:</p>			

Case Analysis for Handover to Investigation Team

Case Ref:

Organisation complained of:

Special information to note:

1. Case summary (no more than 200 words). A detailed understanding of the case should be gleaned from reading of the case file.

2. Suggested heads of complaint (these should reflect the principal and contentious issues of complaint whilst allowing the investigator the scope to go where the evidence takes them)

- 1.
- 2.
- 3.
- 4.

3. Issues which require to be dismissed and the reasoning for same including reference to the 3Ps (responsibility for dismissing issues will lie with the receiving investigator- issues should be dismissed in the letter initiating the investigation)

4. Information/Evidence obtained:
5. Information/Evidence missing:
6. Human rights / FREDA values identified as relevant with reference to the issues of complaint:
7. Analysis of case, under each of the suggested heads of complaint, specifying the reasoning why investigation is warranted:
8. Director of Assist comments: Date passed to Director of Investigations
9. Director of Investigations comments KPI 3 start date:

Investigating the complaint

Letters of Enquiry

Once a complaint has been validated and accepted for investigation, letters of enquiry are sent to the body or bodies complained of. In Mr Jones's complaint, a letter of enquiry is sent to the Chief Executive of A Health and Social Care Trust. As is standard practice, the letter seeks the Trust's response to each of the issues of complaint. In addition, the letter requests:

- detailed comments on the above points (i.e. the issues of complaint), together with any additional general comments the Trust may wish to put forward
- a copy of the documentation relevant to Mrs Jones's discharge from the hospital including the contractual arrangement between the Trust and the nursing home to which Mrs Jones was sent
- a copy of the care plan that applied to Mrs Jones both in the hospital and the nursing home
- a copy of the rehabilitation plan drawn up in respect of Mrs Jones
- a copy of the records compiled by the physiotherapist who attended Mrs Jones in the nursing home
- any other records in respect of Mrs Jones's stay in the nursing home in 2008

- any copy correspondence/background information relevant to Mrs Jones's complaint and
- any proposals for a settlement of this case which you would like to make at this juncture.
- a full copy of Mrs Jones's medical records, including all correspondence from 1 September 2008 to 31 December 2008.

This is an opportunity for AHSCT to provide an initial and broad response. Human rights should be integrated into the Trust's policies and procedures and in decision-making regarding individual patients/ residents and should be evidenced in the records relating to Mrs Jones as requested above. It is not therefore necessary to request specific or general information regarding human rights at this stage. However, once the information is received it should be analysed carefully for explicit mention of human rights and the FREDA values. In Mrs Jones's case, there should be evidence of:

- recognition of Mrs Jones's age and her vulnerability;
- ascertaining Mrs Jones's wishes with regard to her care and treatment;
- promoting independence and mobility in the nursing home in which Mrs Jones was placed;
- the availability of a range of activities for older people in the nursing home, Mrs Jones being made aware of these and her participation being facilitated;
- communication with Mrs Jones regarding her discharge;

- concerted efforts to ensure Mrs Jones received the best care and treatment within the resources available

Where this is not evidenced from the enquiry IOs should go back to the body, in this case the Trust. At this stage IOs should explicitly mention Mrs Jones’s human rights and request evidence as to how AHSCT gave them due regard in its decisions and actions. IOs might consider a broad and generic introduction to the term:

EXAMPLE

Example 1:

In this case the NIPSO considers the Trust had a responsibility to show regard for the human rights of Mrs Jones. I should be grateful therefore if you could provide copies of any relevant policies, procedures or guidance, and in particular those relating to:

- discharge practices;
- activities available in the nursing home
- use of bed rails, wheelchair belts etc.
- use of wheelchairs
- how decisions are made with regard to older people’s needs including in relation to rehabilitation

An alternative is that you are specific about which human rights are considered relevant and how:

EXAMPLE

Example 2:

In this case, the NIPSO considers the body in jurisdiction has a responsibility to show regard for the human rights of Mrs Jones. In particular Mrs Jones has a right to respect for private and family life and a right to be free from inhuman or degrading treatment while in the hospital and nursing home. These rights are relevant to how the Trust makes food and water available to patients/ residents, the manner in which patients are discharged, the opportunities for social interaction and stimulating activity in an institution and the use of any measures that might potentially restrict or restrain a person’s mobility including bed rails and confinement to wheelchairs. I should be grateful therefore if you would provide copies of any relevant policies, procedures or guidance and in particular those relating to:

- discharge practices;
- use of bed rails, wheelchair belts etc.
- use of wheelchairs

THE EXAMPLE

- how decisions are made with regard to older people's needs including in relation to rehabilitation

In addition Mrs Jones has a right to the highest attainable standard of physical and mental health. The Trust has a duty to respect and protect this right within the maximum available resources. I should be grateful therefore if you could provide further information with regard to how the decision was reached that Mrs Jones's rehabilitation should take place in a nursing home rather than a specialist rehabilitation facility. In particular, explaining the difference between the service provided in those specialist facilities and the nursing home and what informed the decision to discharge Mrs Jones to the latter.

Independent Professional Advice (IPA)

In assessing clinical decisions, IPA advice should be relied on as it currently is. In the above example, once all the requested information has been received it will be necessary to assess the adequacy of the physiotherapy Mrs Jones was offered and subsequently received in light of her particular medical needs and condition. Independent Professionals should be asked to advise the NIPSO on the reasonableness of the provision made for Mrs Jones. The advice should include comment on:

- the adequacy of the rehabilitation plan for Mrs Jones
- the adequacy of the physiotherapy Mrs Jones received in the nursing home

- any other matters which the IPA believes to be of relevance to Mrs Jones's care and treatment

Engaging with the aggrieved person(s)

In this example Mr Jones is the complainant and is aggrieved by the treatment his mother has received. He also has issues with regard to the complaints process of the Trust. Mrs Jones, however, is also aggrieved as the complaint is primarily about her care and treatment. Mrs Jones is an older person but there are no issues in relation to her mental capacity and her ability to recall and relate her experience in the hospital and the nursing home. As can be seen from the information above, her son has explained that she wishes to avoid the stress and worry of complaining herself and would find it difficult to cope, emotionally, with a complaints process. However, every effort should be made to communicate with Mrs Jones quite simply because she is the rights-holder in this case and one of the aggrieved persons in this complaint.

Purpose

It is important to be clear about why the NIPSO is engaging directly with the aggrieved person(s) when they are not the complainant. The engagement is intended to ensure the NIPSO itself follows the human rights-based approach that it is now expecting of bodies in jurisdiction. Previously we discussed how "participation", "empowerment" and "non-discrimination" are all central components of the human rights-based approach. This approach ensures that, as far as possible, the NIPSO can be assured that he is in receipt of all the relevant information regarding the complaint. If all or part of the complaint is upheld, directly engaging with the aggrieved person will also assist in the formulation of the remedy

and recommendations. These must be appropriate to the aggrieved person's needs and help ensure that similar situations do not arise for others in the future. Quite simply communicating directly with the aggrieved person, while presenting a number of challenges, has a very practical purpose. The purpose of this engagement is not to reformulate the complaint or to attest the original complaint. IOs should be clear with the complainant that his or her intentions or integrity is not under question and his complaints and concerns are not being put aside or ignored.

In some cases however, it may not be possible or advisable to engage directly with the aggrieved person. For example, a complainant may explain that the aggrieved person's mental disability is of such a nature that they would not be able to communicate effectively or to do so would cause distress. Causing further distress or harm must be avoided and in such cases engagement with the aggrieved person should not be pursued.

