

## **Guidance: Equality and Human Rights in our casework**

As an Ombudsman scheme, we're concerned with fairness and people's rights. It is not within our remit to determine whether an individual's human rights have been breached or whether a landlord has acted unlawfully in relation to its equality duties – that is for the courts. However, fairness, dignity and respect are always at the heart of the complaints we receive and decide.

It is our role to identify whether a landlord has given due regard to its obligations under the Equality Act 2010 ("EA2010") and/or the Human Rights Act 1998 ("HRA 1998"), provide redress for any detriment caused to the resident, and ensure that lessons are learned to minimise the risk of similar failures. In doing so, we will support landlords to improve its services, achieve better outcomes for residents and maximise the impact of our determinations.

We have developed this internal guidance on the EA2010 and HRA 1998, which provides an overview of the two acts in relation to our work and practical advice on investigating complaints which involve these issues. It is to support caseworkers to:

- identify when equality and human rights issues are present in the cases that come to us;
- recognise which aspects of the legislation apply to our work;
- better understand the duties and responsibilities of social landlords in relation to equality and human rights; and
- increase confidence in how to apply a human rights-based approach to our work.

Equality and human rights are factors, alongside many others, we may need to take into account when considering complaints that come to HOS. It is important that we take a balanced, proportionate approach, taking account of all factors relevant to a specific complaint. This is fundamental to our inquisitorial approach.

We should be alive to equality and human rights issues in all the complaints we receive. However, there are some areas of our casework where they are more likely to be present. The below list is by no means exhaustive.

For example:

- where residents have one or more of the protected characteristics and complain to us about unfair treatment – this could be in respect of the substantive matter, the handling of their complaint, and / or the landlord's communication and general attitude towards the resident
- where a resident alleges discrimination whether they have a protected characteristic or not
- where residents or family members have physical and/or mental health conditions that are impacted by the issues complained about – either directly or indirectly

- where residents complain that they have struggled to access the landlord's services due to a disability or the landlord has failed to make reasonable adjustments
- Where we consider that a landlord's policies or procedures indirectly discriminate against a resident due to a protected characteristic (i.e. a policy which says all complaints must be made in writing)
- where residents complain that their ability to enjoy their home and family life has been compromised – this could be in relation to noise nuisance, other forms of ASB, leaks, damp and mould, repairs, adaptations for disabled residents, pest infestations.

## **Complaint definition**

Please refer to our [Guidance on Investigations](#), which sets out our approach to defining the complaint (p.4-5).

Where a resident specifically refers to a breach of their human rights, discrimination, a failure to meet their needs as a disabled person or make reasonable adjustments, or any other matters relating to equalities and human rights and it is a significant part of their complaint, we must include this in the complaint definition. This is the case whether or not there is evidence to support the allegations.

Where a resident does not specifically refer to equality and human rights issues in their complaint to us, or in their correspondence with the landlord, we should still consider whether there are any clear themes that engage these issues. We should think carefully about whether to include this in the complaint definition as this will help structure our analysis and findings and support any orders and recommendations we subsequently make. A conversation with the resident may assist the caseworker to properly understand the complaint, identify the key issues and ensure the residents feels heard.

Where equality and human rights do not form an integral part of the complaint definition but are still relevant to the case, perhaps as an ancillary matter (e.g. where we have identified equality and/or human rights are relevant but the resident has not necessarily mentioned it or has simply made a fleeting comment to this effect), it is important to include reference to the landlord's responsibilities in the legal framework section of the report and set out our findings later in the report.

Referencing equality and human rights issues in the complaint definition and in the body of the report, not only ensures the resident has been heard but also helps frame the issues under investigation. It also sends a clear message to landlords that we have an important role in relation to equality and human rights, holding them to account when the evidence shows they have failed to have due regard for their responsibilities.

## The Equality Act 2010

### Introduction

The EA 2010 came into force on 1 October 2010, providing a legal framework to protect the rights of individuals and advance equality of opportunity for all. It provides Britain with a discrimination law which protects individuals from unfair treatment and promotes a fair and more equal society.

Except for the “public sector duty” (Section 149 explained below), the EA 2010, applies to *all* organisations, so all social landlords, and not just those that are public bodies, or those deemed to be public bodies.

