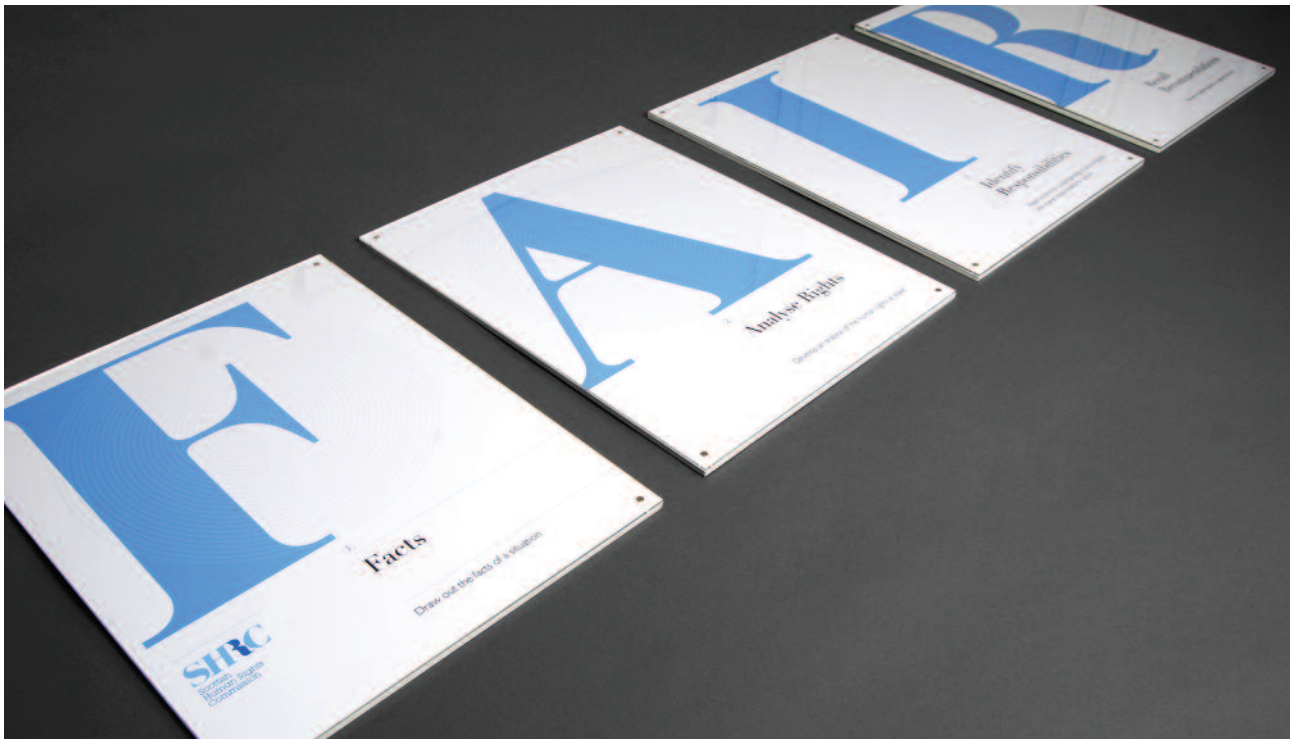
Care about Rights?

Section Five

Information for others involved in policy and practice issues of older people's care and support



Information for others involved in policy and practice issues of older people's care and support

Introduction

This section of the materials is written primarily for care policy makers, commissioners of care, the regulators of care and care assessors, all of whom have a role in ensuring that the quality of care and support services is high and the rights of individuals are protected.

A human rights based approach can strengthen policy and decision making and, when properly understood, can assist in the practical implementation of many legislative provisions applying to care services.

As policy makers, commissioners of care and regulators of care you are "duty bearers" in the legal sense to respect, protect and fulfil the human rights obligations owed to "rights-holders."

Under section 6 of the Human Rights Act it is unlawful for a public authority, or those carrying out functions of a public nature, to act in a way which is incompatible with the European Convention on Human Rights (the Convention). Local authorities, acting as contracting authorities, must therefore take all necessary steps to ensure that the rights of those receiving either local authority or contracted out care services are respected. Statutory bodies, such as the Care Commission, must also comply with the Human Rights Act.

Scottish Parliament legislation must also comply with Convention rights under section 29 of the Scotland Act and be interpreted in a way that complies with Convention rights under section 101 of the Scotland Act. Furthermore, all legislation must be read and given effect to in a way which is compatible with Convention rights and so all legislation must be looked at through a human rights lens.

Much of the legislation you already know and are familiar with has been consciously developed to advance human rights protection and is founded on human rights principles. Redrawing the connections with human rights will help ensure, and not assume, that human rights are fulfilled in the application of the law.