Practicalities

Direct engagement with the aggrieved person who is also likely to be vulnerable must not cause distress or harm. It is important to note that vulnerable witnesses are not unreliable witnesses but they may need some special adjustments to ensure that you are able to get all the relevant information from them. When engaging with the aggrieved person IOs should ensure:

- The communication is tailored to meet the needs of the person.
- Language used whether in writing or orally is clear and simple, avoiding jargon

- Sufficient time is allocated to allow the person to articulate their views and experience
- If there is to be a face-to-face meeting you consider whether it might be more appropriate to travel to the aggrieved person
- If the aggrieved person is in the institution the complaint is about (e.g. prison, hospital, care home, nursing home) you discuss with the complainant the best way to communicate

The evidence

Where there is a lack or absence of any evidence indicating regard for human rights of the aggrieved person, there could be a number of reasons for this:

- human rights were not sufficiently integrated into the Trust's policies, procedures or guidance OR
- the relevant policies, procedures or guidance were not followed in this case OR
- while the case polices and practice do show regard for human rights the written records and documentation in relation to Mrs Jones do not adequately reflect this.

In Mrs Jones's case, the NIPSO has received all the requested medical records, nursing home notes, policies, and guidance. An IO has also spoken to Mrs Jones who has given some additional information with regard to the issues of complaint. Here is what the NIPSO finds:

The hospital

The documentation shows that the decision to send Mrs Jones to the nursing home was based on the latter's Statement of Purpose, which states that physiotherapy is available in the nursing home.

Mrs Jones's rehabilitation plan shows she required physiotherapy five days a week.

The Trust's leaflet "Getting Ready to Leave Hospital" states that options around discharge will be discussed with patients.

Ambulance transport procedures—state that every effort should be made to ensure patients are not left in the hospital waiting for transportation for an unacceptable length of time. However, emergencies will take priority.

The nursing home

The nursing home's Statement of Purpose states that it offers a wide range of physiotherapy for its residents. The Service Level Agreement between the nursing home and the physiotherapist show that the physiotherapist is only contracted to be in the home three days a week.

The nursing home's policy on restraint shows that signed consent is needed from the resident or where there are issues around mental capacity, their next of kin, before bed rails or wheelchair belts can be used.

The nursing home has a policy on encouraging independence and mobility. It makes clear that where residents are at risk of a fall

or have suffered a fall, they should be accompanied by two care assistants when walking around the nursing home.

The nursing home has a dedicated activities assistant who is responsible for organising outings and activities in the nursing home. The activities nurse has a schedule of activities set out at the beginning of every month.

A different activity was scheduled for every day that Mrs Jones was in the home including: bingo; a trip to the library; hairdressers coming into the home and a reading group.

Throughout the policies there are phrases such as "it is important to respect the wishes of residents" and "the wishes and dignity of residents should be respected at all times".

In the nursing home bed rails were used on Mrs Jones's bed. The investigation shows that contrary to the nursing home's restraint policy Mrs Jones's consent was not sought before these were used as the nursing home has no signed consent form from Mrs Jones. In the interview with Mrs Jones the IO is told she was never asked to sign a consent form.

Mrs Jones

In the interview with Mrs Jones she tells the IO she would have liked to walk around the home more but she needed someone to help her in the first few days at the nursing home because she was at risk of falling. Mrs Jones tells you that she asked for help but that was told 'not today, dear, we are really busy and you might fall, maybe it's best if you just stay in your wheelchair. It's much easier for someone to take you wherever you need to go in your wheelchair' The nursing

home records show on three days of every week Mrs Jones was in the nursing home there were simply not enough care assistants on duty to dedicate to helping one person walk around the home. On those days the staffing numbers fell short of the resident to staff ratio recommended by the regulatory body the RQIA.

On the issue of activities Mrs Jones tells you none of them suited her. She likes gardening and that was not offered in the home until the spring. Although she would have been content with being allowed to walk around the garden area on dry afternoons she was again told it would be best if she stayed indoors. She spent most of the day watching TV.

Mrs Jones is an older person. In your interview you hear that she did not like to be troublesome and so did not ask for too much. She did feel neglected but was not in any physical pain. More than anything she was homesick and just wanted to be well enough to get back home.

Mrs Jones was in the nursing home for eight weeks.

Independent Professional Adviser

The IPA comes back with the following:

Mrs Jones's rehabilitation plan and the physiotherapy at the nursing home did not match up. Mrs Jones's rehabilitation stated that she required various physiotherapy exercises to be carried out five days a week. It stated that given her age and frailty she would need assistance with these exercises from a trained physiotherapist. However, Mrs Jones's medical records show she only received the physiotherapy three days a week.

