Rights for Real

Older People, Human Rights and the CEHR

Frances Butler
May 2006
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About the author

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Frances Butler is an independent adviser on human rights policy, particularly the implementation of the Human Rights Act. She was recently a visiting research fellow at the Institute for Public Policy Research, a member of the task force advising the Government on arrangements for establishing the Commission for Equality and Human Rights, and a specialist adviser to the parliamentary Joint Committee on Human Rights. She is the author of *Improving Public Services: Using a Human Rights Approach: Strategies for Wider Implementation of the Human Rights Act Within Public Authorities* (ippr/DCA, 2005); ‘Building a Human Rights Culture’ in *Human Rights in the Community* (ed. Harvey, BIHR; Hart, 2005) and *Human Rights: who needs them? Using Human Rights in the Voluntary Sector* (ippr, 2004). She is also vice president of the British Institute of Human Rights and a member of the executive board of Liberty.

Age Concern England

Age Concern England (ACE) is a national voluntary organisation aiming to improve opportunities and quality of life of people over 50. We work through campaigning, policy development, research, information provision, publishing, training, grant-making and international and European work.

Age Concern England is part of a federation of approximately four hundred independent charities working with and for older people in England. They share the name Age Concern and are committed to a common purpose and shared values. As the national Member, ACE supports and works with local Age Concerns and, as the National Council on Ageing, brings them together with other national bodies, including charities, professional bodies and representational groups with an interest in older people and ageing issues. This report was commissioned by Age Concern England’s Policy Unit, part of the Communications and Marketing Division. The Policy Unit develops the charity’s public policy on ageing and older people, and influences government and other policy makers through research, responding to consultations, working in partnership, and holding policy events.

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Foreword

I am very pleased to be able to introduce this enormously valuable report, commissioned by Age Concern England. The author, Frances Butler, has examined in some detail the importance of human rights law for older people, especially those who depend on public services. New qualitative research, which is annexed to the main report, shows that older people, although often suspicious about the Human Rights Act, relate strongly to human rights values such as dignity and fairness.

It is an indictment of our society that older people who use public services should be exposed to any risk of abuse or neglect. I have been listening recently to accounts of the experiences of older users of the NHS: some individuals, for example, have had to deal with a humiliating lack of privacy on mixed wards or have received such inadequate help with eating that their health and even their lives have been put at risk. Situations such as these represent violations of basic human rights principles such as dignity and respect, equality and fairness. The Human Rights Act can and should provide a safety net for vulnerable older people who experience bad treatment as service users.

This report shows that it is equally important to recognise the potential role of human rights as a framework of values underpinning the planning and delivery of public services. Whether social and healthcare services are delivered via a public body or contracted to a private or voluntary sector agency, the challenge is to ensure that they are ‘human rights proofed’, with human rights awareness embedded into the day to day routines of the hospital ward, the day centre or the care home.

As the report argues, all public authorities, including government departments, have a role in making human rights a reality for older people. Age Concern hopes that it will provide a useful resource to guide the development of the new Commission for Equality and Human Rights, due to start work in late 2007. The report also offers a resource for Age Concern’s own work at local and national level, showing how the language of human rights can help bring about positive changes in local services. And it shows how older people and their families could make use of human rights arguments to help achieve redress for problems they experience.

Age Concern England will be examining the implications of this report for our own work, as well as championing the issues that it raises with key stakeholders – including the new Commission. We commend the report to you and will be delighted to receive comments from readers on the important issues that it raises.

Gordon Lishman
Director General
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Summary

Human rights have huge potential to transform the lives of older people. But to date, little of this potential has been translated into reality – and many barriers lie in the way of change. The new Commission for Equality and Human Rights (CEHR) promises to be a major catalyst, both for enhancing older people’s protection, and for using human rights as a tool for transforming public services. But the CEHR will have many priorities: it could get distracted from older people’s human rights unless there is a strong case for action, backed up by practical solutions. This report makes the case for embedding older people’s human rights into the work of the CEHR. It also aims to bring human rights to life in the planning and delivery of public services and to build human rights awareness within all organisations working with older people.

The challenge – older people and public services

Older people are the most frequent users of many public services, and over the next few decades the share of service users in later life will continue to rise. The older population is hugely diverse and many people aged over 50 are affluent, healthy and able to access the services they need. But millions of older people are disadvantaged and potentially vulnerable, through low income, poor health, isolation, inadequate housing, restricted access to services, caring responsibilities, or dependency on others for care and support. These individuals are among those most reliant on public services. But official investigations have observed that older people with the greatest needs are also most likely to be let down by public services – the so-called ‘inverse care law’.

Older people’s experiences of public services need to be transformed. The highest priority is to minimise the risk of abuse and neglect – such as deliberate physical harm, malnutrition, or demeaning care. This can only be achieved by overhauling systems within public service institutions. It also means providing proper training and support to members of staff, rather than just punishing individuals when things go wrong. Beyond this, services should be more responsive to individual needs and preferences. Services that treat everyone alike – or where issues of cost and convenience for the provider always win out – fail the most vulnerable. To take some examples from social care, cost alone should not determine whether people can live independently at home; whether couples should be split up when their care needs are different; or whether residents should be moved between care homes, when this can be expected to shorten their lives.

Attitudes to older people are a major barrier to transforming services, with ageist prejudice underpinning many weaknesses. The regulators for health and local government in England have found that ageist practice remains pervasive in service delivery. But ageism also distorts policy making, with age arbitrarily used to ration access to mental health services, independent living, diagnostic testing and mobility support. The stereotyping of older people – especially the assumption that ‘one size fits all’ – means that the individual identities and needs of different older people are often ignored. This particularly affects minority groups, such as older gay, lesbian and bisexual people and those from ethnic and religious minority communities.
Improving older people’s experiences of public services is a huge challenge for government departments. There is cross-party agreement that services need to be preventive in their approach, promote independence, focus on the individual, and achieve fair outcomes. The government has set out its plans for service reform in the long-term Opportunity Age strategy, and elsewhere in the Social Exclusion Unit report on excluded older people and the White Paper on community health and social care. But practical tools are needed to turn aspirations into reality. This report shows that human rights are a part of that toolkit – they can and should make a vital contribution to improving services.

Human rights - the potential for older people

Human rights provide a framework for the relationship between people and public services, which shifts the emphasis from the duties of the provider to the rights of the user. They set out minimum legal standards for the way services must be planned and delivered and provide enforceable rights to service users. Human rights also offer a framework of values to drive improvements in services and a set of clear norms that people can use to hold services to account. They should be at the heart of new solutions to delivering services to older people. The potential for human rights to fundamentally change public services was one of the key drivers behind the introduction of the Human Rights Act 1998. But since the Act came into force in 2000, there is little evidence that human rights have made an impact on the experiences of vulnerable older people.

At their core, human rights embody a requirement that people be treated with fairness, respect, equality and dignity (‘the FRED principles’). This means making decisions fairly, taking account of individual circumstances and the views of service users, and balancing respect and dignity for each individual with competing demands from others. The concept of dignity is key to achieving meaningful equality for older people, in a way that is not possible simply by prohibiting discrimination. The FRED principles underpin every international human rights agreement – including the European Convention on Human Rights (the Convention), which was incorporated into UK law by the Human Rights Act. Judges in human rights cases frequently draw on the underlying FRED principles to interpret this Act.

The Convention rights in the Human Rights Act put flesh on the bones of the FRED principles. They begin with an absolute right to life and to freedom from degrading treatment. These provide vital protection to older people with respect to elder abuse and end-of-life decisions. The Convention also includes a wider list of rights – some of which can be restricted in certain circumstances – that must always be weighed up when making decisions. These include the right to liberty, to a fair hearing, to respect for private and family life and for the home, and to freedom of thought, religion, expression and association. Public services must guarantee these rights, without discrimination on any ground, including age. The right to respect for private and family life is particularly relevant to services used by older people.

The legal obligations under the Human Rights Act apply to statutory bodies and to other organisations carrying out public functions. Parliament’s intention was that voluntary and private organisations that deliver public services should be included within the remit of the Act, to reflect the increased out-sourcing of services. But the courts have narrowly construed this section of the Act and many of these organisations now fall outside it. In 2002, the Court of Appeal ruled in the Leonard Cheshire case that residential care services provided by the charity, although paid for by local authorities, were not covered by the Act. This has effectively stripped human rights protection from hundreds of thousands of vulnerable older people.
Human rights are often viewed as ‘negative’ prohibitions on the government and public bodies – as a check on the worst excesses of the state. But this view is incomplete. The Convention and subsequent case law place ‘positive obligations’ on public authorities to respect and protect rights. These positive obligations mean that in some circumstances public bodies have a legal obligation to take active steps to protect people, for example by reviewing and revising their practice. Compliance with the Human Rights Act therefore generally requires a proactive approach whereby human rights are taken into account as a matter of course within public authorities.

Human rights are intended to have a transformative effect: not only guaranteeing protection but also promoting social progress. A human rights approach to decision-making and service delivery – taking full account of fairness, respect, equality and dignity – should be a tool for achieving high service standards and continuous improvement. Even where action may not be required under the Human Rights Act, it is still good practice to think about the human rights implications. A preventive approach can greatly reduce the risk of human rights violations and the benefits are felt by everyone.

But most public bodies have little understanding of this dimension to human rights and focus only on avoiding litigation with respect to the legally enforceable rights of the Convention. To make best use of human rights in public service reform, public bodies should develop a better understanding of the purpose of the Human Rights Act. This means recognising that the FRED principles underpin the Convention rights and that the legal duties can include ‘positive obligations’. It also means understanding when human rights do not apply or when they may be lawfully restricted. Public authorities should broaden their focus to include the wider family of non-binding human rights agreements, in particular the UN Principles for Older Persons.

Human rights, however, are more than a performance management tool because they involve a direct relationship with people using services and legally enforceable rights. Service users can directly challenge decisions that affect them, using the language of human rights to ensure their views are taken into account and they achieve redress. Even where the issue is unlikely to reach the courts or amount to a legal infringement, dialogue based on human rights values can change the terms on which people and services engage.

Overcoming the barriers

The potential benefits of human rights for older people are currently held back by a series of barriers. The government and the CEHR will need to address each in turn.

Legislation

The framework of the Human Rights Act is an essential starting point for embedding human rights values in public services. But the existing legislation is inadequate in three ways. Most urgently, the law should be amended to close the loophole that excludes public services provided by the voluntary and private sector from responsibility under the Act. Second, the case law-based ‘positive obligation’ doctrine is little understood and poorly implemented. This problem may be overcome when the CEHR is able to issue clear guidance. But the government and the Commission should also consider the case for an explicit positive duty to promote human rights, as recommended by the parliamentary Joint Committee on Human
Rights. Third, general human rights legislation should be complemented by age equality law. A duty on public services to promote equality between people of different ages should be introduced as part of the proposed Single Equality Bill, together with a prohibition on discrimination on grounds of age in the provision of goods and services.

Making policy

Explicit references to human rights are largely absent from central government policy making on services used by older people. Recent examples include the Opportunity Age strategy, the White Paper on community health and social care, and the Social Exclusion Unit report on excluded older people. The aspirations set out in government policy however reflect core human rights standards: entitlement to dignity and respect; non-discrimination; security; protection from abuse. The distinction is that there is no acknowledgement that some aspirations are driven by legal requirements; to quote the Joint Committee on Human Rights: ‘citizens enjoy certain rights as an affirmation of their equal dignity and worth, and not as a contingent gift of the state’.

The reason for the absence of direct references to human rights may be because the role of human rights as a tool for social progress is poorly understood by Whitehall policy makers (by contrast, in Wales the new Commissioner for Older People will have a mandate to uphold these progressive values, explicitly drawing on the UN Principles for Older Persons). This is a lost opportunity, because practical benefits flow from explicitly acknowledging human rights in policy making. Adopting a rights-based approach would shift the emphasis away from older people as passive and needy consumers of services, to self-reliant and autonomous citizens. This would contribute to achieving the government’s vision of an enhanced role for individuals in shaping the services they use (‘co-producers’ with voice, choice and responsibility). A strong human rights focus to public service reform would ensure people remained centre-stage in new relationships between ‘producers’ and ‘purchasers’.

Parts of government have already begun to use an explicit human rights framework, although mainly to hold services to account rather than in policy development. For example the Department of Health’s standards for the NHS include human rights requirements, and the joint report by three inspectorates into services for older people recently warned that providers that failed to treat older people with dignity were falling foul of human rights requirements. Further action should be considered including: co-ordination and leadership on human rights across government departments; policy proposals that contain explicit references to human rights obligations and wider human rights values (including the UN Principles for Older Persons); embedding human rights into regulation and performance management; and annual reporting on human rights. The CEHR should be a critical friend of government, but not hold back from using its powers of judicial review as a last resort. It should also promote the use of the UN Principles for Older Persons within the public sector.

Service delivery

The increasing emphasis on human rights in public sector regulation is driven by concerns from inspectorates that the Human Rights Act has had little impact on front line services. While most public servants are quick to endorse human rights values, the implementation of the Act itself is ‘stuck in the legal department’. Too often, compliance is viewed as risk management, rather than a positive responsibility for the whole organisation. Decision-making does not take human rights considerations into account and services are not designed to
actively promote and protect rights. This report shows that all too often services provided by
front-line staff disregard older people’s human rights.

On the other hand, there are positive examples of human rights principles being embedded
into operational practice. The Audit Commission has found that this leads to higher levels of
service to the public, and the British Institute of Human Rights is gathering a range of case-

studies of services that have revised practices following human rights guidance and training.
The CEHR should play a major role in raising awareness of human rights standards
throughout frontline services, by developing guidance and working in partnership with the
public sector regulators. It should also work with large voluntary and private service providers
to ensure they sign up to human rights obligations, whatever their legal status under the HRA.

From the start, the CEHR should prioritise at least one high-profile service delivery issue
affecting older people’s human rights – for example, by carrying out an inquiry into residential
care settings where there have been complaints of abuse and neglect. It should be willing to
use its powers of judicial review if public authorities fail to tackle human rights breaches.

Redress for individuals

Human rights should be a tool for older people, and organisations working on their behalf,
to bring about change in public services. Individuals should be able to raise human rights
concerns directly with service providers, rather than having to bring a legal challenge to court.

However, qualitative research commissioned by Age Concern revealed that ignorance and
suspicion is a major barrier to older people using human rights. They tend to believe the
Human Rights Act is about political correctness, rather than older people’s treatment; human
rights are also seen as being relevant to dictatorships overseas, not to Britain. More generally,
participants felt they had few options for redress when faced by problems with services.
The research suggests that older people lack the confidence, skills and stamina necessary
to pursue complaints, so feel simply unable to effect change.

Participants in the research were particularly averse to ‘legal’ solutions to problems and
appeared to associate human rights with the ‘compensation culture’. They did not believe
people should have to use the courts to get things put right, they lacked faith that using the
law would make a difference in any case, and they believed they would not have the
knowledge or skills to navigate the system to make a claim.

However, the picture is not entirely negative. The research asked older people about their
values, and these were closely aligned with the FRED principles of fairness, respect, equality
and dignity. Hostility to human rights appeared to be grounded on lack of knowledge about
their content. When respondents were briefed on the protection offered by the Human Rights
Act, they thought that it could help them tackle problems they faced, with several mentioning
specific examples. In particular, people with caring responsibilities were extremely positive
about the idea of exercising rights on behalf of those in their care.

The implication of the research is that older people can endorse the human rights framework,
but may be more hostile to legal routes of redress. This suggests that while older people may
avoid the courts, they could in future be prepared to challenge and negotiate with public
services, using human rights as ‘the language you need to speak to win an argument’ (the
words of Jack Straw). But the barriers will be high, with near complete ignorance about
human rights and current frustration with complaints procedures. Few older people can be expected to go down this road without support.

This research may explain why so few human rights cases have been brought by older people – although there are a number of court decisions that address human rights concerns that are very relevant to them. As well as their own reluctance to engage in the legal process, older people may face other barriers, including the limited knowledge of some legal and advice practitioners about human rights. The shortage of legal advice services has also made it difficult for many older people to access advice. All advice agencies and solicitors’ firms advising on issues relating to public services need to develop and maintain adequate awareness of human rights law – and the CEHR must produce tools to support the work of legal advisers.

Voluntary sector advocacy

Support from the voluntary sector has a significant role to play in achieving ‘rights for real’ when older people have been let down by services. To date, few voluntary and community organisations have embraced human rights, particularly in the direct support they provide to clients. But those advocates and support groups who have used human rights arguments have managed to turn decisions around. Following British Institute of Human Rights training, a support group overturned restrictions on access to toilet facilities in a care home, while an advocate successfully helped a frail widow secure a transfer to a ground floor flat.

Larger voluntary organisations should develop resources and training to help individuals and smaller community organisations use human rights. For example, the National Pensioners Convention and British Institute of Human Rights are both publishing practical advice for older people about human rights. Voluntary organisations also need to embed human rights values into negotiations about policy development and the design of services – both at local and national level. The CEHR should see the voluntary sector as a key partner for improving older people’s experiences of public services.

Conclusion

The design and delivery of public services used by older people is rarely informed by human rights thinking. This report concludes that this deficit is caused by ignorance about human rights among policy makers and service providers. A similar lack of understanding has also prevented older people and those who represent them from using the language of human rights to negotiate the changes that are needed. If the CEHR is able to spread understanding of what human rights mean in an everyday context, it will become a catalyst of change. But everyone has a role – and in the case of government and other public authorities, a responsibility – in making human rights a reality. A proper understanding of human rights and how they should be applied will enable older people to achieve ‘rights for real’.
# The European Convention on Human Rights: relevance to older people using public services

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1 Introduction

The decision to establish the Commission for Equality and Human Rights (CEHR) through the Equality Act 2006 was the springboard for this report and provides it with a key reference point. The CEHR is expected to start operations in late 2007. Its central purpose is to act as a catalyst in achieving social progress for the many disadvantaged, marginalised and vulnerable people in our society. This is encapsulated in one of the CEHR’s fundamental statutory duties: to encourage the development of a society in which people’s ability to achieve their potential is not limited by prejudice or discrimination and where there is respect for and protection of their human rights. Over the coming months, there is an opportunity to consider how this duty should be implemented in practice.

Our population is ageing. People are living longer, experiencing better health and having fewer children. It is estimated that by 2007, the year when the CEHR starts work, the number of people over 65 will exceed the number of children under 16; by 2021, 40% of the population will be over 50. The government describes these developments as a ‘demographic revolution’.

There are several questions that this report seeks to answer in relation to this growing population group. What types of prejudice and discrimination do older people experience? Which human rights of older people need particular respect and protection? What is the relevance of the CEHR’s objectives to older people? There are also some definitional questions that need to be considered. What is included within the term ‘human rights’? How should they be applied? A clear understanding of human rights is needed to identify the scope of the CEHR’s remit and to consider the action that it needs to take. This is particularly important because human rights are controversial in some quarters – and for some people they have ‘gone too far’.

Misunderstanding about human rights has no doubt contributed to the limited progress in implementing the Human Rights Act (HRA) effectively within public services. Evidence cited in this report shows that the HRA has not had the expected impact on public service providers, and that it has not empowered users of services to demand changes. Consequently, many older people remain at risk of breaches of their human rights and are unable to achieve redress. This is the principal territory covered in this report – how to implement human rights thinking in policy-making and service provision for the benefit of older people, and how to encourage older people and their representatives to make use of human rights themselves. One of the main aims of this report is to help the CEHR identify approaches to human rights from the perspective of older people, recognising that this is a diverse group with a multiplicity of human rights concerns.

Methodology

This report is based on reviews of existing literature on older people, public service reform and human rights and is informed by interviews with experts and policy-makers working in these fields. In order to include the views of older people, Age Concern commissioned the Institute for Public Policy Research to conduct qualitative attitudinal research among 28 older people, using focus groups and individual interviews. The findings have informed and enlivened this report and the full research report is attached at Annex 1.
In line with Age Concern’s own remit, the term ‘older people’ refers to people who are 50 years of age and over. It is recognised that this definition includes a large population group with wide-ranging interests and concerns.

**Scope of report**

This report focuses on human rights and their role in relation to public services and so it does not address criminal justice or civil liberties issues that may affect older people. Neither does it cover human rights in relation to employment; employment-related age discrimination (which will be subject to regulations coming into force in 2006); or discrimination on grounds of age in the provision of goods, facilities and services in the private sector, such as insurance or leisure facilities.

The human rights issues covered here relate to those public services, such as health, social care and housing, which are subject to the devolution settlement. Different institutional support for human rights, in the form of separate human rights commissions, exists in Northern Ireland and is planned for Scotland. Although this report concentrates on older people’s human rights in England, its content has relevance to older people as users of public services in the other countries of the UK.
Human Rights Act 1998

The Human Rights Act 1998 (HRA), which came into force in October 2000, brings the main rights and freedoms guaranteed by the European Convention on Human Rights (‘the Convention’) into UK law. The Convention is not, as is widely thought, a treaty of the European Union but of the Council of Europe, an unrelated institution. Drafted largely by British lawyers after the Second World War, the Convention sets out guaranteed rights in 14 substantive Articles, later supplemented by a series of Protocols. The UK was the first country to ratify it in 1951. The Convention provides a mechanism for any individual or non-governmental organisation to enforce these rights against the state by bringing a case in the European Court of Human Rights, based in Strasbourg. Since the HRA came into effect, a case relating to Convention rights can now be brought in our own courts.

Convention rights

The HRA brought into UK law the main rights and freedoms of the European Convention on Human Rights. These rights have the following characteristics:

■ they apply to everyone in the UK and are not dependent on citizenship

■ they include the right to life (Article 2); liberty (Article 5); fair hearing (Article 6); respect for private and family life (Article 8); freedom of thought, religion, expression and association (Articles 9 – 11); and prohibition on inhuman or degrading treatment (Article 3)

■ some rights, like the right to life (Article 2) and freedom from degrading treatment (Article 3), are absolute – they cannot be qualified or limited

■ others, like the right to respect for private and family life (Article 8) and freedom of thought, religion, expression and association (Articles 9, 10 and 11), are qualified. These rights may be restricted, provided the restriction is proportionate (the minimum necessary to achieve the justification sought), necessary within a democratic society, and set out clearly in the law

■ enjoyment of these rights must be guaranteed without discrimination on any ground (Article 14).

Public authorities

The HRA imposes legal responsibilities not only on the government but on all ‘public authorities’ within the UK (HRA section 6). These are defined as including:

■ statutory and state-run bodies, such as government departments, local authorities, health services, courts and tribunals, as well as

■ private and voluntary organisations that exercise a ‘public function’ (HRA section 6(3)(b)). However, court decisions have interpreted ‘public function’ more narrowly than the
government intended. This has created a legal loophole which disproportionately affects older people (see page 32).

The HRA therefore applies to the provision of all public services in the UK.

Legal responsibilities

Under the HRA, it is unlawful for any public authority to ‘act in a way which is incompatible with a Convention right’ (HRA section 6(1)). This means that public authorities have to take Convention rights into account in relation to all their functions, including the provision of public services to individual users.

Public authorities also have a ‘positive obligation’ to respect and protect Convention rights. Article 1 of the Convention requires States to ‘secure [the Convention rights] to everyone within the jurisdiction’. Although the government omitted Article 1 from the HRA, this positive obligation remains a duty under the Convention and has been reinforced by decisions of the European Court of Human Rights and, since the HRA came into force, decisions of the UK courts. This means that public authorities have an additional responsibility, in certain circumstances, to take reasonable measures to protect people’s rights. For example, where private care providers do not have duties under the HRA, local social services departments may have to take action to ensure that the human rights of private care home residents are protected.

New legislation

Since the HRA came into effect, all new legislation must be scrutinised for compatibility with Convention rights before it is presented to parliament. Each bill should be accompanied by a statement from a minister confirming that its provisions are compatible with the Convention. If legislation is not compatible, the minister is expected to explain to parliament why this is the case.

This requirement was intended to ensure that all government departments are fully aware of their obligations under the Convention and that they frame new legislation with these obligations in mind. However, there is no comparable system for ‘human rights proofing’ of all new government policies – a point that is addressed in chapter 9 of this report.

Enforcement of human rights

Where a public authority has failed to meet its legal responsibilities under the HRA, a ‘victim’ may bring legal proceedings against that public authority (HRA section 7). Human rights arguments can also be put forward as they arise in ordinary cases, in any court or tribunal. The remedies for breaches of Convention rights are wide and include damages.

When considering cases, courts and tribunals have to interpret all types of legislation so as to be compatible with the Convention ‘so far as it is possible to do so’. If this is simply not possible, the courts can strike down subordinate legislation – although not primary legislation (Acts of Parliament). However, the higher courts also have the power to make a ‘declaration of incompatibility’ calling on the government to bring UK law back into line with the Convention.
Promoting respect for human rights

The HRA was not only designed to give people a mechanism for bringing Convention rights cases in UK courts. As the government explained, it was also intended to create a 'culture of respect for human rights' so that public service institutions would be 'habitually and automatically responsive to human rights considerations' in relation to all their procedures and practices.

In the ambitious words of Jack Straw MP, then Home Secretary, the Act was also designed to provide:

... an ethical language we can all recognise and sign up to, a ... language which doesn't belong to any particular group or creed but to all of us. One that is based on principles of common humanity.

However, within two years of the HRA coming into effect, research showed that the 'culture of human rights' was almost entirely eluding public authorities and that voluntary organisations rarely used the 'language' of human rights in their work. It was also clear that vulnerable people's human rights were still being breached without redress. In this respect, the HRA had foundered – and the case for a human rights commission to rescue it had become persuasive.

This realisation coincided with extensive debate about creating a single equality body – to replace the three existing anti-discrimination commissions – which would tackle discrimination and promote equality across the 'six strands' (race, gender, disability, religion and belief, sexual orientation and age). The government recognised that establishing a combined commission for equality and human rights would harness the contribution of human rights principles to equality objectives, as well as progressing the unfinished business of implementing the HRA.
3 Commission for Equality and Human Rights

The CEHR, established by the Equality Act 2006, represents a welcome development. For the first time, a statutory non-governmental body will be addressing the effects of discrimination in the round rather than in relation to discrete categories such as race, gender or disability. This approach recognises that people are individuals with diverse characteristics and needs who may experience different aspects of prejudice and discrimination at different stages of their lives. The CEHR’s human rights remit also acknowledges that persistent inequalities may result from poor treatment, unfairness and lack of respect by public officials towards service users.

The language of the CEHR’s statutory mission statement is aspirational. In terms reminiscent of the Universal Declaration of Human Rights, its objective will be to encourage and support the development of a society in which:

■ people’s ability to achieve their potential is not limited by prejudice or discrimination

■ there is respect for and protection of each individual’s human rights

■ there is respect for the dignity and worth of each individual

■ each individual has an equal opportunity to participate in society

■ there is mutual respect between groups based on understanding and valuing of diversity and on shared respect for equality and human rights (Equality Act section 3).

The CEHR is expected to work strategically, reducing inequalities to achieve civil, social, economic and cultural progress. Its initial approach is likely to be informed by the Equalities Review, due to deliver its final report in 2006. Under the Equality Act, the CEHR has a specific duty to promote understanding of the importance of equality and diversity and awareness of rights under equality legislation (Equality Act section 8). The CEHR also has a duty to promote good relations between and among members of different groups, whether categorised by age, disability, gender, gender reassignment, race, religion, belief or sexual orientation. In addition, the CEHR must work towards the elimination of prejudice against and hostility towards members of those groups and towards their full participation in society (Equality Act section 10).

The CEHR has also been given legal tools allowing it to help eradicate prejudice and discrimination and to enforce existing anti-discrimination legislation. At present, the underlying age equality legislation offers less protection than other areas of discrimination law: for example, there is no protection against discrimination on grounds of age in relation to goods, facilities and services. The government’s Discrimination Law Review is expected to recommend new legislation to extend and equalise protection for all groups experiencing prejudice and discrimination. Until this ‘harmonisation’ is achieved, the CEHR’s work will be hampered by the limitations of the existing law.
Commission for Equality and Human Rights: relevant powers and duties

Specific duties

In order to fulfil its general duties, the Commission has specific duties to:

- **prepare a strategic plan** containing planned activities, timetables and priorities; it should consult widely on the contents and review the plan at least every three years (Equality Act sections 4 & 5)

- **monitor existing law** on equality and human rights, advise the government on the law and make recommendations for changes (Equality Act section 11)

- **monitor progress** by producing ‘state of the nation’ reports every three years, which should identify outcomes sought and indicators used to measure progress towards their achievement; the CEHR should consult widely on these outcomes and indicators (Equality Act section 12).

Specific powers

The CEHR also has powers to:

- **provide information** and general advice and guidance, undertake and publish research and provide education and training (Equality Act section 13)

- **make grants** (Equality Act section 17)

- **conduct inquiries** into what specific organisations are doing to respect and protect human rights, equality and diversity (Equality Act section 16). It should publish terms of reference in advance, and conclude by publishing a report and making recommendations. Witnesses can be required to give oral or written evidence and interested parties may make representations (Equality Act Schedule 2)

- **undertake legal proceedings** in its own name. These can take the form of judicial review on Convention rights grounds (provided victim(s) of an unlawful act exist) and third party interventions in legal proceedings (Equality Act section 30)

- **provide assistance to a claimant** bringing a case under equality law where human rights issues are also relevant. With the Lord Chancellor’s permission, the CEHR may continue to support the case if the equality point is no longer in issue and the human rights point remains (Equality Act section 28).
Human rights duties

In broad terms, the CEHR’s powers and duties in relation to discrimination are human rights functions, although not expressed as such in the legislation. But the Equality Act also gives the CEHR express duties in relation to human rights. These are to:

- promote understanding of the importance of human rights
- encourage good practice in relation to human rights
- promote awareness, understanding and protection of human rights, and
- encourage public authorities to comply with Convention rights, as required by the Human Rights Act s6 (Equality Act section 9(1)).

The Equality Act defines human rights as including both Convention rights under the HRA and ‘other human rights’ (section 9(2)) – although the Commission is required to ‘have particular regard’ to Convention rights (Equality Act section 9(3)). The next chapter explores in more detail the principles underlying the Convention rights and the sources of ‘other human rights’.
4 Human rights: a framework of principles

To understand properly the nature and purpose of human rights, it is necessary to go beyond the wording of the HRA. Human rights are not just about the legal system or about risk management by public bodies. They represent a framework of values that should inform the design and delivery of public services. They should also underpin the way that people of whatever background can expect to be treated by public authorities in all aspects of their lives. Lord Falconer, Secretary of State for Constitutional Affairs and Lord Chancellor, described this purpose of the HRA in the following terms:

[It enshrines] in British law, through a framework of fundamental rights, the notion that all human beings should be treated with respect, equality and fairness.

These principles I believe are the foundation of an equal, fair and civil society – they protect vulnerable people; the elderly, disabled people and children. They give a voice and redress to those who need it most. It is a force for the vulnerable and the dispossessed – a force for positive change in the way services are delivered.

The Human Rights Act ensures that we look to our own back yard. It means that every piece of legislation complies with human rights legislation and all public services take human rights into account in the way they operate. Not after the event, or in a way that is burdensome – but as part of good business-planning, as an integral part of policy-making (emphasis added).

The ‘FRED’ principles

Lord Falconer refers to ‘respect, equality and fairness’ as fundamental human rights principles. The concept of ‘dignity’ also underpins Convention rights and should be added to this list. These four principles can be usefully summarised in the acronym ‘FRED’: fairness, respect, equality and dignity.

All human rights instruments, particularly since the Universal Declaration of Human Rights 1948, recognise the significance of these interdependent values. Although the HRA and the Convention do not define these four principles as legally enforceable concepts in their own right, they have underpinned many decisions of the European Court of Human Rights and, since 2000, courts in the UK. These principles are intrinsic to the main functions of the CEHR (Equality Act section 3). They are also of real significance to anyone who uses public services and especially to older people.
Fairness

- A fair society is one that is free from prejudice and discrimination and in which people are able to achieve their potential and to participate fully in their communities.
- Public services should be equitably provided.
- Public authorities must use fair decision-making procedures in relation to public services.
- Anyone pursuing or defending their civil rights is entitled to a fair and public hearing by an independent and impartial tribunal (Article 6).
- For the common good, fairness may also require some balancing of rights between people with different interests and needs (the ‘qualified’ rights – respect for private and family life (Article 8), freedom of thought, religion, expression and association (Articles 9 – 11)).

Respect

- Respect describes the optimal way for people to treat each other. The Universal Declaration of Human Rights called for people ‘to act towards one another in a spirit of brotherhood’ (UDHR 1948, Article 1).
- Article 8(1) of the Convention explicitly guarantees the ‘right to respect for private life, family, home and correspondence’.
- For public authorities, respect for people’s human rights constitutes a legal duty (HRA section 6 and the ‘positive obligation’ doctrine under Article 1 of the Convention).
- Respect for people’s human rights means that they must be treated as individuals in all their diversity; blanket approaches to public service provision are likely to be incompatible with human rights (East Sussex case).
- Respect also requires that users of public services needing particular assistance do not experience unreasonable delay in receiving the services that they need (Bernard case).

Equality

- Equality is a fundamental human right. The Universal Declaration of Human Rights states in aspirational terms that ‘all human beings are born free and equal in dignity and rights’ (UDHR 1948, Article 1).
- Equality has been recognised by the UK courts as a human rights principle:

  *In the field of human rights, discrimination is regarded as particularly objectionable because it disregards fundamental notions of human dignity and equality before the law (Carson case)*
Article 14 requires that people’s ‘enjoyment’ of their Convention rights be secured without discrimination on any ground.

UK equality legislation gives protection for specified groups who experience prejudice and discrimination; for example, Sex Discrimination Act, Race Relations Act and Disability Discrimination Act.

Equal treatment may not be sufficient to provide equality of opportunity; action may need to be taken to make its achievement a reality. In the UK, ‘positive duty’ legislation is already in place requiring public authorities to promote equality for some groups.

Dignity

Dignity is represented by a person’s sense of self-worth and autonomy. As the European Court of Human Rights has held, ‘the notion of autonomy is an important principle underlying interpretation of [the Convention’s] guarantees’ (Pretty v. UK).

In particular, dignity underpins Article 8, the right to respect for private and family life. This includes a right to establish and develop relationships with other human beings, to participate in community life and to enjoy independent living (East Sussex case).

Article 8 requires enhanced protection where people are ‘already deprived of so much of what makes life enjoyable and enriching for the majority’ (East Sussex case). It may impose a duty on the state to make sure that disadvantaged people do not become so isolated that their personal development suffers as a result.

The concept of dignity requires the individual to be at the centre of the decision-making process and actively participating in it to the extent that they are able to.

Dignity also includes a person’s physical and psychological integrity (East Sussex case); this can be put at risk, especially where people are vulnerable and in the care of others. Dignity therefore underpins the right to life and freedom from degrading treatment (under Articles 2 and 3 respectively) (Burke case).
**East Sussex case**

Two adult sisters suffering from profound physical and learning difficulties and impaired mobility lived in a house that had been specially adapted for their needs. Their parents objected to the local authority's policy of requiring care staff to use hoist equipment instead of lifting the women manually.

The High Court found that the local authority's blanket ban on manual lifting was likely to be unlawful. Article 8(1) of the Convention (right to respect for private life, home and family) required protection of the sisters’ dignity which needed the human touch of some manual handling, although Article 8(2) required this right to be balanced with the carers’ rights not to be injured at work. The local authority had a duty to provide appropriate care - but at the same time it had to protect the health and safety of its employees. Because the mechanical handling procedures carried some risk of a fatal accident occurring and the possibility of the sisters being treated in a degrading way, Article 2 (right to life) and Article 3 (prohibition on inhuman and degrading treatment) were relevant as well.

**Burke case**

Mr Burke suffered from a progressively degenerative brain condition and was likely to need artificial nutrition and hydration (ANH). He was concerned that the General Medical Council’s guidance on life-prolonging treatment allowed doctors to withdraw ANH at a time when his death might not be imminent but he would be incapacitated. He challenged the guidance, claiming that it was incompatible with the European Convention on Human Rights.

The High Court upheld the challenge, ruling that some parts of the GMC’s guidance were incompatible with Article 2 (right to life), Article 3 (prohibition on inhuman and degrading treatment), and Article 8 (right to respect for private life). Mr Burke's dignity needed protection whether he was conscious or not.

However, the Court of Appeal overturned this decision. It held that the case had been unnecessary. There was never any question of Mr Burke being denied ANH towards the end of his life. He had always made it clear that he would like to receive this treatment after he could no longer express his wishes.
Other human rights

The term ‘other human rights’ (Equality Act section 9(2)(b)) includes international human rights treaties and covenants under which the UK has treaty obligations, as well as guiding principles. Although not all of these human rights instruments impose international law responsibilities on government, they are all important statements that help identify essential elements of the society that the CEHR has been tasked with encouraging and supporting.

The box below summarises the international human rights instruments most relevant in the present context.

<table>
<thead>
<tr>
<th>Title</th>
<th>Source</th>
<th>Status</th>
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<tbody>
<tr>
<td>Universal Declaration of Human Rights, 1948</td>
<td>United Nations</td>
<td>Guiding principles</td>
</tr>
<tr>
<td>International Covenant on Civil and Political Rights, 1966</td>
<td>United Nations</td>
<td>Treaty ratified by UK</td>
</tr>
<tr>
<td>International Convention for the Elimination of Racial Discrimination (CERD), 1966</td>
<td>United Nations</td>
<td>Treaty ratified by UK</td>
</tr>
<tr>
<td>European Convention on Human Rights, 1951</td>
<td>Council of Europe</td>
<td>Ratified by UK</td>
</tr>
<tr>
<td>Protocol 12 European Convention on Human Rights (‘free-standing’ right to equality)</td>
<td>Council of Europe</td>
<td>Not signed or ratified by UK</td>
</tr>
<tr>
<td>European Social Charter, 1961 and 1996; Article 4 of Additional Protocol of 1988 (right of elderly persons to social protection)</td>
<td>Council of Europe</td>
<td>1961 charter ratified by UK; 1996 revised charter signed but not ratified by UK</td>
</tr>
<tr>
<td>Charter of Fundamental Rights</td>
<td>European Union</td>
<td>Agreed but not ratified by the UK</td>
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As the box shows, several of the international human rights covenants specifically address discrimination. Although the UK anti-discrimination laws have not traditionally been regarded as ‘human rights’ laws in this country, they are also part of the human rights family because they promote the principle of ‘equality’.

The support that both the international instruments and other human rights principles – such as fairness, respect and dignity - can give to equality is expressly recognised in the provision requiring the CEHR to take account of ‘any relevant human rights’ in fulfilling its other statutory duties (Equality Act section 9(4)). This has the effect of enabling the CEHR to adopt a broad human rights approach to fulfilling equality objectives, rather than being confined to the ‘black letter law’ of discrimination statutes like the existing equality commissions. Jane Campbell, the outgoing chair of the Social Care Institute for Excellence, recently commented on the shortcomings of tackling discrimination without taking into account the human rights implications:

*Equality without human rights can leave people without their dignity*.

**Limitations of human rights**

As we have seen, the general statutory duty of the CEHR is to work towards human rights goals that reflect the aspirations of the Universal Declaration on Human Rights and international human rights treaties. But ‘human rights’ is not an endlessly flexible concept that can satisfy anyone’s needs and grievances. In the light of prevailing ignorance of human rights – and in some quarters, active hostility towards them – their limits should be recognised. The following quotation underlines these limits:

*Human rights do not protect all aspects of human life but only those particularly important for the protection of human dignity and human beings’ personal development*.

In addition, a human rights approach requires that people’s human rights must at least be taken into account. This is not the same as saying that a human rights argument will always prevail; restrictions on human rights are permissible if they can be justified on specified grounds (see *Carson case*).

**Carson case**

Mrs Carson retired to South Africa where she received her basic state pension. But because South Africa did not have reciprocal arrangements with the UK, she was not entitled to receive the cost of living increases available to pensioners living in the UK or countries which had treaties with the UK. She complained that UK pensioners living abroad in ‘non-treaty’ countries were being unfairly discriminated against.

The House of Lords found that pensions qualified as ‘possessions’ for Protocol 1 Article 1 of the Convention (peaceful enjoyment of possessions) and that Article 14 applied to ensure that this right was enjoyed without discrimination. However, in this case the apparent discrimination could be justified because of the implications for UK public finances.
According to the European Court of Human Rights, human rights are supposed to be ‘practical and effective’ and not ‘theoretical and illusory’ (Artico v Italy). Building on Lord Falconer’s description of the human rights framework, this chapter explores how it works in practice.

Human rights in public services

In order to comply with the HRA, public authorities are required to take people’s human rights into account in:

- the design of public services by government departments and public bodies
- the provision of public services by front-line staff such as social workers, care workers, housing officers, nurses and doctors.

The ‘positive obligations’ doctrine may also require public bodies to take concrete steps to protect people’s human rights. Complying properly with human rights cannot be merely a risk-avoidance issue for assessment by lawyers. The question for policy makers and for those delivering services should progress from: ‘Is this practice lawful?’ to ‘How can we make sure this practice respects people’s human rights?’ Adopting this kind of approach to human rights should become central to the organisation’s strategy for improving standards of public services or, as Lord Falconer put it, ‘a force for positive change in the way services are delivered’.

Because the courts are the arbiters of legal liability in any particular case, it is difficult to be categorical about the point at which the compulsory legal regime ends and optional best practice begins. For example, being left on a hospital trolley might not immediately amount to a breach of the HRA – but, depending on the individual circumstances and their duration, such treatment could lead to a breach taking place. In any particular case, while a human rights approach may not be explicitly required by law, it is underpinned by legal requirements.

The human rights framework, as well as ensuring people’s rights are protected, should be seen as a tool to help public authorities achieve high standards in public services and so achieve social progress. When patients are not left on trolleys in hospital corridors and they experience being treated with dignity and respect, then the hospital can point to these improvements as being for the benefit of all hospital users. Getting things ‘right first time’ is also likely to allow public bodies to save money.

Providing a voice and redress

Human rights do not only exist on the ‘supply side’ of public service provision. They should also be demand-led by people using public services. The HRA has the potential to make a difference to individuals by providing both a set of legal rights and a mechanism for enforcing
them that did not exist previously in UK law. The Act guarantees protection for individuals whose rights have been violated, at the same time as providing people with a tool to ensure that public bodies respect their rights.

Individuals should be able to enforce their human rights themselves, not only through the courts but also through advocacy and negotiation with public authorities. As Jack Straw MP, then Home Secretary, put it, the HRA was supposed to provide ‘the language you need to speak to win an argument’. People should be able to use human rights principles to hold public authorities to account for the services that they provide – a point that is explored more fully in chapter 11.

Irrespective of the HRA, there exist statutory complaints procedures that allow users to raise concerns about a public service provider – normally after first raising the complaint directly with the provider in question. In relation to health and social care services, complaints are handled by the Healthcare Commission and the Commission for Social Care Inspection respectively. Both these commissions might be expected to have regard to human rights in their handling of complaints – a factor that underlines the benefits to complainants of using the language of human rights when raising their concerns.

From protection to progress

Because of the emphasis on circumstances where people are at risk of harm and need protection, the progressive purpose of human rights has tended to be overlooked. In fact, human rights are not only relevant in extreme cases. They also offer a vision of a better society. One of the aspirations of the Universal Declaration of Human Rights was for people to achieve ‘social progress and better standards of life in larger freedom’. As was observed during research undertaken by the British Institute of Human Rights, human rights offer ‘something for everyone’. Although rarely recognised as such, the HRA represents a constitutional charter of common values around which society can coalesce. More explicit acknowledgment of the principles underlying the Act would make this claim more real.

The human rights framework embraces a set of common standards that restore the place of respect in our society. It is a common view, endorsed by Age Concern’s research, that older people are concerned about ‘respect’, in particular that it is being ‘squeezed out of society’. The authors of the research recommend that the benefits to society of ‘establishing clear norms for the treatment of older people’ should be emphasised (Annex 1). The need to set out ‘clear norms’ can be extrapolated beyond the treatment of older people to issues that affect everyone who uses public services.

Summarising a human rights approach

Human rights are intended to be transformative. They should empower people to stand up for their rights and help bring about long-term improvements in the provision of public services. In urgent cases, remedial enforcement action will be required. But human rights must also operate preventively so that violations do not occur in the first place. The box on the following page sets out a summary of the main points in this chapter, which can be used as a resource by anyone seeking to persuade public authorities to rethink their policies and
make systemic changes. It will also be of value to voluntary and community organisations, advisers and advocates when representing people whose human rights have been infringed.

**Human rights: principles, purpose and practice**

<table>
<thead>
<tr>
<th>Principles of human rights</th>
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<tbody>
<tr>
<td>Human rights begin with Convention rights under the Human Rights Act and are underpinned by the FRED principles (fairness, respect, equality and dignity). They also extend to equality laws, international treaties and guiding principles.</td>
</tr>
<tr>
<td>Everyone is entitled to respect for and protection of their human rights – even though some rights are more legally enforceable than others.</td>
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<tr>
<td>Human rights principles are not only available to remedy injustice but represent a set of common values for society.</td>
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</table>

<table>
<thead>
<tr>
<th>Purpose of human rights</th>
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<tbody>
<tr>
<td>The protection of people at risk of violation of their human rights is an immediate priority.</td>
</tr>
<tr>
<td>A human rights approach recognises the diverse needs of individuals and sees people in all their complexity rather than by limited categories such as their race, gender or sexual orientation.</td>
</tr>
<tr>
<td>The achievement of social progress for those who are vulnerable, disadvantaged or marginalised is a long-term human rights goal.</td>
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<tr>
<th>Human rights in practice</th>
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</thead>
<tbody>
<tr>
<td>Human rights responsibilities apply to the design and delivery of public services and so impact on government departments as well as providers of services.</td>
</tr>
<tr>
<td>Legal obligations may require public authorities to take active steps to respect and protect people’s human rights.</td>
</tr>
<tr>
<td>People should be able to use human rights principles to hold public authorities accountable for the services that they provide.</td>
</tr>
<tr>
<td>A human rights approach should improve public services for everyone.</td>
</tr>
</tbody>
</table>
6 Why human rights are important for older people

Human rights are particularly relevant for the increasing population of older people. A significant number of older people fall into categories that make them disproportionately vulnerable to human rights violations – for example, if they:

- are frequent users of public services
- lack a voice or the means to get redress
- experience prejudice and discrimination
- suffer abuse and neglect
- are dependent on the care of others
- are vulnerable and socially excluded
- experience multiple disadvantage

In addition, there are many older people who have experienced prejudice or discrimination earlier in life (such as racism, sexism, homophobia or through being disabled), which typically follows them into old age. In particular, a higher proportion of older people experience disability; between the ages of 16 and 19, the prevalence of disability is about 7%, increasing to over 35% for those aged 60 to 64, and to 59% for people over 85. On the other hand, it should be recognised that older people are not a homogenous group. Not all are at risk of human rights abuses – for example, some people over 50 are affluent, enjoy good health and participate fully in their communities.

Older people as users of public services

As people age, they become more frequent users of public services such as health and social care - whether for themselves or, as carers, on behalf of other family members. Although people over 65 currently represent only 16% of the population, they occupy almost two thirds of general and acute hospital beds and they account for 43% of the total NHS budget. Many older people face the disadvantages of poor health, low skills and an increasing reliance on public services.

Some older people are very vulnerable. About 1.2 million older people are excluded on three or more indicators of exclusion, with one in three people over 80 being excluded from basic services. Around 16% of pensioners are ‘persistently poor’ and 70% of people aged 65 or over reportedly have a long-standing illness. A quarter of those over 80 have a ‘serious disability’. Of those over 90 years old, 27% need residential or nursing home care. One in ten older people have problems with their accommodation, such as damp or infestation by pests or vermin.

As older people increasingly come to depend on public services, many experience barriers to accessing them and poor treatment as users. As noted by the recent report from the Social Exclusion Unit on inequality for older people, the so-called ‘inverse care law’ suggests that the people in the greatest need are the least likely to receive services. As a consequence of poor
health or age-related infirmity, some older people may be more vulnerable than others in society and so need more support and tailor-made services. The interests and needs of older people are increasingly a policy priority for government and an important factor in the provision of public services and the allocation of resources.

Relevant Convention rights

The principles of fairness, respect, equality and dignity underpinning the HRA are central to older people’s ability to achieve their potential and enjoy an equal opportunity to participate in society and a sense of self-worth and fulfillment. A number of articles of the European Convention on Human Rights are particularly relevant to older people. These are explained in the chart that appears on page 11 of this report. Below is a summary of the Convention rights that are most relevant to older people as users of public services.

### Summary of key Convention rights

| Article 2 | Right to life |
| Article 3 | Prohibition of inhuman and degrading treatment |
| Article 8 | Right to respect for private and family life, home and correspondence |
| Article 9 | Freedom of thought, conscience and religion |
| Article 14 | Enjoyment of other Convention rights without discrimination |
| Protocol 1, Article 1 | Right to peaceful enjoyment of possessions |

Relevant United Nations instruments

Several other international human rights instruments are applicable to older people, though they have had little impact in the UK (see table on page 24). We draw attention to two United Nations instruments that are especially relevant: the first because it imposes a treaty obligation on the government and the second because it is an initiative targeted at older people.

**UN Covenant on Social & Economic Rights (ICESCR)**

The ICESCR is of particular relevance to older people experiencing deprivation or social exclusion. It requires governments to take progressive measures to implement policies that will provide, among other things:
- an adequate standard of living (including the right to food, clothing and housing) (Article 11)
- enjoyment of the highest attainable standard of physical and mental health (Article 12).

The UN Committee on Economic and Social Rights has emphasised that poverty constitutes a denial of the socio-economic rights guaranteed under the UN Covenant. Socio-economic deprivation tends to be accompanied by inadequate public services and poor treatment – thus acting as indicator of probable human rights concerns under the HRA.

**UN Principles for Older Persons**

In 1991, the United Nations General Assembly adopted 18 principles for the advancement and protection of older people’s human rights, based on the Universal Declaration of Human Rights. Driven by the demographic reality that more people are reaching older age, these principles recognise the importance of maximising their participation in society. The United Nations has tried to encourage governments to incorporate the principles into their national programmes for older people whenever possible. The principles (which are reproduced in Annex 2) set out basic entitlements relating to all aspects of older people’s lives that may be affected by public policy. They are grouped under five headings:

- Independence
- Participation
- Self-fulfillment
- Dignity
- Care

Because the principles place the primary concerns of older people in a human rights context, they provide a useful tool to guide policy and a benchmark against which progress can be measured. They also offer a complete framework for government departments to use when approaching a wide range of policy questions affecting older people - such as employment, health, social care, civic participation, further education and personal protection. Their neglect by most policy-makers in the UK is a missed opportunity.

However, the Welsh Assembly Government has embraced the UN Principles for Older Persons in its strategy for older people in Wales. The first key aim of this strategy is as follows:

*Reflecting the UN Principles for Older Persons, to tackle discrimination against older people wherever it occurs, promote positive images of ageing and give older people a stronger voice in society.*

The principles are also likely to play a central role in relation to developing policy for older people in Wales. This is reflected in the bill to establish a Commissioner for Older People in Wales in the following mandatory terms:

*In considering what constitutes the interests of older people in Wales, the Commissioner must have regard to the UN Principles for Older Persons.*
Relevant statutory authorities

The HRA clearly applies to all statutory public authorities. Those most likely to be relevant to older people include the following:

- Department for Work and Pensions (DWP), with responsibility for cross-government co-ordination of policy for older people, and for the Pensions Service
- Department of Health (DH), responsible for health and social care
- Office of the Deputy Prime Minister (ODPM), responsible for local authorities and housing
- Cabinet Office, which leads on public service reform
- Audit Commission, Healthcare Commission and Commission for Social Care Inspection, responsible for inspecting local authorities, health and social care services respectively
- local authority social services departments
- hospitals and health centres

Non-statutory providers of public services

However, a significant proportion of public services for older people is provided outside the public sector:

- residential care homes run by private and voluntary organisations account for 86% of all residential care
- domiciliary care provided by private and voluntary agencies accounts for 60% of all domiciliary care
- social landlords, other than local authorities, provide housing for 7% of older people.

Under HRA section 6(3)(b), private and voluntary organisations that exercise a ‘public function’ qualify as ‘public authorities’. The government had expected that residential homes would be covered by this provision.

The ‘public function’ protection gap

However, caselaw on the meaning of ‘public function’ has narrowed its scope. Instead of focusing on the nature of the function (such as housing, health or social care) and how ‘public’ it is, the courts have looked at the relationship between the service provider and the statutory authority with overall responsibility for the service. Court decisions like Leonard Cheshire (see box opposite) have had the effect of excluding private and voluntary organisations from legal responsibility under the HRA where they are judged to be
independent of statutory authority control. Instead the statutory authority retains legal responsibility for the services it has commissioned.

The courts have suggested that contracts with private providers should be used to require human rights compliance (see the ODPM guidance referred to on page 38). The disadvantage of this convoluted mechanism is that it does not give users easy redress against the statutory authority. It also fails to deal with the lack of protection for older people who have paid for care services from their own resources.

This legal loophole has serious consequences. The majority of social care providers do not have a legal obligation to respect or protect the human rights of the people in their care. This problem affects significant numbers of older people, as the main recipients of residential and domiciliary care services. As a result, routes to redress using human rights arguments depend on the status of the service provider rather than the way that the service has been provided. Redress for many vulnerable older people in care homes will be unachievable in practice.

**Leonard Cheshire case**

A group of residents challenged the closure of a Leonard Cheshire care home. They argued this would infringe their right to respect for private and family life and home (Article 8). But the merits of that decision were not addressed because the Court of Appeal decided that the Leonard Cheshire Foundation was not a ‘public authority’ for the purposes of Section 6 Human Rights Act even though the residents’ care home places were funded by their local authorities. As a result, the Foundation did not have a legal responsibility to act compatibly with the residents’ Convention rights. That responsibility remained with the local authorities, which commissioned the care.

As was made clear by the former minister for human rights, Harriet Harman MP, in her recent evidence to the Joint Committee on Human Rights, the government has recognised the need to take action to remedy this defect. This issue is considered again in Chapter 8.
7 The HRA’s failure to deliver for older people

Chapters 4 and 5 looked at how human rights can help protect people at risk of abuse and neglect as well as transforming the delivery of public services. For older people, these are vital objectives. A human rights approach should also promote respect and independence for older people and help eliminate discrimination in policy-making. It should give them a voice in relation to the public services they receive – and redress where these services are inadequate.

A number of developments has occurred since the HRA came into force which should benefit older people – even though they may not have been the target group. These are considered later in this report. However, the HRA and the overall human rights framework appear to have had little impact on several key concerns affecting the human rights of older people. This chapter provides examples of persistent human rights problems facing older people that should be priorities for action by policy makers, service providers and the CEHR. It also highlights the public services provided to older people where human rights should be taken into account, in both service planning and delivery.

Ageism

Prejudice against older people, or ageism, underpins many of these human rights concerns. Poor treatment and discriminatory policies in relation to older people tend to be based on the prejudicial idea that the lives and life-chances of older people do not have the same value as people of other age groups. Research indicates that more people suffer prejudice because of their age than any other form of discrimination; older people are assumed to be incompetent or incapable simply by virtue of their age. As a consequence, they are treated with less respect and policies tend to disregard their interests.

Ageist attitudes and discriminatory practices are offensive to human rights principles. They foster inequality and unfairness within society and deny older people respect for their dignity. Ageism distorts the formulation of policy-making in relation to older people and pervades the way in which older people are treated in practice, as the following examples demonstrate.

Discrimination in policy-making

There are several instances, particularly in health and social care, where older people are treated differently – and unfairly – because of their age, rather than their individual needs. This is despite the National Service Framework for Older People which provides that:

*NHS services will be provided, regardless of age, on the basis of clinical need alone. Social care services will not use age in their eligibility criteria or policies, to restrict access to available services*.

The following examples show how older people have been treated differently and list the Convention rights that should be taken into account in formulating policy.
mental health services for older people are planned separately from services for younger adults and have received less funding. People with long term mental health needs are often moved to older people’s mental health services at around the age of 65, regardless of need (Articles 8 and 14)

a lower level of social care is provided to older adults compared to younger adults (Articles 8 and 14)

women over the age of 70 are not invited to breast cancer screening (Articles 2, 8 and 14)

people becoming disabled after the age of 65 are ineligible to apply for support for mobility and independent living (Article 1, Protocol 1; Articles 8 and 14).

Case Study: National Institute for Health and Clinical Excellence Guidelines

The role of the National Institute for Health and Clinical Excellence is to issue national guidance on the provision of health care. In 2005 it consulted on ‘social value judgement’ guidelines, described as ‘societal aspirations, preferences and ethical principles that ought to underpin the manner and extent of the care provided to NHS patients’. The draft guidelines recommended that ‘where age is an indicator of benefit or risk, age discrimination is appropriate’. This attempt to legitimise age discrimination was robustly challenged by older people’s organisations – and has now been amended in the final version of the guidelines. Significantly, NICE had considered healthcare provision to older people without any reference to the human rights implications. Neither document refers to Convention rights protected by the HRA – such as the right to life, respect for private and family life or freedom from discrimination in relation to human rights protection (Articles 2, 8 and 14 respectively).

Elder Abuse

Evidence suggests that 500,000 older people are victims of abuse at any one time in the UK. Almost four fifths of the abuse is perpetrated against people over 70, with 16% affecting people over the age of 90. Elder abuse, however, is rarely seen as a human rights issue. The following examples provided by Action on Elder Abuse demonstrate how the HRA is not being used to tackle this serious problem:

A nurse pinned a patient to the floor with his hands and knees and stood on his chest to restrain him … he also dragged his shoe down a patient’s shin and refused to … change a resident’s bandages [saying] ‘He can bleed. I’m fed up with changing him.’ (Sheffield Star, 27 July 2004)

Things came to a head … when [the care worker] slapped an elderly woman across the face with her left hand – leaving the pensioner in tears … [the care worker] was heard saying ‘shut up’ (Wirral Weekly News, 9 June 2005).
Action was taken against the individual care workers in both of these cases; one was struck off the nursing register and the other pleaded guilty to common assault. However, this neither recognised nor tackled the institutional problems that allowed the abuse to happen in the first place. Legal action against the care homes or local authorities responsible for them would have been possible under the HRA, on the grounds that Articles 3 and 8 of the Convention had been breached.

Effects of dependence and disadvantage

When older people are dependent on the care of others, there is an increased risk that their human rights will be disregarded. The following instances have been reported since the HRA came into force; the first three examples were identified as recently as March 2006:

- having hospital meals taken away before older patients can eat them (Articles 2 and 8)
- being cared for in mixed-sex bays and wards (Article 8)
- being repeatedly moved from one ward to another for non-clinical reasons (Articles 2 and 8)
- death of residents within weeks of being moved from care homes (Article 2)
- use of covert medication (Article 8)
- carelessness about privacy in hospitals and care homes (Article 8)
- refusal by a local authority to place couples in same nursing home (Article 8)
- being forced to go into residential care because of the council’s unwillingness to allocate resources for services in the person’s home (Articles 8 and 14)
- care home residents not being given their weekly personal expenses allowance by the care home manager (Article 1, Protocol 1)

Age is just one characteristic of a person’s multiple identity. Older people also face human rights violations or discrimination based on other aspects of their identity. For example:

- ‘Do not resuscitate’ notices have been used in relation to both disabled and older patients in hospitals without the agreement of the individual concerned (Article 2)
- unsatisfactory hospital care for older black and minority ethnic patients due to staff ignorance or insensitivity to cultural, religious and linguistic needs, lack of interpreters, hostility and racism (Articles 8, 9 and 14)
- same sex older couples in residential accommodation report homophobic prejudice (Articles 8 and 14)
Why has the HRA not had an impact?

These examples reveal that human rights are not being used to make a difference to older people’s lives. There are several reasons for this lack of impact:

**Lack of comprehensive legislation**
- The legislative framework is not sufficiently comprehensive to encourage a human rights approach in the design and provision of services for older people and to provide protection for vulnerable people.

**Limited understanding by public authorities**
- Public authorities lack understanding of their legal responsibilities under the HRA.
- There is little awareness of the importance of human rights to services provided to older people.
- The human rights framework is not applied to policy-making on older people within government.
- Public authorities delivering public services are not implementing the systemic changes that are needed to ensure that human rights are respected and protected.

**Older people failing to use human rights**
- There is a lack of awareness among older people of the relevance of human rights to their lives.
- Older people may be reluctant to complain about human rights violations or to stand up for their rights.

**Limited understanding by the voluntary sector**
- Organisations and advocates representing the interests of older people often do not see the relevance of human rights to their work.
- Many advocates and advisers do not use human rights principles in challenging poor practice by public bodies or in advancing the interests of older people.

**Poor access to legal advice and the courts**
- Older people experiencing abuses and poor treatment have difficulty accessing legal advice and representation in the courts.
- Solicitors and advisers working on social justice cases may not use Convention rights effectively to support their legal arguments.

The rest of this report explores each of these problems in turn, and makes recommendations for action by public bodies, the CEHR and the voluntary and community sector.
8 Comprehensive legislation

The narrow interpretation by the courts of the meaning of ‘public function’ under the HRA has led to a gap in the law, leaving many services run by private and voluntary sector providers outside the scope of the Act. This has exposed their users – including older people – to the risk of human rights violations that they cannot easily challenge under the HRA.

The current legal architecture also fails to provide the statutory basis for making systemic changes to public services or to encourage the development of a progressive approach to respecting human rights. Changes in the law could offer better protection for older people.

Closing the ‘public function’ loophole

Chapter 6 explained how the exclusion of private and voluntary providers of public services from responsibility under the HRA has created a ‘protection gap.’ Recognising this problem, the government has taken the following action:

- the ODPM has issued guidance to public authorities requiring human rights specifications to be included in contracts with private and voluntary service providers. However, the guidance does not apply where older people who have the means to fund their own care make their own arrangements with care providers. There are also concerns that the guidance has been insufficiently disseminated and is being under-used.

- as part of the current Discrimination Law Review, the Department for Constitutional Affairs (DCA) will be consulting on how best to resolve the ‘public function’ issue.

These developments are welcome, but have yet to make an impact. Urgent action is needed to ensure that private and voluntary providers of public services are brought within the remit of the HRA. This will ensure that these organisations are directly accountable for the abuse, neglect and poor treatment of older people perpetrated by those responsible for their care. They must also be required to take the preventive action necessary to respect and protect people’s human rights.

A positive duty

Article 1 of the Convention obliges a state to secure human rights for everyone in its jurisdiction. Although developing case law has helped to shape this ‘positive obligations’ doctrine, the HRA did not incorporate Article 1 into UK law. The fact that the duty is not enshrined in statute means that public authorities have difficulty in understanding or complying with it.

The Joint Committee on Human Rights expressed its concern that the requirement on public authorities to act compatibly with human rights under HRA section 6 is not enough on its own. It recommended a statutory duty to respect human rights. The Joint Committee did not expand on what such a duty might look like, but one approach might be for public authorities
- including the government – to be required proactively to ‘have regard’ to the need to respect and protect Convention rights. This should lead to a human rights framework being more effectively applied to public service design and delivery. It would also progress a preventive approach to human rights compliance, complementing the existing ‘positive duties’ to promote equality of opportunity. However, the government is not actively considering legislation for a positive human rights duty.

Achieving equal protection for older people

There is legal protection for people at risk of discrimination on grounds of race, gender and disability – but not yet in relation to age. Older people’s organisations have been campaigning for law reform:

- A statutory duty to promote equality of opportunity between people of different ages

‘Positive duties’ to promote age equality already exist in some parts of the United Kingdom. The Greater London Authority and public bodies in Northern Ireland have a duty to promote equality of opportunity across all strands of equality, including age. A similar duty should be extended to all public bodies in the UK because it would provide a framework to tackle ageist attitudes and prevent the formulation of discriminatory policies. At the same time, it could proactively integrate age equality into all public services used by older people, requiring public bodies to assess the impact on older people of proposed developments in service provision and policy changes.38

- Prohibition of discrimination against older people in relation to goods, facilities and services

Legal protection against age discrimination in employment and adult learning will come into force in October 2006, but the legislation does not cover goods, facilities or services. As is shown by the healthcare examples above, discrimination on grounds of age still continues – despite the existence of Article 14 of the Convention.

It is expected that these age equality issues will be given full consideration by the Discrimination Law Review.

Recommendations

- Legislation to bring all providers of public services into the ambit of the Human Rights Act should be introduced into Parliament as soon as possible.

- The Discrimination Law Review should set out plans for a positive duty to promote age equality and for extending protection against age discrimination, and its recommendations should be reflected in the promised Single Equality Bill.

- The CEHR should ensure that the ‘positive obligations’ doctrine is fully embedded in any guidance that it provides to public authorities (Equality Act section 9 – duty to encourage compliance with Convention rights).
The CEHR should fulfill its duty to monitor the implementation of both the ‘positive obligations’ duty under the HRA and the existing equality ‘positive duties’. In doing so, it should evaluate the case for more comprehensive legislation for a positive duty to promote equality of opportunity and respect for human rights (Equality Act section 11 – monitoring the law).
Human rights in policy-making

Although government departments are required to scrutinise new legislation for compatibility with the Convention, there is no comparable statutory requirement for ‘human rights proofing’ of all new policies. Human rights are also perhaps seen as more relevant to emergency measures like counter-terrorism than to the improvement of public services. There may be an instinctive reluctance at the heart of government to engage in discourse about ‘rights’ for fear of downplaying the significance of ‘responsibilities’. One senior official responsible for developing policy for older people offered the view that there is ‘complete ignorance’ about the application of human rights principles within certain departments. Examples of this lack of awareness and understanding include:

- The phrase ‘human rights’ is not mentioned in the recent DH White Paper on health and community care, even though many of the human rights problems faced by older people occur in health and social care settings.

- The DWP’s strategy paper for the ageing population, Opportunity Age, does not refer to older people in terms of their human rights entitlements or the government’s responsibility to protect them. However, it does anticipate that the CEHR will have:

  A role in helping public bodies fully understand their responsibilities under the Human Rights Act, thereby putting dignity and respect for individuals at the centre of public services.

- The government does not explicitly develop policy in line with its international human rights commitments, particularly the UN Covenant on Economic, Social and Cultural Rights. As a consequence, human rights thinking is absent from debate on the social exclusion of older people through poverty, poor housing and ill-health.

- The government does not refer explicitly to the UN Principles for Older Persons in its policy proposals for older people, as intended by the United Nations. The UN Principles provide a useful benchmark for measuring progress for older people in all aspects of their lives and they should be taken into account in policy-making.

Although specific entitlements under the HRA are rarely acknowledged in policy statements, government departments often use the language of a human rights framework - for example, by referring to ‘dignity’, ‘equality’ and ‘respect’. But they do this without recognising that these principles are legally enshrined or that government has a responsibility in relation to them. The goals may be the same – but the approach is different. As Opportunity Age made clear:

**Older people are entitled to dignity and respect at all stages of their lives.**

*They have the right … not to be discriminated against … to feel safe at home and on the streets [and] to live in decent, warm accommodation.*

*That means protecting the vulnerable from abuse and setting high standards for services.*
There is no acknowledgement that these outcomes are underpinned by requirements under the HRA and international law; there is an implication that they are based on moral – and therefore unenforceable – imperatives. The parliamentary Joint Committee on Human Rights explained the significance of this distinction:

*Citizens enjoy certain rights as an affirmation of their equal dignity and worth, and not as a contingent gift of the state.*

Explicitly formulating policy within a human rights framework would alter the driver for change from something desirable, based on needs, to something legally required that is based on human rights. For example, care standards legislation does not provide a guarantee of human rights to those receiving care. Although older people have needs that the state has committed itself to meeting, in doing so the state should explicitly recognise that older people also have human rights that must be respected.

There is little understanding of human rights as a potential means of achieving social progress, and this probably explains why public policy has not adopted a rights-based approach. This argument is particularly relevant to older people in receipt of state subsidised services and, increasingly, the force of this approach is being recognised. For example, in a recent report on care services for older people in London, the King’s Fund called for:

*Reform of social policies to ensure equality of opportunity for older people and a culture that focuses on their rights as well as their needs.*

Adopting a rights-based approach could encourage users to assume greater individual autonomy. Older people have a desire to be self-reliant and are resistant to the idea of being in need of state hand-outs (Annex 1). If people felt empowered to raise human rights concerns, this could lead to public services being more accountable and thus to improved standards. In this context, human rights principles could contribute to the government’s public service reform agenda of ‘putting the citizen centre-stage’, encouraging people themselves to achieve improvements in public services. The case studies referred to in the following chapters illustrate the potential of this ‘bottom-up’ approach. If government departments referred to human rights in their policy statements, there is no evidence that this would encourage a rash of litigation against local councils or hospitals.

Some government departments have made genuine efforts to embed human rights into policy making. The DCA Human Rights Division has led the way by seeking to improve understanding of human rights issues among other Whitehall departments. The DH has also taken some steps in the right direction. It has set up an Equality and Human Rights Unit and incorporated human rights thinking into some areas of health policy. For example, the DH document *Standards for better health* expressly requires all health care organisations to ‘challenge discrimination, promote equality and respect human rights’. National statutory agencies, such as the Audit Commission and inspectorates for health and social care, have developed a good understanding of the application of human rights to public services. The recent joint report by three inspectorates on services for older people, for example, noted that a failure to treat vulnerable older people with dignity is ‘an infringement of their human rights’.
A role for older people’s organisations

Organisations of and for older people need to make a convincing case to government for including human rights in policy development, where relevant. Responses to consultations on designing policy and submissions to parliamentary select committees reviewing policy should explain and apply the human rights framework whenever this is appropriate. The UN Principles for Older Persons, though not binding, provide a useful guide because they specifically address older people’s concerns.

Recommendations

There are a number of additional practical measures that the government can take to embed human rights thinking into policies:

■ recognition of the importance of the UN Principles for Older Persons, with explicit references to these Principles when designing policy for older people

■ improved communication between different parts of government; for example between the DCA Human Rights Division/DH Equality and Human Rights Unit and departments responsible for policy-making on public services to older people – the DH, DWP and the Social Exclusion Unit, based in the ODPM

■ express reference in the text of policy documents to the government’s human rights responsibilities and the relevance of human rights to policy formulation

■ dissemination of guidance to organisations providing public services

■ injecting human rights thinking into incentive schemes for local government. One suggested approach is to include references to human rights in the current Beacon Council awards for ‘services to older people’ 48


In relation to government policies, the CEHR should take the following steps as part of its duty to promote awareness and protection of human rights:

■ encourage the wider use of the UN Principles for Older Persons, as well as using the UN Principles in relation to its own work

■ complement and continue the work of the DCA Human Rights Division on raising awareness of government responsibility to apply the human rights framework within departments formulating policy affecting older people

■ consider taking legal action (by judicial review) where government policies appear to be incompatible with Convention rights (such as age discrimination in health and social care).
10 Human rights in public service provision

Many of the reported instances of abuse and neglect are due to the actions of people who have failed to match up to the responsibilities involved in caring for older people. However, as Help the Aged points out in its report, *Rights at Risk*, it is not sufficient just to blame and punish isolated individuals. It is also necessary to reform both the culture within organisations that permit such people to be in positions of responsibility and the systems that allow such abuses to occur. A human rights approach should safeguard compliance at the same time as providing an incentive and a framework to improve services.

Unfortunately, there is widespread evidence that public authorities are not implementing human rights properly. The Audit Commission’s 2003 survey found that responsibility for compliance with the HRA was ‘stuck in the legal department’ rather than spread throughout the organisation as it should be. Although public authorities with responsibility for service delivery may regard the principles of dignity, respect, fairness and equality as central to the provision of high quality services, they fail to recognise that these principles are grounded in legal obligations. There are a number of reasons for this:

- there is a lack of understanding of the ‘positive obligations’ doctrine – in particular, that it imposes legal duties on public authorities
- consequently, most of the guidance for public authorities is still unclear and so insufficient action is taken in response to it
- public authorities’ decision-making processes are not underpinned by human rights thinking and they have not made the changes necessary to ensure that services are provided in a way that positively respects users’ human rights
- there is little practical leadership on human rights from the relevant government departments
- there are no official mechanisms, such as the statutory codes of practice that support developments in equality law and practice, to ensure that the implications of human rights cases are disseminated properly.

These deficiencies do nothing to contribute to a proactive compliance regime or encourage the use of human rights principles to help transform public services. They can also contribute to cases ending up in court unnecessarily (*Cowl* case).
Developments since the HRA

A number of initiatives have been launched which are intended to make the HRA have more impact on the providers of public services.

- The DCA Human Rights Division is prioritising the implementation of human rights in public services. Harriet Harman MP, the former human rights minister, explained in her recent evidence to the Joint Committee on Human Rights that the Act is now in phase three of its implementation. The intention is to ‘take the human rights issue beyond policymakers, lawyers and the courts’ because ‘human rights protection is important for all who are vulnerable [including those who] are elderly or … in a care home’. As part of its ‘Human Rights in Public Services’ programme, the DCA Human Rights Division is providing education and training to a range of public authorities via a series of ‘road-shows’ round the country. To inform policy development, it has also commissioned research seeking the views of public authorities, public service users and commentators.

- The Audit Commission and Healthcare Commission are now inspecting providers of public services for adherence to equality and human rights requirements. This should encourage both better compliance with the HRA and greater human rights awareness. The former chairman of the Audit Commission noted the improvements that a human rights approach brings to public services:

  *Time and again we observe in those public bodies, fast increasing in number, which have adopted and embedded human rights principles in their everyday operations, that they provide much higher levels of service to the public*.56

- The British Institute of Human Rights (BIHR) provides information, training and consultancy to a range of organisations, including public sector bodies. The work of the charity is regarded as highly effective in training frontline staff, as the following example illustrates:

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Cowl case

Eight residents of a care home challenged Plymouth City Council’s decision to close it on financial grounds. The residents, who were aged between 66 and 92, were frail and in ill health – one of them died during the course of legal proceedings. Three of the residents believed they had been promised a place in the home for life. All of them were distressed at the prospect of the home’s closure and a psychiatric report expressed grave concerns about its impact on the residents’ physical and mental health.

The council and the residents eventually reached agreement on the process of assessment and consultation that would be followed before a decision was reached. In approving this agreement, the Court of Appeal ordered the council to take into account its human rights obligations, especially under Article 2 (right to life), Article 3 (prohibition of inhuman and degrading treatment) and Article 8 (right to respect for private life, home and family). The court also emphasised the role of alternative dispute resolution in avoiding the time, expense and stress of legal proceedings in these types of cases.

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These developments are in their infancy and need time to bed down. However, poor understanding of the purpose of the HRA means that the guidance provided to public authorities needs careful scrutiny. It must be clearly explained that a human rights approach is intended to provide tangible benefits for users by improving services, as well as ensuring compliance with the law. One local authority manager responsible for equality and diversity observed that the human rights agenda needs to be linked to the organisation’s strategy of ‘striving for excellence’. Since this agenda is underpinned by legal requirements, it should be seen as an imperative part of the strategy rather than merely a desirable attribute.

**Recommendations**

- A human rights approach should inform those public officials with responsibility for designing policy and should guide the work of front-line staff.

- Regardless of their legal status under the HRA, private and voluntary providers of public services such as residential care should adopt best practice by using an explicit human rights approach to the provision of services – and encourage other organisations to do the same.

- Voluntary sector development work on improving services for older people, undertaken in partnership with local authorities, hospitals and social care providers, should be explicitly based on human rights principles.

As part of its duty to encourage compliance and good practice, the CEHR could do the following:

- complement and inform the ongoing human rights work undertaken within the DCA and the inspectorates

- monitor these developments and ensure that the approaches are consistent

- assist public authorities in developing their own corporate guidance and staff training

- produce a non-statutory code of practice for human rights

- include references to the implications of recent court decisions on Convention rights and other relevant human rights developments within its statutory codes of practice on equalities

- consider what indicators of progress on human rights might be suitable for public authorities in its ‘state of the nation’ report.

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**Case study**

A residential care worker who attended a training session commented on a resident who for health and safety reasons needed to be watched as he bathed: ‘I knew in my heart he was being treated without dignity, and now I recognise that his human rights are perhaps being violated’. The care worker said she would use this new human rights language to seek a more appropriate care assessment for the resident.
Using its responsibility for promoting the protection of human rights, the CEHR could also consider the following action:

- a sector-wide inquiry into hospitals, hospices and care homes where complaints of abuse, neglect and poor treatment have been made

- legal action where public authorities have failed to protect people from breaches of their Convention rights.
11 A voice for older people

The following chapter draws on Age Concern's qualitative research, which is appended as a full report in Annex 1.

Responses from older people in the focus groups illustrate that human rights are thought to be more relevant to other countries than to the UK:

'[Human rights are] for people in Zimbabwe and places like that

It's why they got rid of Saddam

Some people showed considerable hostility to the Human Rights Act:

To put it simply, it protects the rights of the bad people against the good people

I think it's gone too far now, the Human Rights Act. It's European and all that, it's a joke. You can't do anything now because you're against rights. You can't protect your home

Although the HRA seems to be counter-intuitive to the values and concerns of older people, these objections were practical rather than philosophical. When ‘human rights’ are presented as a restatement of treasured values like respect and fairness – and as offering opportunities for greater autonomy – then the barriers were not as insuperable as they first appeared. The research found ‘a chasm between people’s unprompted understanding of human rights and the HRA’ and what focus group members thought after being given more information about their relevance and application. As the researchers concluded:

It was clear that, when exposed to the themes of the HRA, people could see ways in which it might help them, their family or their friends

During the focus groups, older people identified issues of concern in public services where they thought human rights principles might be able to help protect their interests – such as the closure of care homes, having to move into a care home or being treated in a mixed sex ward.

Older people should not have to wait for a court to determine their legal rights but should be able to expect that providers of public services respect and protect their rights. With improved understanding, they could raise human rights issues directly with the staff responsible for service delivery, as and when they arise. For example, being treated on a mixed sex ward could constitute a breach of the right to respect for private life (Article 8) by offending a person’s dignity. If a patient is distressed or upset, family or friends should feel entitled to ask the nurses to provide a bed in a single sex ward or to ensure that the mixed ward provides sufficient privacy. Likewise, service users or their families could remind the social services department of its obligation to ensure that the right to respect for family and home life is properly considered before someone is moved into residential accommodation, separated from family members or before a care home is closed. If older people – or family and friends on
their behalf – could articulate human rights in this way, they would be actively participating in the drive to improve public service standards.

Some older people do articulate their concerns in human rights language, though they may not know that legal responsibilities are involved:

Case study
An older woman, whose husband is in residential care, was recently interviewed on the television news. She commented that ‘older people have their dignity; they need to be respected and they have their rights’ (BBC Ten O’clock News, 7 February 2006).

Information needs to be provided to older people that makes sense of the human rights relevant to them and gives practical guidance on how they can be applied. As a focus group participant commented:

If you don’t know about them, how can you use them?

The researchers concluded that it is necessary to:

Emphasise the role of law as a back stop that strengthens older people’s position in negotiations with service providers rather than as solely a mechanism for enforcing rights through legal action.

A role for voluntary organisations

Many older people do not claim their legal entitlements or think of themselves as holders of rights. The research findings suggest that some put up with poor public services because they do not want to ‘make a fuss’ (Annex 1). This is perhaps because the generation that came through the Second World War, who have experience of life before the welfare state, is more likely to be grateful for public services than to think in terms of their rights.

Through the efforts of campaigning groups like the National Pensioners Convention and Better Government for Older People, these attitudes are being challenged by older people themselves. For example, the National Pensioners Convention is publishing a leaflet, entitled ‘Just because you’re older doesn’t mean you have no rights’. It provides practical information to older people about their human rights and how to access them36.

For those who are vulnerable and socially excluded, charities and voluntary organisations may be in the best position to engender change on their behalf. Such organisations are crucial to making sure that the HRA provides a voice for older people and redress when they need it. Advocacy services are particularly important in ensuring that the needs of vulnerable older people are identified and articulated.
Changing practice

It is at the local level that human rights principles have the most potential to achieve practical changes for individuals. There are signs that older people’s organisations are now beginning to use the language of human rights in relation to issues affecting older people, such as social care.

Case study

In a widely reported recent case, a couple, both 89 years old, were separated by the social services department on the grounds that their differing needs could not be met together. A representative from Help the Aged, interviewed on the radio, explained that Article 8 – the right to respect for private and family life – applied to the case because human rights are concerned with ‘the human side’ of these kinds of decisions (BBC Radio Four, 2 February 2006)

By using human rights principles, voluntary organisations can hold public authorities to account for their human rights responsibilities, without the uncertainty and risks of legal action. The British Institute of Human Rights delivers awareness-raising sessions for voluntary and community organisations which are designed to empower them to use human rights principles to achieve changes for the people that they represent. The following case studies illustrate what can be done:

Case studies

A care home for elderly people had a blanket policy of not providing residents with bed-pans between lunch-time and tea-time, no doubt to give staff a break. Following BIHR training this was challenged by a local support group as a breach of the residents’ right to respect for their private life under Article 8 of the Convention

Following a bereavement, an older person was moved from her council house to a smaller flat on the seventh floor of a building. The woman did not want to move because she had mobility problems and a severe fear of heights but the housing department decided that the accommodation was suitable. Her advocate attended one of BIHR’s training sessions and used human rights arguments to negotiate with the local authority. The housing department eventually provided alternative housing in a ground floor property, enabling the woman to go out rather than to become isolated.

Influencing policy and campaigning

Some older people’s organisations are using human rights principles to seek to influence government policies. They have developed rights-based strategies and published reports showing how human rights are relevant to issues facing older people. For example, Help the Aged and Age Concern among others have used human rights language in responses to government consultations, submissions to select committees and in press releases.
In view of the current controversy over the HRA, voluntary groups will need to adopt a sophisticated media strategy in public campaigns for older people’s ‘human rights’. Using the language of the FRED principles may be more effective in this situation; for example, by referring to older people’s ‘right to be treated with dignity and respect’ as a human rights requirement.

Recommendations

■ The CEHR, public authorities and voluntary organisations should all provide accessible and relevant information on human rights aimed at older people.

■ People should be advised that human rights can be used in negotiations with service providers as well as in legal action against them and that one approach does not preclude the other.

The relationship between the CEHR and the voluntary and community sector should be complementary and symbiotic. Voluntary and community sector organisations should:

■ absorb information received from the CEHR and repackage it for further dissemination to their constituents using their own channels of communication

■ help the CEHR to make sure that members of the public, especially those in ‘hard to reach’ groups, are able to participate in its work

■ organise themselves so that they can anticipate and raise issues that the CEHR should tackle, providing an evidence base to support CEHR inquiries

■ suggest priorities for action, together with outcomes and indicators by which the Commission should be measuring progress.

In relation to the voluntary and community sector, the CEHR should:

■ ensure that the widest possible range of voluntary groups contribute to the development of the CEHR’s strategic plan and to the periodic ‘state of the nation’ reports

■ work with voluntary organisations and coalitions both to raise their awareness of the role of human rights in advancing the interests of older people and to provide information to older people themselves

■ build up the capacity of advisers, advocates and voluntary groups to use human rights language on behalf of older people when negotiating with providers of public services

■ through frequent contact with voluntary organisations, encourage them to provide an evidence base supporting the CEHR’s work

■ encourage the voluntary and community sector to provide ideas and promote debate about issues that the CEHR should be engaged with.
12 Access to legal advice and the courts

The primary objective for both public authorities and voluntary sector organisations working on behalf of older people should be to prevent breaches of human rights from occurring in the first place. To achieve this goal, a human rights approach must be applied at the heart of the system where policy is designed, supported by a comprehensive legislative framework. However, recognising that breaches of human rights cannot always be resolved by negotiation, older people should have access to effective systems of redress through the courts – especially when protection is urgently required, as it was in these two cases:

**Bernard case**

Enfield Council social services department assessed the needs of a severely disabled woman who used a wheelchair. The care plan stated that she needed assistance to move to a suitably adapted property - but the council then failed to take action even after the court had ordered it to rehouse her. For 20 months, the woman was almost confined to her home and forced to sleep in the lounge with her husband-carer and children. The council gave no reason for this delay or its failure to respond to correspondence.

The High Court decided that the council’s failure to act on the assessments showed a ‘singular lack of respect’ for the claimant’s private and family life; she and her family had been living in conditions denying them any meaningful private or family life. Where someone is particularly vulnerable, Article 8 may require local authorities to take positive measures to secure respect for private and family life. On this basis, the court awarded £10,000 damages. However, the humiliation experienced by the disabled woman was not severe enough to amount to inhuman or degrading treatment under Article 3.

**Madden case**

In 2002, Bury Metropolitan Council decided to close two of its care homes because of the cost of meeting care standards requirements. One of the residents became depressed on learning that his home was to be closed. The council justified its decision by suggesting that the buildings had structural faults – although a later survey showed that this was not correct.

The High Court found that the consultation process with residents and their families was ‘inadequate and misleading’. The decision-making process should have taken into account Article 8 (right to respect for private life, home and family) and there should have been a careful balancing process to make sure that the council’s interference in the residents’ rights was ‘proportionate’. Article 2 (right to life) and Article 3 (prohibition on degrading treatment) were also relevant to the case.
Since the HRA came into force, there have been a number of court cases addressing the human rights of vulnerable people. Even where the cases did not specifically involve older people, they have established important principles for their protection. However, older people have found it difficult to resort to legal action under the HRA for a number of reasons. The lack of decided human rights cases involving older people suggests that there may be several barriers to using the courts.

First, many older people appear to lack the ‘system navigation skills’ to use the HRA (Annex 1). As one older man asked during a focus group session:

*If you want to use this [law], what do you do? See a solicitor and pay for it?*

The reality is, as another older man pointed out:

*If you’re poor, that doesn’t work for you. How much is it going to cost in time and energy?*

Another problem is that many advice agencies and solicitors’ firms do not have sufficient familiarity with the HRA to use it on behalf of older people in the circumstances described in this report. For example, a survey of solicitors in the Cynon Valley, South Wales suggested that few who practised outside family and criminal law recognised the relevance of the HRA to their work; under half the solicitors surveyed had used the HRA in their work at all.

The pressures on the civil legal aid budget together with the shortage, in some parts of the country, of legal aid contract holders specialising in key areas of social welfare law – such as public law and community care – are well documented. As a result, there is no doubt that older people are among those who have experienced difficulties in accessing face to face advice and legal representation for cases in courts and tribunals.

Legal action can also seem a remote, inaccessible and stressful strategy for many older people experiencing violations of their human rights. An extensive survey of people’s experiences of legal need showed that those with long term health problems or disabilities were particularly vulnerable to civil law problems. Ten per cent of people who experienced problems took no action to solve them, and of those who tried to get advice 15 per cent failed to do so. The survey also suggests that over a quarter of civil law problems lead to stress related illness.

Taking all these factors into account, it is questionable whether in practice the UK has provided the ‘effective remedy’ to older people for breaches of the Convention that is required by Article 13 of the Convention.

**Recommendations**

Local advice agencies and solicitors’ firms advising on issues relating to public services should:

- develop and maintain an adequate understanding of the relevance of the HRA to cases concerning older people
where appropriate, provide advice and representation on human rights issues to older people, particularly in view of the CEHR’s restricted power to support individual human rights cases

where they have capacity to support litigation, remain vigilant for opportunities to support affected individuals bringing human rights cases

share the information and expertise that they acquire, for example through their professional body or advice network

if the issue constitutes a ‘test case’ with implications for many people, notify the CEHR to give it the opportunity of intervening as a third party in the case.

The CEHR should consider taking the following action:

raise awareness of the importance of the HRA among legal advisers, particularly those working in the health and social care field

produce regularly updated tools to support the work of legal advisers

monitor the levels of awareness and consider using its inquiry or research powers to investigate the extent of awareness

in cases brought by others, consider intervening as a third party to contribute expertise on the human rights aspects. The Disability Rights Commission has done this to good effect (for example, in the East Sussex and Burke cases).
13 Conclusion

The challenge of transforming human rights from being ‘theoretical and illusory’ to ‘practical and effective’ has been the theme of this report. A negative chain reaction has so far prevented real progress from being made. Lack of knowledge of human rights has led to lack of understanding of their relevance to the provision of public services and to the concerns of older people. This in turn has both prevented a human rights approach from being applied to the design and delivery of services and prevented older people and their representatives from using the language of human rights. Consequently, many of the changes that would help ensure respect and protection of people’s rights have yet to be made.

Older people have as much right to fair treatment, equality of opportunity and respect for their dignity as any other group of the population. These principles are important to everyone – but they are of particular significance to those older people who may be less able to enjoy these basic values and may even experience discrimination, abuse, neglect and poor treatment. Where relevant, human rights principles should be used as a tool to ensure that they have a ‘voice’ and can obtain redress as well as immediate protection when needed.

Everyone has a role – and in the case of public authorities, a responsibility – in making human rights a reality. Priorities for action range from preventive work within public authorities to protecting people at risk and empowering them to stand up for their rights. Action is needed to progress the realisation of human rights; there are many opportunities to achieve this goal, particularly through the new Commission for Equality and Human Rights. When the approaches highlighted in this report are followed more comprehensively, then human rights will be for real.
References

3 Straw, J (Rt Hon MP). Building a human rights culture. Speech to Civil Service College seminar, 09 December 1999.
10 Building a human rights culture, op cit.
11 Something for everyone…, op cit.
14 Social Exclusion Unit. A sure start to later life: ending inequalities for older people. 2006.
15 Ibid
19 Commissioner for Older People (Wales) Bill. Clause 25.
21 Ibid.
26 Living well in later life…, op cit.
31 Help the Aged. www.helptheaged.org.uk. I will help stop elder abuse campaign. (21/4/06).
32 Living well in later life…, op cit.
33 6th report - the case for a human rights commission, op cit.
34 Age Concern’s response to the social care green paper…, op cit.
41 Opportunity age…, op cit.
42 Ibid.
47 Living well in later life…, op cit.
49 Rights at risk…, op cit.
50 6th report - the case for a human rights commission, op cit.
51 Human rights: improving public service delivery, op cit.
52 Ibid.
53 Evidence to Joint Committee on Human Rights: Human Rights Policy, op cit.
57 National Pensioners Convention. Just because you’re older doesn’t mean you have no rights. Forthcoming.
Cases

Artico v Italy (1981) 3 EHRR 1.


Burke case; R (Burke) v General Medical Council [2004] EWHC 1879 (Admin) Munby J; [2005] EWCA Civ 1003, Court of Appeal.

Carson case; R (Carson and Reynolds) v Secretary of State for Work and Pensions [2005] UKHL 37, para 49.

Cowl case; Cowl and others v Plymouth City Council [2001] EWCA Civ 1935, Court of Appeal.

East Sussex case; R (A and B) v (1) East Sussex County Council (2) The Disability Rights Commission (Interested Party) [2003] EWHC 167 (Admin).


Madden case; R (Madden) v Bury Metropolitan Borough Council [2002] EWHC 1882 (Admin).

Annex 1

Rights for Real: research on attitudes of older people towards human rights

Research conducted by: Miranda Lewis and James Morris, ippr Trading Ltd, May 2005

Introduction

Age Concern England commissioned the Institute for Public Policy Research (ippr) to use qualitative research to explore attitudes towards human rights and the Human Rights Act (HRA) among people aged 50 and over.

Although the human rights agenda and the HRA aim to improve standards of service provision for older people, the first generation to grow up with the Universal Declaration on Human Rights is more likely to resist human rights discourse than warm to it. This report looks at older people’s attitudes to human rights and the HRA. It specifically explores:

- older people’s attitudes to human rights and human rights language
- older people’s views on the potential of human rights in general, and the HRA in particular, to improve the quality of the public services they use.

Age Concern commissioned this study as part of a wider review of human rights as they relate to people in later life. The impetus for this research was based on the view that human rights in general, and the HRA in particular, are directly relevant to older people; that human rights legislation is not just a statement of principles, but also a practical body of law that has the potential to be used to improve people’s lives.

Methodology

The ippr carried out a limited programme of qualitative research comprising focus groups and paired depth interviews. In total, 28 older people took part in the research. The sample covered a range of socio-economic groups and age segments of the 50+ population within the following design:

- one focus group of eight women in Croydon aged between 50 and 75 from socio economic groups B and C1
- one focus group of eight men in Sutton Coldfield aged between 50 and 75 from socio economic groups C2 and D
- six in-depth interviews, each with a pair of non-cohabiting friends aged 76+. Three interviews were with pairs of women, three were with pairs of men. Three were with B / C1 pairs, three with C2 / D pairs.
The groups and pairs were split by gender because we expected the women to have more caring responsibilities than the men and so a different perspective on the potential of the HRA, and also because discussion would be facilitated by a gender split.

For retired participants (the vast majority of the sample), our definition of socio-economic grade was based on the employment status of the participant or their partner when last in full-time employment.

Due to the small scale of the research, the sample did not include any ethnic diversity. Further work which includes the views of black and minority ethnic older people needs to be undertaken. The sample included participants with chronic health problems, including arthritis and angina, and one participant had lost the use of an arm.

Findings

1. How do human rights fit into older people’s framework of values?

*Politeness and respect, there doesn’t seem to be any of it about. They don’t even seem to respect themselves. There’s no respect for the law*

*Male, 50-75, C2D group*

*We all know it comes down to yourself at the end of the day*

*Male, 50-75, C2D group*

*You need to be able to hold your head up when you walk down the street*

*Male, 76+, C2D group*

Older people do not share a single framework of values; however, the research revealed a great deal of commonality between people in terms of the values they hold most dear. These values were entirely consistent with, and often supported, the concept of human rights.

One value came through particularly strongly: respect. This was mentioned unprompted in nearly every depth interview and was endorsed by all respondents in the groups. Conceived in terms of politeness, decency and deference to authority, respect was seen to be at the heart of a decent society. Respondents felt that this value was under attack in today’s world, and that we needed to take action to make sure that people in general and older people in particular were respected. Interestingly, language around ‘respect’ had far more resonance than language around ‘dignity’.

Other values that were mentioned without prompting included:

- family and friendship
- independence
- honesty
- discipline
- respect for authority
- fairness
All these values are consistent with the values implicit in most conceptions of human rights. Securing respectful treatment from public services is at the core of human rights legislation. The barriers to greater use of human rights language and legislation do not appear to be profoundly philosophical.

When prompted, there was broad assent to the idea that, in principle, everyone should be treated equally; though there was significant disagreement as to what ‘equally’ meant. Some understood ‘equal treatment’ to mean something like ‘giving people’s preferences equal weight’ – a view easily squared with human rights discourse. For others, ‘equally’ was interpreted as meaning ‘identically’. Respondents that held this view used several examples to illustrate their point. For example, they resisted the idea of local authorities making special provisions for traveller communities because, in their view, equality meant offering equal use of ‘standard’ council facilities, not tailoring them to different lifestyles. That said, all respondents believed that ‘equality’ and ‘fairness’ were key values and that everyone shared a set of basic entitlements; any disagreement was about the specific commitments that fall out from those principles rather than the principles themselves.

2. What tools do older people currently use to challenge poor treatment?

The majority of the people participating in the research felt they had few options for redress. Lacking the confidence, skills and stamina necessary to pursue complaints, they often found themselves simply wringing their hands at their inability to effect change. This sense of powerlessness was found in all the groups we spoke to, but was much stronger amongst the older and C2/D respondents. Further, even those older people who had the skills to complain effectively felt that their arsenal of tools was incomplete and cumbersome.

However, there were some examples of older people making use of a diverse arsenal of tools to seek redress. Some had a great deal of experience of successfully complaining about poor treatment:

■ one younger C2/D man had complained to hospital management, medical workers and social services over the care of his mother in hospital and secured her better treatment at a care home

■ one younger C2/D man had successfully sued the local council over the persistent damp in his council house

■ one older woman had successfully objected to a care home’s treatment of her mother, and had the treatment improved

■ one younger C2/D man had enlisted the services of legal students at his local university to contest the rejection of his application for disability allowance

■ several people had written to local councillors and their MPs to seek support in disputes.

While some older people do successfully secure redress for mistreatment at the hands of public services, there is widespread exclusion from that process.
3. The role human rights can play

If we didn’t have human rights it would be ‘money talks’

Male, 50-75, C2D group

We have had to fight for this over the years, it gives us an avenue to go through

Male, 50-75, C2D group

Older people have their pride, they find it hard to ask for help, something like this could help them

Female, 50-75, BC1 group

Aware that a full copy of the HRA was unlikely to be easily comprehensible, each person was given a brief summary of the terms of the Act, and asked whether they could see themselves using the terms of the Act to effect change. The response was clear: people could see a great deal of potential in the HRA.

The rights to life, liberty, freedom from degrading and inhuman treatment, respect for private and family life and freedom from discrimination in relation to rights were seen as being highly relevant and potentially of direct use. For example:

■ one woman felt that being treated in a mixed sex ward had been degrading and wanted to use the Act to give people the option of insisting on single sex wards

■ two of the pairs felt the right to life and right to freedom from degrading treatment might allow euthanasia should they wish it

■ there was widespread concern about the forced closure of care homes and interest in the right to respect for private life in this context

■ the right to liberty was seen as protection from children seeking to put them in care homes

■ the right to freedom from age discrimination led several people to discuss the possibility of continuing to work for local authorities after the statutory retirement age

A very good mate of mine wanted to carry on working after he was 65, and they said ‘no’; under the Human Rights maybe he can say ‘I want to carry on working’

Male, 50-75, C2D group

I was recently in hospital and I had to go for an examination with a woman doctor; it was embarrassing. Would this have helped?

Male, 76+, C2D group

When exposed to the themes of the HRA, people could see ways in which it might help them, their family or their friends. However, prior to being exposed to the HRA, the tenor of
discussion had been very hostile to ‘human rights’. The next section of this report looks to understand this hostility, and diagnose the barriers to older people making use of the HRA.

4. Barriers to making use of human rights

To put it simply, it protects the rights of the bad people against the good people

Female, 76+, BC1 group

Most research participants were aware of the HRA, and for most of them it meant trouble. It was often seen as a ‘do-gooder’s’ manifesto – an imported European document that limited Britain’s ability to defend and assert its Britishness and traditions. The first generation to grow up with the Universal Declaration of Human Rights is far more likely to resist human rights discourse than warm to it. Even where older people come to see the HRA as potentially useful, there are further attitudinal and practical barriers to their making use of it. This section examines these barriers in the context of the fact that, when people examined the Act these concerns largely abated and people emphasised the concord between their values and the values that underlie the HRA.

Different barriers to take-up of HRA rights arose as discussion progressed from initial reactions to human rights to a discussion of the practicalities of the HRA. Overall, we diagnosed five key barriers, which are listed in the order that they arose in discussion and the rough temporal order in which one might expect them to arise in practice:

1. The HRA is about political correctness, not older people’s treatment
2. Human rights are in issue in dictatorships, not Britain
3. People shouldn’t have to use legal rights to get action
4. Lack of faith that using the act will make any difference
5. Lack of information and system navigation skills

Below we explore the nature of these barriers and offer some tentative potential solutions. The qualitative nature of the research does not lend itself to a rigorous ranking of the barriers in terms of scale, but we have tried to give some sense of their relative significance and the impact of age, gender and socio-economic status on their strength.

4.1 The HRA is about political correctness, not older people’s treatment

I think it’s gone too far now the Human Rights, it’s European and all that, it’s a joke.
You can’t do anything now because you’re against rights. You can’t protect your home
Male, 50-75, C2D group

You shouldn’t beat the kids up, but if they’re naughty there’s nothing wrong with a slap
Male, 76+, C2D group

I’ve been brought up to speak my mind and this means I can’t do that
Male, 50-75, C2D group
You feel that nothing’s in control anymore  
Male, 76+, C2D group

It means you can get away with murder, literally, it means the victims don’t get a say  
Male, 76+, C2D group

Many research participants saw human rights and the HRA as:

- a mechanism through which minority groups get ‘unfair’ access to services and avoid having to fit into British culture
- a symbol and example of Europe’s perceived dominance over Britain
- an illegitimate restraint on parents’ and teachers’ ability to use corporal punishment (which was seen as a key reason for the perceived decline in respect in society).

This antipathy to the HRA and human rights language poses the most dramatic barrier to encouraging people to take up their human rights - it certainly provoked the most colourful language during the research. That said, for most people this barrier is fairly easily breached once they see a practical application for human rights in their lives. It is a barrier to interest in the HRA rather than a barrier to using the HRA once it is understood. As discussed above, there was little dissent from the idea that everyone has certain basic entitlements.

This barrier was significant for every group we spoke to - though not every individual. However, there appeared to be a fairly significant class effect in determining its potency. C2/D respondents were more likely to interpret human rights discourse along the lines outlined above.

The barrier is rooted in human rights language rather than the concept of human rights - people simply stop listening when they hear the phrase ‘human rights’.

This suggests a need to rehabilitate the phrase ‘human rights’. The phrase has become associated with international issues, terrorism and some ideas of ‘political correctness’. That said, the idea that everyone has the right to a minimum level of opportunity remained widely endorsed in our research sample. It appears that it may be possible to rehabilitate the language – though the scale of the challenge appears significant.

4.2 International focus: Human rights are needed in dictatorships, not Britain

They’re for people in Zimbabwe and places like that  
Female, 76+, BC1 group

It’s why they got rid of Saddam  
Female, 76+, BC1 group

I always think of marches and starving people in Africa  
Female, 76+, BC1 group
For many older people, ‘human rights’ are seen essentially as democratic rights – the right to freedom of speech, the right to choose the government, and so on. These are seen primarily in an international context and are not felt to be relevant to people’s lives in Britain.

This barrier is felt far less intensely than the issues around ‘political correctness’, but works in a similar way: it stops people relating human rights discourse to their lives and the lives of their friends and family. Like ‘political correctness’, this is in some ways easily dealt with – once people see the domestic relevance of human rights, they are happy to engage with them. Again, it is a barrier rooted in human rights language rather than in the idea of human rights.

There appears to be some class effect in determining the potency of this barrier – it was more of an issue with B/C1 respondents.

One way of rehabilitating the term in this context is to demonstrate the practical implications of the HRA on a domestic issue that people are already impassioned about – for example, issues around shutting care homes, or having to leave existing housing and move into a care home to get the care required. An emphasis on the positive domestic impact of the HRA on behalf of older people would ultimately broaden their conception of human rights.

There is a need to give older people a sense of ownership over their rights rather than see them as a ‘politically correct invention’, or a ‘handout’, or simply a matter for other countries. It is this sense of ownership that ultimately diffuses these first two barriers.

4.3 People shouldn’t have to use legal rights to get action

It’s sad that we need them
Female, 76+, BC1

All of that, I would take that for granted
Male, 50-75, C2D group

Respect is something you earn, not something you demand, as soon as you put in a law you are demanding it
Male, 76+, C2D group

This barrier is in some ways more profound than the two barriers outlined so far. Many participants expressed a deep sense of regret that laws are needed to define their rights; they felt that in the past these rights were simply assumed and that it was a sign of deterioration that we now need to codify rights. On this perspective, using human rights legislation would demonstrate complicity with the degenerative forces that are feared to be transforming society. Many older people agree that they have the rights enshrined in the HRA; but they don’t agree with using a legal process to defend those rights. While the issues discussed above around ‘political correctness’ and the international application of human rights have been more focussed on the language of human rights than the concept, this barrier is more directly rooted in the idea of legally enforceable human rights.

This barrier also reaches into a broader concern: the desire to be autonomous and self-reliant. Many older people, particularly those born before the creation of the welfare state, have a tendency to see state intervention on their behalf as ‘a handout’ and they have a very deep
resistance to thinking of themselves as being in need of handouts. Unsurprisingly, this barrier was far less powerful where people saw the HRA as recognising rights they already possess rather than creating new entitlements. They were more likely to see it as recognising existing rights when they felt those rights had been earned through a life of work and/or contribution to British society.

This barrier is in some ways less tractable than the issues around ‘political correctness’ and international focus; however it appears to be less widespread than the other issues – it was certainly a minority view in the focus group of men aged 50-75, and was principally raised by the over-75 B/C1 women. Equally, this barrier very seldom appeared when people were talking about the potential to exercise rights on behalf of others. In particular, people with caring responsibilities (often women) were extremely positive about the possibility of making use of the HRA on behalf of people in their care (often parents). In what is arguably a characteristically British way, older people were in some way ashamed of ‘making a fuss’ on their own behalf, but had a much more positive view of standing up for the rights of others.

This is in many ways a constructive attitude: recourse to law is often expensive and time consuming. Society benefits from law acting as a back-stop that guarantees rights rather than being the mechanism for day-to-day enforcement. Further, it is the case that people shouldn’t have to actively use legal mechanisms to ensure that their rights are enforced; one of the points of human rights discourse is to embed certain patterns of behaviour into everyday life so people do not need to use the law to protect their freedoms. That said, human rights legislation exists because people do sometimes need to turn to the law to back up their rights and the barrier outlined above retards that process.

It is hard to identify potential solutions to this barrier, but it may be that the best approach is to seek to disassociate human rights from the ‘compensation culture’ narrative perhaps by:

■ emphasising the benefits to society as a whole of establishing clear norms for the treatment of older people

■ positioning action by individuals under the HRA as advocacy on behalf of their peer-group rather than a self-interested act

■ emphasising the role of law as a last resort that strengthens older people’s position in negotiations to defend their rights, rather than as a first-recourse mechanism.

4.4 Lack of faith that using the act will make any difference

It’s alright putting down these ten commandments, but they have to be enforced
Male, 50-75, C2D group

The bureaucrats just write stuff because they have to, but unless you have people in the middle to get it done, it doesn’t matter. You can write as many things as you want to
Male, 50-75, C2D group

Where is the party that would ensure it would be implemented? I don’t see how it would work in practice
Male, 76+, BC1 group
Human rights needs to address these sorts of things [a local authority’s planning decisions], but no-one listens, and they won’t do anything about it

Male, 76+, BC1 group

People of all ages are often doubtful about the ability of central government to act usefully. According to work conducted by MORI for the Audit Commission, just 24% of adults see senior public service managers as ‘competent’ (the equivalent figure for senior politicians is just 22%1). Unsurprisingly, and despite their relatively high levels or political participation, this scepticism is widespread amongst older people - they do not believe that using the HRA will make any difference. There are two dimensions to this concern:

■ cynicism about politicians’ motives, and hence the motives behind government actions; for example training schemes are often seen as an effort to cook the unemployment numbers. This translates into a belief that, despite appearances, the Act is designed to work in someone else’s interests rather than theirs

■ fatalism about the capacity of government to do what it says it will. Even where people feel that plans are well intentioned, there is a strong sense that the machinery of government too often does not work.

Even where participants saw the HRA as offering rights that would be useful, they sometimes felt that it was not worth taking steps to use the powers because events and the system will conspire to prevent them securing the result they want. They think it is ‘not worth the effort’. This fatalism is compounded by the fact that many people saw the Act as irrelevant to some of their key concerns: for example issues around poverty and anti-social behaviour.

This barrier is probably the weakest of the five we identified, but nevertheless it is present and powerful for two groups: the most cynical, and those who see themselves as powerless. For these groups it can be a very significant hurdle. In our sample the two groups tended to be populated by C2/D respondents.

This barrier is rooted in very deep concerns about the possibility of effective action in the face of the state’s perceived incompetence and untrustworthiness. It is hard to see how specific action in this area can challenge this barrier except insofar as stories of success are celebrated and propagated.

4.5 Lack of information and lack of system navigation skills

If you don’t know about them, how can you use them?

Male, 50-75, C2D group

In contrast to the four attitudinal barriers outlined above, the final barrier we identified is deeply practical and has two aspects. The first is that people do not know that they have legally enforceable rights and secondly they lack the know-how to make use of them.

Someone who is streetwise and has the smarts can probably go into a human rights issue and wipe the floor with them, but the less fortunate should be protected. They are going to

1 Trust in Public Institutions, p21MORI (2003)
lose out because they will make certain that you are not going to get your way. That’s when you need backing.
Male, 50-75, C2D group

If you want to use this, what do you do? See a solicitor and pay for it?
Male, 50-75, C2D group

If you’re poor, that doesn’t work for you. How much is it going to cost in time and energy?
Male, 50-75, C2D group

There are a lot of people who aren’t in a fortunate position. They don’t have the mental capacity or know how to handle themselves in a meeting or whatever. They aren’t going to get on [in using the HRA].
Male, 76+, C2D group

While many participants – particularly in the younger groups – were very confident about their ability to navigate the system, several others were far less sure that they would know how to go about pursuing a complaint, and certainly had no idea as to how they might use the HRA. Unaware of their rights and often isolated in their homes, they felt that they did not know how to start any process that would allow them to insist upon exercise of their HRA rights.

This concern reaches far more widely than the HRA and human rights. Some people simply felt powerless in the face of the system and were either unaware of, or unwilling to make pro-active use of intermediate institutional resources like Citizens Advice Bureaux, charities or advocacy groups. This barrier appeared to be re-enforced when combined with fatalism about the chance of action succeeding – where people felt that the system would never work, they felt that there was no point learning how to challenge it.

At first glance, the solution seems simple: provide relevant information about how to navigate the system and use the HRA. However, we need to be very clear in defining ‘relevant information’. People did not feel that they wanted information about the different provisions of the Act. Instead, they felt that all they needed to know was that there is a firm legal right to be treated decently, and to know the first step needed to assert those rights should they feel that their treatment is inappropriate. Essentially, they wanted system navigation skills. The best mechanism for developing those skills is beyond the remit of this report, but it seems clear that at a minimum people need to know how to access the grievance process. This means providing clear information about first steps in locations where complaints might arise.

Conclusion

While the sample size of this supplementary research is limited, it is possible to draw some tentative conclusions about the impact of age, gender and socio-economic status. Further research which better addresses issues of diversity in the older population is required before robust conclusions can be drawn.

The research suggests that, by and large, older people do not have any fundamental objections to making use of the HRA. They believe that everyone is entitled to be treated with respect and, when confronted with the HRA, they see potential for it to play a role in ensuring
that that happens. More specifically, they can see many ways in which the HRA can be used to improve the quality of the public services they use and ensure that they are treated with respect by public servants.

That said, while older people passively endorse the concept of human rights, they are frequently actively hostile to human rights language and the HRA. This hostility can be diffused, but doing so will prove a challenge. The barriers identified in the research stretch right through any grievance process that makes use of the HRA. The issues around ‘political correctness’, the perceived irrelevance of human rights in a domestic context and the bias against using legal means to secure redress make it less likely that people would consider using the HRA. Where people transcend these issues, concerns about the efficacy of the system and the value of investing the time and energy needed to get a result make it less likely that people will pursue a claim should they come up against opposition. The practical barriers around access to information and system navigation skills make it harder for people to make use of the HRA even if they want to.

None of these barriers were universal among those who took part in the research, but they were very significant for some individuals that we spoke to, and the issues around ‘political correctness’, lack of domestic relevance and the futility of challenging the system were present to some extent in most people. People need to see action under the HRA as a legitimate expression of their rights as British citizens, rather than an endorsement of ‘political correctness gone mad’. This involves weaving the HRA into complaints procedures and ensuring that those procedures are accessible.
Annex 2

United Nations Principles for Older Persons

Adopted by General Assembly resolution 46/91 of 16 December 1991

The General Assembly:

Appreciating the contribution that older persons make to their societies,

Recognizing that, in the Charter of the United Nations, the peoples of the United Nations declare, inter alia, their determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom,

Noting the elaboration of those rights in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and other declarations to ensure the application of universal standards to particular groups,

In pursuance of the International Plan of Action on Ageing, adopted by the World Assembly on Ageing and endorsed by the General Assembly in its resolution 37/51 of 3 December 1982,

Appreciating the tremendous diversity in the situation of older persons, not only between countries but within countries and between individuals, which requires a variety of policy responses,

Aware that in all countries, individuals are reaching an advanced age in greater numbers and in better health than ever before,

Aware of the scientific research disproving many stereotypes about inevitable and irreversible declines with age,

Convinced that in a world characterized by an increasing number and proportion of older persons, opportunities must be provided for willing and capable older persons to participate in and contribute to the ongoing activities of society,

Mindful that the strains on family life in both developed and developing countries require support for those providing care to frail older persons,

Bearing in mind the standards already set by the International Plan of Action on Ageing and the conventions, recommendations and resolutions of the International Labour Organization, the World Health Organization and other United Nations entities,

Encourages Governments to incorporate the following principles into their national programmes whenever possible:
Independence
1. Older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help.

2. Older persons should have the opportunity to work or to have access to other income-generating opportunities.

3. Older persons should be able to participate in determining when and at what pace withdrawal from the labour force takes place.

4. Older persons should have access to appropriate educational and training programmes.

5. Older persons should be able to live in environments that are safe and adaptable to personal preferences and changing capacities.

6. Older persons should be able to reside at home for as long as possible.

Participation
7. Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations.

8. Older persons should be able to seek and develop opportunities for service to the community and to serve as volunteers in positions appropriate to their interests and capabilities.

9. Older persons should be able to form movements or associations of older persons.

Care
10. Older persons should benefit from family and community care and protection in accordance with each society's system of cultural values.

11. Older persons should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness.

12. Older persons should have access to social and legal services to enhance their autonomy, protection and care.

13. Older persons should be able to utilize appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment.

14. Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.
Self-fulfilment

15. Older persons should be able to pursue opportunities for the full development of their potential.

16. Older persons should have access to the educational, cultural, spiritual and recreational resources of society.

Dignity

17. Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.

18. Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.
Rights for Real
Older People, Human Rights and the CEHR

Frances Butler
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