

## Case study

# Northern Ireland Public Services Ombudsman: Complaint to a health trust about the care and treatment of an elderly relative

### The complaint

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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 October to November 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, and
- 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, and
- 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

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Taking the example outlined above, this section will look at how investigating officers (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, for example, they may refer to a lack of respect for their right to private or family life.
- Complainants may refer to some of the FREDAs values, for example, 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 NIPSO Human Rights 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 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.

## Investigation

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### 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 (AH SCT). 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 and background information relevant to Mrs Jones's complaint
- any proposals for a settlement of this case which you would like to make at this juncture, and
- 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 AH SCT 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 or 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, and
- 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 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, and
- 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 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 and 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, and
- 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**

In assessing clinical decisions, independent professional advice (IPA) 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, and
- 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. '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, and
- 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
- the relevant policies, procedures or guidance were not followed in this case, or
- while the case policies 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 Regulation and Quality Improvement Authority (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 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 FREDAs 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.

The NIPSO could confine his original communication to a general expression of human rights as in Example 1.

### **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, Example 2 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**

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.
- 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, and

- 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. 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 humanising bureaucracy and improving the experience of service users.