Mrs Jones's rehabilitation plan also shows that mobility should be encouraged to ensure her recovery is as full as possible.

The IPA questions why the Trust would send Mrs Jones to a nursing home that has made clear it only has a trained physiotherapist on the premises three days a week. There is also no evidence of the Trust reviewing Mrs Jones's treatment through, for example, Mrs Jones's assigned social worker. In addition a consultant geriatrician is contracted by the Trust to visit the nursing home every week to look at rehabilitation and medical care. There is no evidence in Mrs Jones's nursing home notes or medical notes that the geriatrician visited Mrs Jones and assessed her rehabilitation over the eight weeks she was in the home.

Analysis

Based on the information, the nursing homes policies show an awareness of the obligations the nursing home has towards its residents. However, in practice these obligations were not always met. It appears from the evidence that the reasons for this were mainly around staff shortages and the need to keep residents physically safe meant that residents' independence and autonomy were sacrificed.

It also appears that the hospital's need to free up a bed meant that decisions around Mrs Jones's care were not communicated to her properly, that her own views were not sought in this regard and the decision to send her to the nursing home was made quickly. The Service Level Agreement with the nursing home was not checked thoroughly as to the level of physiotherapy it could provide. The nursing home in turn accepted a patient that it could not provide the appropriate level of treatment to. However overall, Mrs Jones did

not receive the physiotherapy she needed. This led to her being unable to use her arm to a level that would have been expected after her eight week stay at the nursing home.

Now assess this evidence against the rights identified as relevant:

The right to be free from inhuman or degrading treatment or punishment

This is an absolute right and the nursing home and hospital have an absolute duty to provide care and treatment and to refrain from certain actions in order to prevent any treatment that is inhuman or degrading. Given Mrs Jones's age extra care and attention was needed. In terms of policies and procedures the home is aware of its obligations to show due regard for the dignity of residents. On balance and in practice Mrs Jones's treatment in the home although not always satisfactory was not of a severity that it would suggest the home would treat residents in an inhuman or degrading way. Mrs Jones was not in the home for very long and although she describes how she felt homesick, there is nothing to indicate she felt 'humiliated' in 'anguish' or in 'fear'.

The right to respect for private and family life

IOs will recall that this is a qualified right and therefore interference with it can be justified provided it is lawful and in pursuit of a legitimate aim. It is also closely linked to the right to be free from inhuman or degrading treatment in that treatment that fails to meet a threshold considered inhuman or degrading can indicate an unlawful interference with private and family life. The home interfered with Mrs Jones's right by using bed rails, refusing assistance with walking and not allowing her to go out into the garden until spring.

In response, the nursing home, via the Trust, claims this was necessary (or legitimate) for the physical safety of Mrs Jones and other residents given the shortage of staff on certain days. However, the home failed to keep its staffing levels to the recommended ratio. In terms of the inadequacy of the physiotherapy, Mrs Jones's requirement was not of a necessity that would engage the right to respect for private and family life under the jurisprudence. On balance however, the nursing home could clearly have done more to ensure the proper procedures were followed and the guidance on staff was followed. The evidence suggests that the 'legitimate aim' only arose because the nursing home failed to follow the guidance on staffing. It also failed to follow its own procedures in relation to consent. The nursing home should have done more to show regard for Mrs Jones's right to private and family life.

The right to equal enjoyment of rights

There is nothing to suggest that Mrs Jones was treated less favourably in the hospital or nursing home because of her age. However, the Trust policies (e.g. the ambulance transport policy) do not make specific reference to the needs of older people.

The right to the highest attainable standard of physical and mental health

The IPA has confirmed that Mrs Jones did not receive the clinical care she needed and that the Trust's decision to send her to the nursing home was flawed. On further probing the Trust tells the NIPSO that Mrs Jones received the best care that was available within its resources at that time.

Reporting

A finding of maladministration is reached based on the Trust's decision to send Mrs Jones to a facility where it should have known from the outset could not provide the level of rehabilitation she required. It also failed to mitigate this failure by not continuously reviewing the situation or identifying if there was a need for additional care and treatment.