### Jurisdiction

We do not have the power to decide whether a landlord has breached the EA 2010. Only the courts can make that decision. However, we can decide whether a landlord has properly considered its duties under the Equality Act.

Section 114 of the Act provides members of the public with recourse to the county court for damages claims, if they believe they have experienced unlawful discrimination. Complaints of this nature may fall outside jurisdiction under paragraphs 42(e) and (f) of the Scheme.

However, we should not automatically rule out complaints when an individual claims they have been discriminated against by a landlord. Residents may use such terms, but the underlying action complained of may still constitute maladministration. As stated above, we would consider whether the landlord has considered its duties under the Act in its decision making, its actions and treatment of the resident and their complaint. It is for the caseworker to define the complaint in our terms.

In deciding whether 42(e) or (f) apply – i.e. whether it would be reasonable for the resident to make a claim of discrimination to the county court under Section 114 - we need to consider the following factors:

- Whether someone is still in time to make a discrimination claim - there is a time limit of six months less one day for making discrimination claims. The time period runs from the day the act complained about took place or the date of the “last discriminatory act” if it is over a period of time. Section 118(1)(b) of the Equality Act says that if the matter is not raised within 6 months, a court can accept a late claim if the county court thinks it just and equitable, however we should not rely on this.
- The outcome someone is looking for – if they are looking for damages for unlawful discrimination, that would be a matter for the court. However, if they are seeking service improvements and/or a remedy for personal detriment as a result of a landlord’s failure to make reasonable adjustments, that would be a matter we could consider.

- The purported maladministration – is it a failure to properly consider whether an adjustment is reasonable or a breach of the EA 2010? Only a court can determine whether a landlord has unlawfully discriminated against an individual. We can decide whether a landlord has acted fairly, taking account of all relevant factors, when considering requests for reasonable adjustments.
- The extent to which we could provide a remedy for the claimed detriment.
- Why the person has not already pursued a claim in the county court.
- The prohibitive cost of court action for many members of the public. If a resident is seeking a modest remedy and/or service improvements then it may not be reasonable to expect them to resort to costly legal action. EHRC guidance says taking court action in relation to discrimination can be lengthy, expensive and draining.

## Terms:

### Protected characteristics

The Equality Act protects people with “protected characteristics”. Section 4 sets them out as follows:

- Age;
- disability;
- gender reassignment;
- being married or in a civil partnership;
- being pregnant or on maternity leave;
- race (including colour, nationality, ethnic or national origin)
- religion or belief
- sex;
- sexual orientation

### Disability

Section 6 defines a disability as a physical or mental impairment that has a ‘substantial’ and ‘long-term’ negative effect on a person’s ability to carry out normal daily activities. Some conditions are always a disability (such as cancer) and some are never a disability. (tendency to light fires) (1)

We do not make findings as to whether a resident is under a disability. We look at whether the landlord has considered whether the resident is under a disability.

- (1) [Disability: Equality Act 2010 - Guidance on matters to be taken into account in determining questions relating to the definition of disability \(HTML\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/disability-equality-act-2010-guidance-on-matters-to-be-taken-into-account-in-determining-questions-relating-to-the-definition-of-disability)

A proportionate means of achieving a legitimate aim.

Landlords can justify discrimination in certain instances. This can be referred to as “objective” discrimination.

Factors to consider in deciding whether objective justification is relevant include:

The aim must be a real, objective consideration, and not in itself discriminatory (for example, ensuring the health and safety of others would be a legitimate aim);

If the aim is simply to reduce costs because it is cheaper to discriminate, this will not be legitimate.

Working out whether the means is ‘proportionate’ is a balancing exercise: does the importance of the aim outweigh any discriminatory effects of the unfavourable treatment? Has the landlord considered alternative measures?

There must be no alternative measures available that would meet the aim without too much difficulty and would avoid such a discriminatory effect: if proportionate alternative steps could have been taken.

The main obligations which may apply to social housing providers are (more than one may apply):

### **Direct discrimination**

**Section 13** prohibits direct discrimination: A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

Includes:

- someone thinks they have that protected characteristic (known as discrimination by perception);

- they are connected to someone with that protected characteristic (known as discrimination by association).

Direct discrimination can only be justified in relation to disability/where act provides an exemption.

The landlord can justify discrimination if the protected characteristic is age.

It is not discrimination against a non-disabled person to treat a disabled person more favourably.

This does not apply to marriage and civil partnership.

In the case of race, less favourable treatment includes segregating B from others.

To decide whether someone has been treated less favourably, a comparison must be made with how an organisation has treated other service users or would have treated them in similar circumstances. If the organisation’s treatment of the service

user puts the service user at a clear disadvantage compared with other service users, then it is more likely than not the treatment has been less favourable.

Less favourable treatment could also involve being deprived of a choice or excluded from an opportunity. If the quality of the service being offered, or the manner in which it is offered, is comparatively poor, this could also amount to less favourable treatment.

In the context of our work, we cannot say a landlord has discriminated against a resident. That is a decision for the courts. But we can consider whether the landlord properly took account of the resident's protected characteristics in the way it treated them. We may find service failure or maladministration if a landlord cannot demonstrate it properly considered the resident's unique circumstances or had due regard to its duties under the Equality Act.

## **Disability discrimination**

**Section 15** A person (A) discriminates against a disabled person (B) if— (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

This does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability. The duty only arises when the landlord is aware that the resident is disabled. This differs to the Public Sector duty (see below) which is a positive, anticipatory duty. In addition, it is not unlawful for a landlord to discriminate against a resident as long as it is justified.

For example, a landlord evicting someone whose conduct is due to mental health issues may be discrimination as it is subjecting the resident to a detriment due to something arising from their disability, but it may be justified because of the ASB that person is causing. In order to show that the behaviour was proportionate, the landlord would have to show it had tried other ways of controlling the behaviour.

## Indirect discrimination

**Section 19** A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's. This provision is *not* limited to disability. A provision, criterion or practice is discriminatory if that they put that person at a particular disadvantage, compared to people without those protected characteristics and of the landlord cannot show it to be a proportionate means of achieving a legitimate aim.

Indirect discrimination is when there is a policy that applies in the same way for everybody but disadvantages a group of people who share a protected

characteristic. If this happens, the person or organisation applying the policy must show that there is a good reason for it.

A 'policy' can include a practice, a rule or an arrangement.

It makes no difference whether anyone intended the policy to disadvantage someone or not.

To decide if a landlord has given due regard to how it can eliminate indirect discrimination:

- There must be a policy which an organisation is applying equally to everyone (or to everyone in a group that includes the resident).
- The policy must disadvantage people with the resident's protected characteristic when compared with people without it.
- The resident must be able to show that it has disadvantaged them personally or that it will disadvantage them.
- The landlord cannot show that there is a good reason for applying the policy despite the level of disadvantage to people with the protected characteristic.

The landlord can justify the discrimination if it shows it to be a proportionate means of achieving a legitimate aim: If a landlord can show there is good reason for its actions or application of its policy and for applying it in the particular circumstances of the complaint, it is unlikely to have caused indirect discrimination.

Ultimately, this would be a decision for the courts. In the context of our work, we consider whether the landlord has properly considered the resident's protected characteristics and provided cogent reasons for its decision.

## **Reasonable adjustments**

**Section 20** imposes a duty to make reasonable adjustments as follows: **(2)**:

There are three ways landlords may make adjustments: (Section 20 of the Act)

- Take reasonable steps to avoid any disadvantages presented by a provision, criterion or practice
- take steps to avoid a disadvantage presented by a physical feature
- provide extra aids or services (auxiliary aids and services). See also Schedule 4 of the Act.

'Reasonable' means that a landlord can consider whether such an adjustment would be practical and/or affordable and the resources available to the organisation making the adjustment. An example would be adjustments can include installing a wet room but under Schedule 4 2(8), it is never reasonable for the landlord to have to take a step which would involve the removal or alteration of a physical feature (in the property).

Organisations are only obliged to make adjustments when it is *reasonable* to do so. Ultimately, it is for the courts to determine whether any adjustments (requested or provided) are reasonable. However, we can investigate whether a landlord has

properly considered whether the adjustments are practicable and if they would overcome the disadvantages experienced by disabled people. We may find service failure or maladministration if a landlord cannot demonstrate it properly considered whether adjustments were reasonable or should be made.

[The Housing Ombudsman's Complaint Handling Code](#) sets out what landlords should do to promote accessibility and awareness including complying with the [Equality Act](#).

## Harassment

**Section 26** of the EA 2010 prohibits harassment: unwanted conduct related to a relevant protected characteristic, and

the conduct has the purpose or effect of—

- (i) violating B's dignity, or
- (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

## Management of premises

**Section 35** of the EA 2010 states that person (A) who manages premises must not discriminate against a person (B) who occupies the premises by subjecting B to any other detriment. The landlord must not harass the resident or applicant for housing, must not victimise the resident by:

- a) in the way in which A allows B, or by not allowing B, to make use of a benefit or facility;
- (b) by evicting B (or taking steps for the purpose of securing B's eviction);
- (c) by subjecting B to any other detriment.

## Section 149 - The public sector duty (PSED)

This duty applies to public bodies and landlords which carry out public functions. Whether a landlord carries out a public function would include whether the landlord is in receipt of public funding, if they are partners in a local authority allocations scheme, or a recipient of a stock transfer. This has been shaped by a line of case law. [London & Quadrant Housing Trust v Weaver, R. \(On the application of\) \[2009\] EWCA Civ 587 \(18 June 2009\) \(bailii.org\)](#) We cannot determine whether a landlord is deemed to be public body as that would be for the court. However, the landlord should consider whether it is or not.

**Section 149** of the Act (known as the “Public Sector duty” or “PSED”) requires the relevant landlord to have ‘**due regard**’ to how they can eliminate discrimination, advance equality of opportunity and foster good relations who share a relevant



protected characteristic and persons who do not share it. This is a positive obligation requiring the landlord (where relevant) to think proactively about how they can achieve these aims in the way that they go about their business. It is an “anticipatory” duty: the relevant landlord would have to consider all individuals when shaping policy, in delivering services.

The requirement to have due regard to the need to eliminate discrimination applies to all the [‘protected characteristics’](#) protected by the Equality Act: age, disability, gender reassignment, marriage or civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The second and third requirements (to have due regard to the need to advance equality of opportunity and foster good relations) apply to all of the protected characteristics apart from marriage or civil partnership.

### **Investigating complaints about direct and indirect discrimination**

When considering a complaint about discrimination, we must first identify which protected characteristic(s) may have been the subject of the unfairness the resident has experienced. In some cases, this will be clearly communicated by them. It is not necessary for the resident to state the grounds of discrimination which might have occurred. Some individuals with protected characteristics may be unaware of their legal protections under the Equality Act. Also, their protected characteristic might create a barrier in them articulating a complaint about discrimination. If we consider discrimination might have occurred – even if a resident has not made an explicit allegation – we should make enquiries of the landlord where it is proportionate to do so in the wider context of the complaint.

### **Enquiries at Triage**

We should gather information from the resident about the events or actions which appear discriminatory, and ask them why they believe the treatment they received disadvantaged them in comparison to those without protected characteristics.

As part of our enquiries, we should ask the landlord if they agree with the description of the treatment alleged by the resident, or otherwise provide their version of events, and justification for the action or decision taken. We should also ask the landlord if it can justify any indirect discrimination which has been alleged or appears to have occurred as a ‘proportionate means of achieving a legitimate aim’. To do this, we could ask the landlord enquires such as, but not limited to:

- its reasons for the action/omission complained about
- what factors it took into account
- if/how it considered the resident’s protected characteristics
- Copies of any supporting information from any third parties, such as doctors or other health professionals and advocates
- An explanation of the landlord’s understanding of the health or disability needs of the resident

- Where any reasonable adjustments were put in place, please advise what these were and on what grounds the adjustments were put into place
- Copies of any correspondence where the resident raised concerns that the landlord was not following their request
- Any explanation of any support or advice offered, or currently being offered, to the resident
- which policy/policies it was operating under and why it was appropriate to apply the policy/policies in this case.

Our analysis of the complaint should consider whether the landlord had due regard for the Equality Act in the provision, or denial, of services to the individual. In doing so, we might find there is contemporaneous evidence which makes direct reference to the Equality Act. However, a landlord might legitimately justify its actions with reference to how it applied a non-discriminatory policy in a fair manner.

If we find evidence that a landlord has failed to consider of its duties under the EA 2010, we can find maladministration. We should then assess the consequences to the individual and consider an appropriate remedy for any detriment. We should also consider whether the maladministration might have an impact on a wider group of individuals who share the same protected characteristics. If so, we should consider whether it would be appropriate to issue a wider order under paragraph 54(f).

### **Talking to residents about their protected characteristics**

It may be necessary to ask residents about their race, nationality, or ethnic/national origin.

We should bear in mind that in relation to disability it is the court who decides whether a person has a disability. We should take care not to raise expectations in the resident when making those enquiries. Ask open questions like – in what way did you feel the landlord discriminated against you.

It is important that we fully understand a resident's complaint. That means we will need to have open conversations with residents about their circumstances. We should use the resident's own language in our reports as far as is possible. For example, in a complaint where a resident feels they were discriminated against due to their race, we could say: The resident describes herself as Black and of dual heritage. We have decided to use the resident's preferred description of herself. Below are some suggested questions to help you approach these conversations with residents:

1. You mentioned in your complaint that the landlord discriminated against you because of your [protected characteristic]. So that I can understand this better, can you tell me about your [protected characteristic]? Can you explain to me how you feel this has affected the landlord's actions?
2. We publish all our determinations and, when it is an important part of someone's complaint, we will normally include details of the person's [protected characteristic] with their consent. May I check how you would prefer to be referred in our determination? How would you describe yourself?

3. You said in your complaint that the landlord failed to consider your cultural and personal beliefs. So that I can understand, can you tell me about these and their significance to you?
4. Are you willing to share your ethnic background with us?
5. Is there any information about your ethnicity or race that would help us understand your complaint?

## **Human Rights Guidance**

### **Introduction**

The HRA 1998 sets out the fundamental rights and freedoms that everyone in the UK is entitled to. It incorporates the rights set out in the European Convention on Human Rights (ECHR) into domestic UK law.

As with the public sector duty of the EA 2010 above, the HRA 1998 only applies to local authorities as they are public bodies, and organisations deemed to be public bodies. To reiterate, landlords who provide social housing such as housing associations which perform public functions. We cannot determine whether a landlord is deemed to be public body as that would be for the court. However, the landlord should consider whether it is or not. Examples of public functions would be if the landlord is in receipt of public funding, if they are partners in a local authority allocations scheme, or indeed a recipient of a stock transfer (this list is not intended to be exhaustive).

### **Jurisdiction**

Under the HRA 1998, individuals who claim their human rights have been breached by a relevant landlord may have a right to go to court if they have suffered a loss or injury.

Based on the specifics of a case and what the resident is seeking, it may be appropriate to consider whether paragraph 42(e) or (f) of the Scheme applies.

If we cannot provide the remedy they would like, or the resident requires us to make a determination about whether the landlord has breached the resident's human rights, rather than whether the landlord considered those rights, we need to be clear about our jurisdiction and signpost them appropriately for this aspect of their complaint. There is a time limit for issuing proceedings of 12 months from the date of the alleged breach. Where, for example, the resident wanted to challenge the landlord's decision on the basis it was unlawful because it did not uphold the resident's rights under the HRA 1998, this might be by way of Judicial Review. In that case, the time limit would be 3 months.

We should be mindful of the prohibitive cost of court action for many members of the public, the access to representation and complexities. If a resident is seeking a modest remedy and/or service improvements then it may not be reasonable to expect them to resort to costly legal action.

Under paragraph 52(a) of the Scheme, maladministration can arise from a lack of regard for human rights.

Paragraph 52(a) states that: “When investigating, the Ombudsman is concerned to establish whether the member has been responsible for maladministration (which includes findings of service failure, maladministration, and severe maladministration). This may include, but not exclusively, circumstances where the member: a. failed to comply with any relevant legal obligations”.

While we will not decide whether the landlord was in breach of its legal duties, which is a decision for the courts alone, we can look at whether the landlord considered the resident’s rights, where appropriate. Detriment (the impact) caused by maladministration may be due to a failure to consider a resident’s human rights. In both instances, reference to human rights can be a powerful way to articulate both detriment and maladministration.

We should not automatically rule out complaints when a resident claims their human rights were ‘breached’. Residents may use such terms, but the responsibility is on the caseworker to define the complaint in our terms. An alleged failure to uphold a resident’s human rights is likely to equate to an allegation of service failure or maladministration in our terms. There may also be instances where a resident uses the language of human rights where these issues are not present.

### **Categories of rights**

Broadly, there are three categories of human rights. These 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

### **Rights relevant to social housing provision**

Under the HRA, the relevant landlords are legally obliged to deliver their services in a way which respects the human rights of their tenants. The rights most relevant to their work are:

#### **Article 6: Right to a fair trial**

Article 6 is an absolute right.

Everyone has the right to a fair and public hearing, heard by an independent and impartial decision maker, within a reasonable time. Broadly, this means that a person should be given the opportunity to participate effectively in any hearing of their case, and to present their case in conditions which do not place them at a substantial disadvantage when compared with the other party in the case. They should have all the relevant information available to them and be allowed representation and an interpreter where appropriate. The hearing should be followed by a decision. This could be relevant in a landlord's review or appeal procedures which would determine a tenant's rights. For example, where a landlord has taken steps to restrict contact with a resident.

### **Article 8: Respect for your private and family life**

Article 8 is a qualified right.

Everyone has the right to respect for their private and family life and also the right to respect for their home and correspondence (letter, telephone calls and emails etc).

This does not mean a right to housing, but is a person's right to access and live in their existing home without intrusion or interference. The right to respect for family life includes the right for a family to live together. "Private life" also includes an individual's right to develop their personal identity and develop relationships and participate in essential economic, cultural and leisure activities.

In some circumstances, landlords should take positive steps to prevent other people interfering with a resident's home or private life through serious pollution or anti-social behaviour. However, we should first consider how domestic law protects residents, such as the right to quiet enjoyment and contractual rights.

Examples of where Article 8 may be relevant include:

- Where a landlord's employees or contractors entering a resident's home without permission, justification (such as in an emergency) or without giving reasonable notice;
- where a tenancy agreement seeks to prevent family members living with the resident;
- taking measures against perpetrators of ASB. The measures must be proportionate and comply with the law, balance the rights of the perpetrators and "victims".

### **Article 14: Protection from discrimination**

Article 14 is a qualified right. It is not a "stand alone" right and sits with a person's other article rights. The HRA protects people from discrimination in relation to the human rights set out in the European Convention on Human Rights.

This provides that a person must have equal access to the other rights contained in the HRA regardless of race, religion, gender, sexual orientation, disability, political views or any other personal characteristic. A difference in treatment can only be

justified if there is a good reason for the treatment and if it is proportionate in light of that reason. Discrimination is when individuals are treated less favourably than others in a similar situation and this treatment cannot be objectively or reasonably justified (in pursuance of a legitimate aim, necessary in a democratic society and proportionate).

The Equality Act 2010 provides more general protection from discrimination. Where we find a landlord has treated the resident personally in a heavy-handed, unsympathetic or inappropriate manner (under para 52(f) of the Scheme), we should also consider whether the issues relate to Article 14.

### **The First Protocol of Article 1: protection of property**

This is a qualified right.

The right entitles people to the peaceful enjoyment of their possessions (such as home, land, physical possessions, money, pensions and welfare benefits). It will often be closely linked to rights under Article 8 (right to a private and family life). A public body cannot take away an individual's property, or place restrictions on its use without very good reason.

There are some situations in which landlords can take an individual's possessions or restrict the way they use them. This is only possible where the landlord can show its action is lawful and necessary for the public protection. If property is taken away, the resident may be entitled to compensation. However, again we would first consider the resident's rights under domestic law, for example Tort (Interference with Goods) Act 1977 where the landlord seeks to remove a resident's possessions left in common areas.

**The following would only apply in rare instances.**

### **Article 9: freedom of thought, belief and religion**

The inclusion of this Article and its relationship to social housing is mainly for information – it is unlikely that we will receive many complaints where Article 9 is relevant. Caselaw confirms that we must take into account the resident's age, vulnerabilities and personal circumstances in deciding whether Article 9 is relevant.

Article 9 provides a right to belief; this includes the right to wear religious clothing, the right to talk about beliefs or take part in religious worship.

Landlords can only interfere with the right if it can show its actions are lawful, necessary and proportionate in order to protect:

- public safety;
- public order;
- health or morals; and
- the rights and freedoms of other people.

In the context of our work, Article 9 might be relevant if residents' ability to practise their religion is neglected or limited without proper reason. Article 9 might be relevant where a landlord fails to take appropriate action in relation to neighbour disputes and anti-social behaviour involving religious hatred. In such cases, we should consider whether the landlord has had due regard for its duties under Article 9.

### **Article 3: Freedom from torture and inhumane or degrading treatment**

Article 3 is an absolute right.

The HRA says *"No one shall be subjected to torture or to inhuman or degrading treatment or punishment"*.

Article 3 protects individuals from torture (mental or physical) and inhuman or degrading treatment. Public bodies including social housing providers should not subject individuals to this treatment and must take steps to protect someone if they are being treated this way. If they know this right is being breached, they must intervene to stop it. For example, if a child is being ill-treated or a disabled person is being harassed, landlords may have a duty to take action to stop it.

The human right to freedom from inhumane or degrading treatment would be relevant where 'grossly unsuitable accommodation' is provided to a resident who had had no choice but to take it. However, cases in the UK courts have generally not been successful in establishing that grossly unsuitable accommodation was a breach of Article 3. The threshold is very high.

### **The International Covenant on Economic, Social and Cultural Rights (ICESCR)**

While the following may be worth being aware of as an aspiration, these rights are not legal rights enshrined in domestic law. We would not expect the landlord to have regard for these rights and it is therefore highly unlikely and not suggested they are referred to in our findings. They are aims rather than legal obligations.

The ICESCR is monitored by the UN Committee on Economic, Social and Cultural Rights (CESCR) and the ESC by the Committee on Social Rights. The committees do not accept complaints from individuals. It is framed as "parties must take steps to the maximum available resources, with a view to achieving progressively the full realisation of the rights".

### **Article 11: The right to an adequate standard of living.**

The minimum requirements under the covenant for adequate housing are:

- security of tenure;
- adequate lighting, heating and sanitation;
- habitability;
- location from which health and education services are accessible, including the provision of adequate infrastructure; and

- cultural adequacy.

### **Investigating complaints that may involve Equality and Human Rights issues – practical steps and considerations**

1. We should consider if the resident refers to specific rights. The resident may identify equalities and human rights issues in their complaint, but not always. Or they may not reference these specifically but may say they did not feel their treatment was fair or dignified. This may include how the landlord considered unreasonable behaviour or whether it acted in line with its vulnerable persons policy.
2. Even if the resident does not raise these issues specifically, are there actions or decisions that raise human rights or equalities issues? We do not expect residents to necessarily be familiar with the articles of the ECHR so not raising them specifically in a complaint does not mean we should not consider them as part of our investigation.
3. If the resident raises human rights issues and we do not think they are present, or we think they are present but have been appropriately considered by the landlord, we need to say this in the determination report with a brief explanation why.
4. If relevant, make a brief note of which articles are being considered and why.
5. Human rights should be integrated into all landlord policies and procedures. There are unlikely to be standalone human rights and equalities procedures and so there is little value in asking for these. Where relevant, it would be useful to obtain copies of the landlord's vulnerable persons and/or reasonable adjustment policies.
6. Landlords must act in a way that is compatible with the HRA. When they introduce new policies or change existing ones, there should be some kind of check or audit of compatibility. Though not a legal requirement, most local authority landlords do an equality impact assessment when they introduce a new policy or change an existing policy and so it could be useful to ask for this impact assessment.
7. We should consider whether the application of a particular policy may have directly or indirectly discriminated against a protected group. In such cases, a landlord would need to justify the policy.
8. Has the landlord, or third parties acting on its behalf:
  - behaved unfairly, unreasonably or incompetently (para 52(e) of the Scheme); or
  - treated the resident personally in a heavy-handed, unsympathetic or inappropriate manner (para 52(f) of the Scheme)?
  - If the resident has one or more of the protected characteristics, we should consider whether the landlord has given due regard to Article 14 and its responsibilities under the Equality Act.
  - We should think carefully about any actions (including behaviour and communications) of third parties acting on behalf of the landlord – the landlord remains accountable for their actions. We should consider whether the landlord has taken proportionate steps to address any poor practice by its contractors and make appropriate orders/recommendations where the evidence does not show this.



9. We would not generally expect human rights to be explicitly referenced in records and decisions. Instead, decisions and actions should be taken in such a way which do not conflict with the principles of human rights and equalities. If a human rights based-approach is not identifiable from the records, then you may need to ask the landlord to evidence how it had regard to these issues. For example, it may be helpful to ask the landlord to provide its risk assessment(s) in relation to ASB or damp and mould, or records of case conferences and panel review meetings (if not already on the casefile).
10. Where a resident has told a landlord that they have been treated unfavourably in relation to a protected characteristic or where they have referenced the human rights or equality legislation in their complaints, we should consider whether, and how a landlord has responded to this aspect of the complaint in the complaint responses.
11. We should consider whether the landlord addressed the resident's complaint that they were discriminated against. We may find service failure in its complaint handling if it failed to consider the complaint.
12. If considering any of the qualified Articles (like Article 8) the landlord may have a justification for interfering with those rights which we would need to consider. If a caseworker thinks a right may have been interfered with, the landlord must show that interference was:
  - Lawful, for a legitimate aim, necessary in a democratic society and proportionate.
  - Legitimate aims include: public safety, national security, national economic wellbeing, prevention of crime, protection of health or morals and protection of rights and freedoms of others.
  - As these aims are broad, landlords may be able to assert one or more to justify interference. But we can comment particularly on proportionality by asking the landlord if there were any alternatives available that would have involved less interference (and consider why they were not used).

However, we cannot carry out a full assessment of the balance of rights and proportionality. We only look at whether the landlord has considered the issues, considered alternatives.

### **Suggested standard paragraphs**

*General HRA (to use in the legal and policy framework section, if appropriate where relevant/necessary talking care not to raise the resident's expectations.*

The Human Rights Act 1998 sets out the fundamental rights and freedoms that everyone in the UK is entitled to. The Act requires all public authorities - and other bodies carrying out public functions - to respect and protect individuals' rights.

The Ombudsman has no legal power to decide whether a landlord has breached the Human Rights Act – this can only be done by the courts.

However, the Ombudsman can decide whether a landlord has had due regard to an individual's human rights in its treatment of them, as part of our consideration of a complaint.

Landlords may be able to show they have shown due regard for the Human Rights Act if they consider the impact their decisions will have on the individuals affected and that there is a process for decisions to be challenged by way of review or appeal.

*General EA paragraphs (to use in the legal and policy framework section):*

The public sector duty:

The Equality Act 2010 provides a discrimination law to protect individuals from unfair treatment and promotes a fair and more equal society. The Act requires any person or organisation which carries out public functions to have 'due regard' to how they can eliminate discrimination, advance equality of opportunity and foster good relations in doing so.

*Where the public sector duty is engaged:*

The reasonable adjustment duty is 'anticipatory', meaning landlords cannot wait until a disabled resident needs to use their service. They must consider in advance what disabled residents may reasonably need to access their services.

*Where the resident inappropriately refers to the HRA / EA:*

The resident complained the landlord discriminated against them under the [Human Rights Act / Equality Act]. Our view is that the [Human Rights Act / Equality Act] is not relevant to these issues because...

*Where a resident has alleged a breach of equality or human rights law and it would be inappropriate to expect the resident to take the matter to court:*

We cannot find a landlord has breached the [Human Rights Act / Equality Act]. However, we can decide whether a landlord failed to take account of its duties under the [Human Rights Act / Equality Act].

## **Useful information**

- Guidance from UK gov includes: [Equality Act 2010: guidance - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/equality-act-2010-guidance)
- The Equality and Human Rights Commission (EHRC) publishes [guidance to help people working for ombudsman schemes](#) decide when and how to apply human rights to their casework.

- A full list of the Article Rights and a more detailed explanation of each can be found on the EHRC website: [The Human Rights Act | Equality and Human Rights Commission \(equalityhumanrights.com\)](https://www.equalityhumanrights.com/en/the-human-rights-act)
- EHRC also issued [guidance for social housing providers](#) to help them comply with the HRA.