The table on pages 66 to 75 of these materials shows how some key pieces of legislation connect with human rights. It illustrates how often the legislation strongly reflects the underlying principles and legal tests of the human rights framework.

Care policy makers

Policy decisions impacting upon care and support services must take into account both the Human Rights Act and Scotland Act obligations, both in their conception and drafting, as well as in their subsequent practical implementation and the possible human rights impacts they may have.

This means policy makers require an awareness of the human rights standards as set out in Section 1 of this pack. There is a need to bear in mind the thresholds, or floor, of protection put in place by human rights, in particular the absolute right not to be subject to inhuman or degrading treatment set out in Article 3, as well as the balance to be struck between the individual right (such as the qualified right to a private, home and family life under Article 8) and a recognised public interest or the rights of others.

Also, as explained in Section 1 a human rights based approach fundamentally requires the genuine participation of "rights holders" in decision making. This means a high degree of meaningful participation, including from communities, civil society, minorities, and other groups, particularly those who may be vulnerable or marginalised. The participation should be both meaningful and constructive and all information about proposals should be easily accessible to affected individuals who should be supported as necessary to participate.

Policy makers may wish to consider developing a Human Rights Impact Assessment methodology as a tool to assist integrating human rights into decision making. Human Rights Impact Assessments are one of the key ways in which human rights and a culture of human rights can be systematically embedded into the policies, practices, procedures and priorities of government, public and private bodies.

Policy makers may also wish to develop human rights based indicators for the regulation of care services as objective measures of the extent to which services adopt and ensure a human rights based approach.

Local Authorities

Commissioning authorities

Local authorities must take into account their legal obligations, in particular their duties under section 6 of the Human Rights Act. These duties will apply not only in the direct provision of services but also in ensuring human rights standards are respected, protected and fulfilled through the processes for the commissioning and procurement of care services through to the final delivery of care services.

The National Care Home Contract for contracted out care for older people specifies that care providers must be compatible with the Human Rights Act. As a commissioning authority, however, local authorities retain a responsibility to ensure these human rights obligations are fulfilled.

The implementation of a human rights based approach means an awareness of the PANEL principles discussed in Section 1 of these materials: **p**articipation, **a**ccountability, **n**on-discrimination and equality, **e**mpowerment of rights' holders and **l**egality of rights. Of particular relevance to the commissioning and procurement of care services is the principle of participation.

A human rights based approach to social care means that people who use the services and their families and carers participate in its design and delivery. The involvement of communities increases the likelihood that the needs of the community will be met more effectively and thus contribute to achieving better social care. Furthermore, participation helps ensure that the social care system is responsive to the particular needs of individuals using care services.

Contracting authorities should consider how they might achieve the meaningful participation and involvement of those receiving services at each step of the process, for example at the pre-tender commissioning stage, the development of tender specifications, and in the award and selection criteria.

Commissioning authorities may also want to consider how human rights standards can be linked to quality in the specifications, selection and award criteria of the procurement process.

By focussing on these particular considerations in the commissioning and procurement processes the human rights of people using services will be better respected, protected and fulfilled in line with duties under the Human Rights Act and international human rights legal obligations and standards.

Social work care managers

Care managers have an important role to play in the protection of human rights. When assessing and managing an individual's care needs, care managers must bear in mind the minimum standards of rights protection. In particular, where an individual is found to be in circumstances which could amount to an Article 3 situation of inhuman treatment or in a situation where their private, home and family live or physical integrity is being compromised, then the careful application of a human rights based approach to the situation should be considered.

Adult protection services

Adult protection services and the inter-agency Adult Protection Committees have an important role to play in upholding the human rights of adults at risk of harm. The table on pages 66 to 67 show the connections between the adult protection laws and human rights.

Care Regulators

As a statutory body the Care Commission and its successor must comply with the Human Rights Act in performing its regulation, inspection, and complaint handling functions.

The National Care Standards

Human rights are a natural fit with the National Care Standards and the system of inspection and regulation in Scotland. The Standards themselves are underpinned by human rights principles (dignity, privacy, choice, safety, realising potential, equality and diversity).

It can easily be shown where the National Care Standards directly relate to human rights standards. To take one example, protection under Article 8 of the Convention regarding the right to respect for private and family life, home and correspondence relates to the following extracts from the National Care Standards for Care Homes for Older People:

> "• Standard 6 Support arrangements
> Development of a personal plan detailing needs and preferences"

> "• Standard 8 Making choices
> You can make choices in all aspects of your life"

> "• Standard 10 Exercising your rights
> You keep your rights as an individual"

"• Standard 12 Lifestyle – social, cultural and religious belief or faith
Your social, cultural and religious belief or faith are known and respected. You are able to live your life in keeping with these beliefs"

"• Standard 16 Private life
You have the right to a private life"

"• Standard 17 Daily life
You make choices and decisions about day-to-day aspects of your life and about how you spend your time"

Regulation of Care Award

The underpinning values of the Regulation of Care Award (ROCA) qualification for Care Commission Officers also reflects the human rights based approach promoted by these materials.