In addition, the nursing home failed to follow its own policies and the RQIA's guidance in relation to staff to resident ratio.

From the outset, human rights have been identified as relevant to this complaint. AHSCT is aware that the NIPSO is investigating whether regard was given to Mrs Jones's human rights and has been given a number of opportunities to respond to this aspect of the NIPSO's investigation. The range of documentation does not mention any specific human rights but does mention the FREDA values of dignity and respect throughout various policies. Based on the evidence outlined above the Trust in terms of hospital and nursing home care did allow Mrs Jones's treatment to be at a level that justifies the NIPSO finding it did not show due regard for Mrs Jones's right to respect for private and family life and her right to the highest attainable standard of physical and mental health. Below are some suggestions of how the NIPSO might express these findings in the final report.

If the NIPSO confined his original communication to a general expression of human rights as in Example 1 above

EXAMPLE EXAMPLE

Example 1:

In arriving at a determination of maladministration I have identified a number of areas under which the Trust failed to show regard for Mrs Jones's human rights and the dignity and respect to which she was entitled, which in turn led to Mrs Jones suffering injustice:

1. Sustained staff shortages over an eight week period. Regard was not shown for what the staff shortages meant for Mrs Jones's desire to maintain her mobility and independence. The unauthorised use of bed rails and the discouragement from walking was a direct consequence of staffing which did not meet the relevant guidelines
2. Inadequate rehabilitation. The inadequacy of the physiotherapy and the Trust's failure to adequately review it had health consequences for Mrs Jones rehabilitation. This is significant in and of itself in human rights terms but it also shows again a lack of regard for Mrs Jones's dignity.

However, if the NIPSO has been explicit in the human rights it is investigating as in Example 2 above, the following will be more appropriate:

Example 2:

In arriving at a determination of maladministration, I have identified a number of rights which the Trust has failed to evidence its regard for in its treatment of Mrs Jones. This failure directly led to injustice being suffered by Mrs Jones:

The right to respect for private and family life

Independence, including physical mobility, is an important aspect of the right to respect for private and family life. Despite the policies in place at the nursing home which require authorisation before bed rails can be used and which encourage independence and mobility these were clearly not followed in Mrs Jones's case. While the nursing home has asserted that the interference was necessary for safety reasons this does not justify why Mrs Jones's consent was not gained before bed rails were used. The shortage in staff also meant that Mrs Jones could not walk around the home or venture out into the garden area and was largely confined to a wheelchair. The nursing home claims that it needed to balance Mrs Jones's right to respect for private and family life against her safety needs. However, had it followed the relevant guidance on staffing requirements these choices would not need to have been made. In failing to follow the guidance set out by the RQIA with respect to the ratio for staff to residents the nursing home failed to show regard for the impact this would have on Mrs Jones's, and indeed other residents' right to respect for private and family life.

The right to the highest attainable standard of physical and mental health

In addition the Trust has failed to provide an adequate explanation as to why Mrs Jones was discharged to a facility where it was clear from the outset that she would not receive the level of treatment she required. It maintains that the decision needed to be made quickly which could have led to the inappropriate placement but was not financially driven. The need for expediency led to failures to conduct basic checks and also shows that the Trust failed to show regard for Mrs Jones's right to the highest attainable standard of physical and mental health.

Equality and non-discrimination

While there is no evidence suggesting the unsatisfactory treatment offered to Mrs Jones was due to her age, there is also a lack of evidence showing the Trust is aware of the distinct needs of older people.

Recommendations

Once a conclusion has been reached on the human rights involved, it is important that the remedy and recommendations reflect these. A human rights-based approach is not only important in identifying where a body in jurisdiction has failed in its engagement with an individual but also in identifying an effective remedy. Human rights require a person-centred approach to remedy. This means giving the personal experience of the individual in the administrative

process central place when formulating a remedy. The NIPSO should think carefully about whether the recommendations it is making will empower the aggrieved person. Financial compensation is an important aspect of remedy when the courts rule a violation of human rights but a human rights based approach requires public authorities to go beyond financial redress in putting things right. It is important to explain to the body complained of, that the recommendations are being made because they will ensure that human rights are given regard in the future and that human rights should inform how decisions and actions are undertaken. It should be emphasised that one of the reasons for the determination of maladministration was the failure to show regard for human rights. Human rights are not a peripheral concern of the NIPSO but a fundamental part of his deliberations and determinations.

EXAMPLE

Example:

I have identified a number of shortcomings in the Trust's treatment of Mrs Jones. Given the inadequacies and maladministration I have identified, I recommend the Trust ensures that the human rights of patients and residents are given regard at all stages of their contact with the Trust and the services it is responsible for delivering. Specifically I recommend that the Trust ensures that:

- Decisions around discharge to nursing homes are made with full cognisance of the facilities and services offered in the latter. Reliance on nursing home websites or brochures is not sufficient

EXAMPLE

- Patients are fully informed of the choices available to them and encouraged and facilitated to participate in decision-making impacting on them.
- Patients are informed promptly once a decision has been made regarding discharge and the reasons for it explained.
- Adequate review mechanisms are in place to ensure the required care and treatment is being provided following discharge
- Where the care and treatment is found to be of an unsatisfactory level, procedures are in place to ensure individuals are offered the appropriate treatment promptly.

With respect to the Trust's Service Level Agreements with nursing homes, I recommend that as a minimum the Trust ensures that any nursing home with which it has a Service Level Agreement:

- Is able to meet the RQIA's recommended staff to resident ratio at all times
- Has measures in place to ensure that unplanned staff absences are addressed promptly and with minimum disruption and impact on residents

- Has measures to ensure staff are made aware and are regularly reminded of the need to show regard for the human rights of patients and residents and the need to assess the impact of their decisions in light of this
- Has measures to ensure decisions around resident safety and promoting resident autonomy and independence are made in light of the wishes of the resident. That nursing home records accurately reflect the wishes of the resident and the home makes every effort to accommodate these

In addition I have seen nothing in the Trust's publicly available information that shows an awareness of the distinct needs and rights of older people and the Trust's commitment to upholding those rights. Such information would go some way in helping older people see themselves as rights-holders rather than the recipient of goodwill. This in turn would help in older people articulating their own wishes and drawing attention to the problems they experience. I therefore recommend the Trust considers the publication of such information through engaging with relevant expert bodies to ensure these are in appropriate formats and accessible.

Conclusion

This Section has given some examples of how a human rights-based approach might be followed by the NIPSO. As discussed previously, human rights are a universal set of values. As legal entitlements they are predicated on the notion that in order to live in peace and dignity they are the minimum that States must guarantee to all within their borders. A lack of regard for human rights can be maladministration. Equally, human rights can also be an effective way of expressing the injustice suffered by an individual as a consequence of maladministration. In Ella Jones's case a human rights-based approach has required an interview with Ella herself. The interview revealed feelings and experiences that the complainant might not have articulated. A human rights-based approach has also led the NIPSO to articulate in strong terms the impact of maladministration on that human experience. A human rights-based approach therefore strengthens the NIPSO's fulfilment of the Ombudsman objective of humanizing bureaucracy and improving the experience of service users.

Practical Tools

4

4

The rights that are the subject of this Manual are:

- The right to life
- The right to be free from torture or cruel, inhuman or degrading treatment or punishment
- The right to liberty and security of person
- The right to a fair hearing
- The right to respect for private and family life, home and correspondence
- The right to freedom of thought, conscience and religion
- The right to freedom of expression
- The right to health
- The right to an adequate standard of living
- The right to education
- The right to social security

Human Rights Based Approach to Assessing Complaints Screening Tool

1. Does the complainant refer to specific rights?
(For example, the right to respect for private and family life, or the right to be free from inhuman or degrading treatment)
2. Does the complainant use phrases such as “respect, dignity, freedom”?
3. Does the complaint raise issues of human rights in terms of general/ overall treatment or impact e.g. “I felt degraded” “It was humiliating”
4. While not inferring matters, does the complaint raise any of the above in your own assessment?
5. Are there specific actions/decisions that raise issues of human rights?
(For example: specific types of treatment – use of equipment that restricts ability to move freely (even if used for person’s safety); disregard for person’s choices; failure to attempt to ascertain person’s choices)
6. Is it an issue of overall impact of a series of decisions/ actions/ inactions?
7. Does the complaint relate to a vulnerable person e.g. an older person, child, someone with a learning disability, someone in the care of the state?