The values explored in ROCA specifically advise that

"in working with providers, inspectors will ensure respect for users' basic human rights, especially the following:

a. the right of freedom of movement, free expression and to follow personal cultural, religious and spiritual beliefs

b. the right to express their views and to be heard

c. the right to rely on staff caring for them who are competent, suitable and fit to undertake the duties for which they are employed

d. the right to be safe and protected

e. the right to seek independent advice, help or treatment when required; and

f. The right to live their life independently whilst being treated with care and dignity."

These materials are designed to assist you in the practical implementation of these values by applying a human rights based approach to the standards with which you are already familiar. The materials also build on this by showing how other rights which are not explicitly mentioned in ROCA – such as freedom from degrading treatment and the right to respect for private and family life – are relevant in care settings.

Human rights sit at the core of the care services you regulate. Daily decisions that care providers make such as staffing levels, medication, physical restraint, personal care and end of life decisions will all carry human rights implications, and applying a human rights based approach will assist in this decision making process.

Best practice human rights principles should also be kept in mind when undertaking a complaint handling role.

In particular the principles behind of Article 6 of the Convention and the right to a fair hearing are informative here. These include:

- Right to an independent and impartial tribunal
- Right to no unreasonable delay
- Right to a reasoned judgment
- Right to disclosure
- Right to representation
- Right to a hearing in one's presence
- Right to participate effectively at the hearing
- Equality of arms

Promotion of human rights to improve performance

In its role to help improve performance the Care Commission can assist in promoting the adoption of a human rights based approach to care providers.

The drivers for embedding a culture of human rights in care provision present themselves on many levels: legal, reputational and operational, not to mention ethical.

Human rights should not be viewed in any way as a risk, threat or burden to care provision but instead as a means of resolving issues and improving service delivery.

Human rights can help care providers to provide quality care in the following ways:

- **Balancing risk and quality of life considerations**

Sometimes service providers may try to avoid risk by limiting the rights and freedoms of service users in order to preserve the safety of individuals and to keep the families of individuals receiving care happy. Examples of this might be found in restrictions on bedsides, diets, movement or outdoor activities etc.

Human rights can assist in putting the individual service user's rights at the centre of this and balancing these difficult decisions against the risk to the safety of the individual or the rights of others.

To understand better how this works in practice you can use the flowchart on page 41 to assist you in this type of decision making.

- **Person-centred care**

Human rights are about looking at all the circumstances affecting an individual on a case by case basis and considering their care needs and rights entitlements. Blanket policies applying to all people using services should generally be avoided. It could be that a culmination of factors could lead to a human rights violation if this person-centred approach is not adopted.

Detailed care and support plans may be an essential element of fulfilling this requirement. Recording life histories and likes / dislikes will also assist in ensuring care and support is suitably tailored to individual needs and wishes and therefore less likely to lead to a situation where a human rights violation may be possible.

The genuine participation and involvement of people using services in all decisions affecting their rights, with the involvement of their families and carers where necessary, is key to ensuring this person-centred approach is adopted as part of a human rights based approach.

- **Better communication - common framework of rights and responsibilities for everybody**

A human rights based approach which is understood by everybody will provide a common framework of understanding which can make disputes or disagreements easier to resolve.

For example, where a family member of an individual using care and support services raises concerns about an aspect of an individual's care, a common understanding of human rights would mean that the views of the individual receiving care must be heard and their rights put at the centre of decision making. For many issues it may be about considering the proportionality of an intervention, ensuring that it is the minimum required to achieve the desired aim without unduly restricting someone's rights. In some circumstances, however, it might be that if people are fully supported and informed, they have the right to make (even irrational) decisions about their own care which should be respected so long as they don't have a disproportionate impact on others' rights.

- **Foundation for other duties**

Taking a human rights based approach can make delivering on other duties a less daunting process. It can lay strong foundations for equality, adult protection, mental health and other duties.

To make sure this happens it is important to maintain a clear link to human rights in practice – to ensure and not assume compliance when delivering on other duties.

- **Not a risk or a burden but a tool for improving care**

Human rights should not be seen as a risk or a burden but rather as a tool for decision making and a means of resolving issues and improving service delivery.

Human rights intersect and support the role of the regulators to improve service delivery. We hope that an understanding of a human rights based approach, as promoted in these materials and worked through in the flowchart on page 41, will assist you in your role and help bring a coherent underpinning to the National Care Standards and legislation that applies to care services.