If the answer to any of the above is ‘yes’, further human rights specific queries with the complainant and/or body is likely to be required.

But before proceeding:

8. Have you considered the rights of both the person aggrieved as well as the complainant?

INITIAL ASSESSMENT AND ASSESSMENT

Case Ref:

Complainant:

Body Complained Against:

Jurisdiction:

Description of complaint:

Care and treatment

Date Received: Today

Initial Assessment		Yes	No
1.	Is the organisation within jurisdiction?		
2.	Is the subject of the complaint within jurisdiction?		
3.	Is the complainant statutorily barred?		
4.	Is the complaint within the statutory time limit?		
5.	Has the organisation's formal complaints procedures been fully exhausted?		
	What date was local resolution completed? / /		
	If the complaint has been delayed in coming to us, have any reasons been provided for the delay?		
	Is the complainant complaining about the organisation's complaints handling?		

6.	Has, or had, the complainant a remedy by way of court action?		
	Has the complainant mentioned court action? Please provide details		
	Has the complainant mentioned compensation?		
7.	Has, or had, the complainant recourse to a Tribunal?		
	Who provides administrative support for this tribunal?		
8.	Is the complaint from someone else?		
	If yes please specify who is making the complaint:		
	What is their relationship to the complainant?		
	Has the person given their consent? (specify how)		
	Is there any evidence that the complainant is unable to act for themselves?		
	Is the representative suitable to act on behalf of the complainant?		
9.	Is there sufficient information for the complaint to be assessed?		

INITIAL ASSESSMENT CHECK- IO		Yes	No	N/A
1.	Initial Assessment by Casework Officer agreed?			
2.	Discretion to be exercised re aggrieved person?			
3.	Discretion to be exercised re time limit?			
	Investigating Officer: A N Other			
	Date: XX/xx/XX			

ASSESSMENT - IO		Yes	No	N/A
1.	Is an investigation appropriate and necessary? (proportionality)			
2.	Would an investigation directly bring about a solution or adequate remedy? (practical outcome)			
3.	Would investigating the issues of complaint be of potential benefit to the general public? (public interest)			
4.	<p>Does the complainant refer to specific human rights / FREDA values? Please provide details and any potential further action</p> <p>Dignity, Respect Right to highest attainable standard of health Right to be free from inhuman or degrading treatment Right to private and family life Equality / Discrimination Further enquiries to be made of body during investigation</p>			

OUTCOME OF ASSESSMENT - IO				
1.	Close Case			
2.	Settlement			
3.	Progress case for investigation			
	<p>Comments:</p> <p>Investigating Officer :</p> <p>Date:</p>			

Case Analysis for Handover to Investigation Team

Case Ref:

Organisation complained of:

Special information to note:

1. Case summary (no more than 200 words). A detailed understanding of the case should be gleaned from reading of the case file.

2. Suggested heads of complaint (these should reflect the principal and contentious issues of complaint whilst allowing the investigator the scope to go where the evidence takes them)

- 1.
- 2.
- 3.
- 4.

3. Issues which require to be dismissed and the reasoning for same including reference to the 3Ps (responsibility for dismissing issues will lie with the receiving investigator- issues should be dismissed in the letter initiating the investigation)

4. Information/Evidence obtained:
5. Information/Evidence missing:
6. Human rights / FREDA values identified as relevant with reference to the issues of complaint:
7. Analysis of case, under each of the suggested heads of complaint, specifying the reasoning why investigation is warranted:
8. Director of Assist comments: Date passed to Director of Investigations
9. Director of Investigations comments KPI 3 start date:

