



BIHR BRIEF

The newsletter of the British Institute of Human Rights | Winter 2005

Welcome

The British Institute of Human Rights has, for over thirty years, been educating people about the importance of human rights. Today it has a significant voice, advocating for the human rights of the most disadvantaged and vulnerable communities across the UK and striving to make human rights relevant for all.

BIHR Brief is produced four times a year. To receive the newsletter regularly join us as a BIHR Friend. Please check our web site www.bihar.org or contact the office for details.

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BIHR news

Lunchtime Lectures

The 19th annual series of Lunchtime Lectures started in October 2004 with a lecture by Clare Short MP on 'Human rights and development'. The former international development secretary spoke with great enthusiasm of the potential for human rights to bring about real change.

Philippe Sands QC delivered the second lecture in the series to a packed audience, speaking on the international law implications of Abu Ghraib and Guantanamo. Saira Shah, the award-winning journalist and documentary-maker, gave a thoughtful and moving lecture in December on her experiences reporting from human rights hotspots such as Gaza, Afghanistan and Columbia. This was followed by an inspiring and refreshing address given by Ken Macdonald QC, the Director of Public Prosecutions, on the role of prosecutors in balancing human rights. Visit the BIHR website for transcripts of the lectures.

The speakers for the remaining lectures are Ann Clwyd MP and Sarah Spencer. Full details are in the Events Calendar. BIHR is pleased that the leading solicitors' firm Irwin Mitchell has become the headline sponsor for this series, joining *The Independent* as our media sponsors.

Carolina Gottardo wins Human Rights Award

BIHR is delighted that the judges of the Human Rights Awards 2004 named Carolina Gottardo, BIHR's Community Outreach officer, as the recipient of the Peter Duffy Award for young human rights lawyer. The judges commended Carolina's tireless and dedicated management of the Community Outreach Programme, and her commitment to the human rights of people with mental health disorders, disabled people, refugees and disadvantaged older people.

Events

A popular Friends Reception took place in October 2004 in the Lord Chancellor's Rooms at

the House of Lords. Addresses were given by BIHR's President, Lord Justice Stephen Sedley, and the Secretary of State for Constitutional Affairs, Lord Falconer of Thoroton, who spoke about the central role of human rights in the government's vision of a modern constitution. In November 2004 a party was held in honour of Sue Baring to mark her outstanding contribution as Chair for 30 years. Her contribution to BIHR has been valued immensely. Sue has agreed to remain closely involved with BIHR's work as a member of the Advisory Board.

New Trustees

Four new Trustees have been appointed following an open recruitment process. Sarah Barclay, Mary Kane, Michael Pitchford and Patti Whaley bring a wide range of skills and experience to the Board of Trustees and will help BIHR through an exciting phase of expansion and development. More details of their backgrounds can be found on the BIHR website.

Funding

BIHR is very grateful to have been awarded two major grants from Atlantic Philanthropies and the Baring Foundation. Together they will make an invaluable contribution to BIHR's budget and most importantly our ability to carry out our programmes of substantive work.

New members of staff

Following the success of BIHR's awareness raising work with the public sector, we have recruited a Human Rights Training Officer to help deliver our human rights training programme. Sonya Sceats, an Australian qualified human rights lawyer, joins BIHR in early 2005. We also welcome our new Events and Publicity Officer Jo Morgans to the staff team who joins us from haysmacintyre chartered accountants. Jo will run and develop our Public Education Programme including BIHR's newsletter, lunchtime lectures, panel discussions and the website.

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The draft Mental Health Bill 2004 – delivering better safeguards for patients

Adrian Sieff Head of Mental Health Legislation, Department of Health

There has long been a consensus within the mental health community that the current Mental Health Act 1983 needs to be updated. Reforming mental health legislation is a vital part of the Government's overall strategy to improve mental health services for all, along with substantially increased investment and the reform of service delivery.

Mental health legislation sets out the circumstances in which a person can be treated for mental disorder without their consent and the safeguards they are entitled to. By its very nature mental health legislation balances an individual's rights with the need to prevent harm to themselves or others.

While the legislation is only used in few cases, it is one of the most difficult pieces of legislation any society has to grapple with. Because the issues it deals with are so sensitive and so important, it is right that the Bill should be the subject of well-informed debate that takes account of all the various perspectives. That is why it is appropriate that the Bill will be subject to pre-legislative scrutiny and a joint committee of both Houses of Parliament has now been set up to scrutinise the Bill. It has until March 2005 to report.

Through a new focus on the individual, the Mental Health Bill aims to make significant improvements to patient safeguards, provide a legal framework that is more in line with up to date patterns of care and treatment, and to protect public safety by enabling patients to get the treatment they need.

The Bill provides new support for patients by allowing them, wherever possible, to choose their own representative to help them to clarify their views to the clinical team, as well as to apply to the new Tribunal on their behalf. Both patients and their representatives will also, for the first time, have statutory access to specialist independent advocacy to ensure their voice is heard and their views taken into account.

The Bill provides clear procedures and strengthened safeguards. For example, there is a new requirement that use of compulsory powers

beyond 28 days must be independently authorised by the Tribunal or the courts, with independent advice from the new Expert Panel. Also, the Bill ensures that there will be integrated, consistent, standards of inspection by the Healthcare Commission, which will have new powers to monitor how the new law is used.

An important improvement under the Bill is that there can be no compulsion without the availability of appropriate treatment for the individual patient, taking into account all their circumstances. That treatment must be recorded in a care plan, which must be approved by the Tribunal when making an assessment or treatment order. A new protection for patients' rights is that the Bill enables patients, where appropriate, to be assessed and treated as out-patients in the community under requirements, rather than be detained in hospital. This means that treatment can be tailored to the needs of each patient, taking into account the safety of the patient, carers and the wider public. This flexibility provides a positive alternative for patients who, supported by new community services, do not need to be detained in hospital. It also provides an opportunity to minimise the disruption to their lives and the risks of social exclusion.

Under the Bill, the initial use of compulsory powers in the community for civil patients will be controlled by regulations. Only those patients who will be defined in those regulations will be eligible for initial assessment or treatment in the community.

Treatment under requirements in the community may be effective in reducing the cycle some patients experience of being detained and treated in hospital, being discharged when their condition improves but, if they then deteriorate again, they require another round of compulsory hospital treatment (so called "revolving door" patients). It is patients such as these that will be defined in the regulations. It is envisaged that the majority of these patients will initially be assessed and treated in hospital.

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The Government has listened to what people have said and has made some important changes to the Bill as a result.

The Bill introduces other improvements over the current law, for example, there will be special safeguards for children under 16 who are being treated in hospital for serious mental disorder against their own wishes because their parents consent to it. There will also be a new right for patients who are capable of making treatment decisions to refuse as well as to consent to electro-convulsive therapy.

Naturally, consultation on the draft Bill published in 2002, generated much debate. The Government has listened to what people have said and has made some important changes to the Bill as a result. The Government believes it has made a Bill that strikes the right balance between an individual's liberty, the need for treatment and the health and safety of the patient and others.

What do mental health organisations say?

A number of measures in the Government's draft Mental Health Bill have been heavily criticised. Most controversially, the bill sets out plans to extend compulsory treatment so it can be imposed on people being cared for in the community as well as hospital patients. Richard Brook, chief executive of Mind has commented this: "risks introducing fear and coercion into what should be a purely therapeutic relationship. It risks driving those who most need care and treatment away from seeking help as and when they need it most".

Campaigners have argued the bill's proposals risk bringing mental health services to their knees as more people will be brought under compulsory powers. Mike Shooter, president of the Royal College of Psychiatrists, said: "We are worried the bill will extend use of compulsory powers to a wider group of patients than is medically necessary, thus putting pressure on psychiatric services, and infringing people's human rights." Paul Farmer, chair of the Mental Health Alliance, a coalition of over 60 professional bodies and non-governmental organisations, argues: "The bill's proposals would force professionals to bring too many people in for compulsory treatment, damage the trust that is so vital between doctors and patients and lead to a bureaucratic overload on an already overstretched system" and re-iterated the proposed legislation "remains objectionable in principle and unworkable in practice."

Concerns have also been expressed about the revised definition of 'mental disorder' in the bill which would, if it became law, include depression and learning disabilities. The 1983 Act's condition of treatability would also be removed to enable the detention of those with untreatable severe personality disorders who have not committed any crime. The Bar Council has highlighted that: "the criteria for the imposition of detention and compulsory treatment are too vague, the threshold for such imposition is too low and the safeguards against arbitrariness too weak to comply with the provisions of Articles 5 and 8 of the European Convention on Human Rights (ECHR)" and that "the absence of any reciprocal right to treatment of a minimum standard and in appropriate conditions and to suitable aftercare is incompatible with international human rights standards and may violate Articles 5 and 8 ECHR". Justice, has concerns: "that an overriding emphasis on public safety within the bill risks undermining both its therapeutic objectives and the human rights of prospective patients".

The parliamentary committee considering the draft Mental Health Bill is due to report in March 2005. The written and oral evidence presented to the committee can be found at: www.parliament.uk/parliamentary_committees/jcdmhb.cfm

What can the Human Rights Act do for my mental health?

A précis of the Paul Sieghart Memorial Lecture given to BIHR on 7 July 2004 by
The Rt Hon the Baroness Hale of Richmond

From the point of view of the patient or even an outsider, a great deal of what occurs in psychiatric hospitals is potentially inhuman or degrading

In her research for the British Institute of Human Rights, published in December 2002, Jenny Watson found a lamentable ignorance of human rights values amongst the providers of public services for vulnerable people. The Human Rights Act (HRA) was seen as something for lawyers, rather than 'something for everyone... for the good of the people.' Perhaps this is part of the generally negative image of the Act portrayed in the media. That is why I want to ask 'what can the Human Rights Act do for my mental health?'

Services for mentally distressed and disabled people struggle to reconcile three overlapping but often competing goals: obtaining access to treatment and care, safeguarding civil rights, and protecting the public. Basing myself on the 1991 UN Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, I consider there to be five core human rights values in the mental health field, each of which I will discuss in turn.

(1) People with mental disorders and disabilities should be enabled to receive the treatment and care they need

It may be easier to use the Convention to secure proper treatment for compulsory hospital patients than for others, usually through Article 3, an unqualified right prohibiting the use of torture and inhuman or degrading treatment or punishment. If the conduct complained of comes within Article 3, it cannot be justified or excused. This has led to a very high threshold test of severity, although with a strong subjective component in the effect on the individual concerned. From the point of view of the patient or even an outsider, a great deal of what occurs in psychiatric hospitals is potentially inhuman or degrading. But the Strasbourg court has imported a concept of medical necessity into its assessment. In *Herczegfalvy v Austria*, the Court started well:

"The position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance

in reviewing whether the Convention has been complied with. While it is for the medical authorities to decide, on the basis of the recognised rules of medical science, on the therapeutic methods to be used, if necessary by force, to preserve the physical and mental health of patients who are entirely incapable of deciding for themselves and for whom they are responsible, such patients nevertheless remain under the protection of Article 3, the requirements of which permit of no derogation."

But then it gave the game away:

"The established principles of medicine are admittedly decisive in such cases: as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading. The Court must nevertheless satisfy itself that the medical necessity has convincingly been shown to exist."

Mr Herczegfalvy had been force-fed, forcibly given psychotropic drugs, kept for over two weeks in handcuffs and tied to a security bed, but the Court decided the evidence was not sufficient to disprove the arguments that medical necessity justified the treatment.

Although it was in many ways a conservative decision, the Court of Appeal was able to use it in *R (Wilkinson) v RMO Broadmoor Hospital* to hold that the court must be able to hear evidence and adjudicate upon disputes about a controversial treatment decision which may breach the patient's Convention rights.

How far is the concept of medical necessity dependent on the patient's incapacity? It was argued in *Wilkinson* that to impose treatment forcibly upon a patient with the capacity to refuse it breached his Convention rights. Under the English Mental Health Act, however, the criteria for detention do not depend on incapacity, and most forms of medical treatment for mental disorder may be imposed upon a detained patient against her will, albeit some only with a second opinion. What did the European court mean in *Herczegfalvy* by 'patients who are entirely incapable of deciding for themselves'?

Promoting a more positive attitude towards rights could be a much more effective way of attaining proper standards than criminal or civil liability or even the Care Standards Act

Was it referring to a legal or a mental disability? I see the logic of saying that treatment for mental disorder and physical disorder should be no different. If so, it can only be given with the consent of a capable patient, or where necessary in the best interests of an incapable one. But I also see dangers in using capacity as a criterion for defining degrading treatment. Why should it be acceptable to treat an incapacitated person in a way which would be degrading if done to a capacitated?

Article 3 also has the potential to develop a positive right to appropriate treatment: if you deprive a vulnerable person of his liberty, you must provide him with certain minimum standards of care. There is a glimmer of this in the draft Mental Health Bill, requiring as a condition of compulsion that 'appropriate medical treatment is available in the patient's case'. That falls short of an enforceable obligation to provide that treatment, but might the courts be prepared to construct one either under Article 3 or Article 8?

Article 8 gives everyone the right to respect for their private and family life, home and correspondence. It is a qualified right - interference is permissible under certain circumstances. As with Article 3, Article 8 has both a negative and positive aspect. Primarily, it is there to prevent the state interfering arbitrarily in family and private life. But it may do so to protect, for example, the health and welfare of a child. If it does so, the Court of Appeal has said there should be a corresponding obligation to use its best endeavours to supply an alternative family life which will better protect the child's health and welfare.

So far, however, Article 8 has rarely featured in mental health law, except in relation to patients' correspondence. The Strasbourg court has not found it necessary to consider complaints about treatment in prison or hospital under Article 8 separately from Article 3. But there are indications that it may be prepared to do so. The Court has said, in *Bensaid v United Kingdom* (2001), that treatment which does not reach the

severity of Article 3 may nonetheless breach Article 8 if there are sufficiently adverse effects on physical and moral integrity.

The threshold for what constitutes 'interference' under Article 8 can be much lower than for 'inhuman or degrading treatment' under Article 3, because of the qualifications. The concept of 'respect' is also a powerful one because it brings with it both positive and negative obligations. Whether Strasbourg would be willing to develop these to require minimum standards of appropriate treatment and care for vulnerable people, I do not know. But there are signs that Strasbourg is beginning to develop concepts of self-determination and autonomy out of Article 8.

A great deal of what goes on in hospitals and care homes betrays a lack of respect for patients' and residents' privacy and autonomy. Promoting a positive attitude towards rights could be a much more effective way of attaining proper standards than criminal or civil liability or even the Care Standards Act.

But what about people outside hospitals and care homes? One might think to detain someone in hospital for the sake of her mental health who did not need to be there would be a breach of the right to liberty under Article 5. But the English cases suggest it will rarely be possible to complain even if the only reason for continued detention is the lack of appropriate community or half way house facilities. If a patient still meets the criteria for detention, our law says she may be detained, without saying where, or obliging the authorities to find appropriate facilities for a patient whom is deemed ready to move on but not for immediate discharge into the community. Even if she could be discharged with appropriate help and support, the law only obliges the authorities to use their best endeavours to arrange this. For some patients, the tribunal has the power to order a conditional discharge, but if the community agencies do not make arrangements necessary to meet the conditions, our courts have held it is not contrary to Article 5 to continue to detain a person who is 'of unsound mind'. It would be

Compulsion also raises fundamental questions about discrimination between people with mental disorders and everyone else. Why should there be different criteria between treatment for mental and physical disorders?

otherwise if he were no longer of unsound mind at all, but the Convention criteria set out by the Strasbourg court are not very demanding.

There is as yet little hint of a positive obligation to provide what the patient needs to be able to live safely in the community. Yet the failure to do so often keeps people in unsuitable surroundings long after they could have moved on. Alternatively, people may be forced into unsuitable institutional care because of a lack of adequate services to keep them in their own homes.

It is in this area of access to proper treatment and care that the Convention has least to offer, but there are a few ideas on which to build.

(2) Treatment and care should be available to all who need it, without discrimination on grounds such as sex, racial or ethnic origin, membership of a particular religious or social group, or the nature of their disability (including, I would add, their age).

One of the complaints made in the BIHR research was that the level and standards of community provision for elderly people varied greatly from place to place. Article 14 of the Convention does not give a free-standing right against discrimination; some other Convention right must be in play, even if it has not actually been breached. So it might be possible to attack some inequalities of access on the basis that the right to respect for private life in Article 8 was engaged even if not breached. Differences in treatment serving a legitimate aim are allowed, as long as they are proportionate. But the Court has said that 'very weighty reasons' would be required to justify differences of treatment based solely on race or gender. The whole picture is distorted by the use or prospect of compulsion, which deters people from seeking treatment, denies them the right to choose the treatment they want, and prioritises certain patients in the offer of services.

Compulsion also raises fundamental questions about discrimination between people with

mental disorders and everyone else. Why should there be different criteria between treatment for mental and physical disorders? Why should capacitated people be able to make advance directives about treatment for future physical disorder but not mental disorder? Is mental disorder or disability a 'status' for the purpose of Article 14? If so, and Article 8 protects personal integrity and autonomy, when is it justifiable to distinguish between that group and others in the enjoyment of that right?

(3) Enabling should not entail enforcing: a person's right to choose – at least if she is capable of choice – what may be done to her body or her mind can only be taken away with due legal process

The Convention can protect against forcible interferences with liberty and self-determination. But there is still the so-called 'Bournewood gap': the common law allows necessary treatment and care, including admission to psychiatric hospital, to be given without consent or legal formality to those who are incapable of making the decision for themselves and do not actively protest. The Mental Capacity Bill, now before Parliament, maintains the basic principle that the compliant person without capacity may be given care and treatment without formality, although it does provide some safeguards. Is incapacity a rational and sufficient reason for drawing this distinction?

(4) That due legal process requires (i) principled grounds for intervention; (ii) a fair machinery for determining disputes; and (iii) appropriate and humane treatment and care in return

This is the area where the Convention ought to do best. Under Article 5(1)(e) only those genuinely 'of unsound mind' can be deprived of their liberty. Yet the Strasbourg court has declined to define that concept. The Richardson Committee, like the Law Commission in its work on mentally incapable adults, saw much of the answer in a rigorous definition of incapacity, although they acknowledged the need to cater for some who posed a risk to others. If incapacity were the criterion, rather than severity of

Human dignity is all the more important for people whose freedom of action and choice is curtailed

symptoms or prospect of harm to others, some people might be given the help they need before their situation became too desperate.

Another problem is that the Convention provides protection against arbitrary deprivation of liberty in the narrow sense of detention. Restrictions are not covered, especially if for the person's own good. Strasbourg has found that measures taken in the best interests of a patient or child are less likely to amount to a deprivation of liberty. This means the procedural protections of Article 5 may not apply if and when compulsory treatment in the community becomes possible.

The best procedural protection is under Article 5(4), which requires a speedy review of the lawfulness of detention; this has to be a proper merits review which can lead to release. Article 6 requires a fair process in the determination of civil rights and liabilities: and even if the right to bodily self-determination is not fully protected under the Convention, it is undoubtedly a civil right in domestic law. But protection of civil rights has traditionally been individually initiated after the event. There is also a useful procedural component in Article 8, under which Strasbourg has developed the right to be involved in the decision-making processes before the authorities interfere with the right to respect for family life: there is no reason in principle why the same should not apply to private life.

We have already seen that the Convention may help to secure appropriate and humane conditions of treatment and care for people detained in institutions, although the Strasbourg institutions appear able to tolerate much that we would not.

(5) Underlying and overriding all of these is respect for the equal dignity and humanity of all people, however great their disorder or disability.

Human dignity as a distinct concept has recently begun to appear in constitutions and human rights instruments. I would suggest that human dignity is all the more important for people

whose freedom of action and choice is curtailed. The Convention is a living instrument. The recent development of its ideas on gender reassignment, homosexuality and sentences of life imprisonment gives me hope that it can develop a more positive role in the field of mental health. We need to be able to use it to promote respect for the inherent dignity of all human beings but especially those who are most vulnerable. In reality, the niceties and technicalities with which we have to be involved in the courts should be less important than the core values which underpin the Convention. If everyone in the mental health and community care services were imbued with and committed to those values, I am sure that it would do much more for my mental health, and that of everyone else, than any number of cases in the courts.

The full transcript of this lecture can be downloaded from www.bihhr.org/sieghart.html

Interview with Francesca Klug

It struck me that human rights were a set of ethical values

Francesca Klug is a Professorial Research Fellow at the Centre for the Study of Human Rights at the London School of Economic and is currently a member of the government's Task Force and Steering Group on the proposed Commission for Equality Human Rights. Francesca's published work includes "Values for a Godless Age: The Story of the UK's new Bill of Rights" (Penguin, 2000). As one of the driving forces behind the Human Rights Act, she was the joint winner of The Times/Justice 1998 award for an outstanding contribution to civil justice and was awarded an OBE for services to human rights and civil justice in the 2002 New Year's honours list.

Looking at your previous and current positions and your published work it is clear you have had a full career. Was your path into the field of human rights one of design or accident?

In some ways more accident than design. In 1989 I went to Liberty and became Director of the Civil Liberties Trust (which I have just become a trustee of, incidentally). This was obviously a conscious decision on my part, but it happened to coincide with the time that Liberty was actively addressing fundamental questions around whether they needed to re-orientate their focus to embrace international human rights standards which, as a home-grown civil liberties organisation, was not a major priority for Liberty before the late 1980s. As Director of the Trust I was responsible for the research profile of Liberty and I had the opportunity to do lots of reading and thinking about human rights as an idea and to saturate myself in international human rights standards.

What struck me the most was that these standards appeared to address some of the problems I had faced in my previous post as a special adviser to the Chairs of Social Services and Community Development Committees at Hackney Council (during its pseudo-revolutionary period!). At Hackney there were frequent conflicts and tensions between different vulnerable or minority groups and there was no common or consistent ethical framework with

which to address these. When this occurred, disputes tended to be settled through numerical strength or 'voting power.' For example, the Council piloted an independent living scheme for people with disabilities which was contested by some members of the trade unions. This wasn't a classic conflict between poor and rich and therefore could not be adequately addressed by the socialist framework which was paramount at Hackney Council at the time. It was a conflict between two groups both of which had reasonable arguments about what was fair and just. When I came across international human rights standards I could see how they could be applied to these important bread and butter issues as much as they were relevant to the classic concerns about liberty, free speech or the criminal justice system. It struck me then that human rights were a set of ethical values – the accumulated wisdom of human beings down the ages which addressed situations of conflict at both the macro and micro levels, involving the individual and the state or different individuals and indeed different groups within society. So I found my way into human rights from that angle. And now of course we have had case law under the Human Rights Act which successfully addresses very similar dilemmas and conflicts to the ones we faced in Hackney (most notably East Sussex concerning the 'manual handling' of disabled people).

What do you think about the renewed focus by politicians on the notion of "rights and responsibilities"? How does this fit into a human rights perspective?

The language of "rights and responsibilities" has some overlap with the human rights perspective but largely it is actually a misunderstanding of the idea of human rights. I say this because the post-war international human rights framework tried to move on from the individual rights position, which is associated with traditional civil liberties here or with the American or French Bill of Rights. The focus now is not just on the rights of individuals but on how to create a society in which the human rights of all are respected. This more collectivist approach to the enforcement of

The human rights vision... cannot be effective unless individuals respect each other's rights

human rights started to emerge after the Second World War when the drafters of the UDHR, a number of whom were social democrats, socialists or communists deliberately inserted a different perspective into the then rather individualistic, rights framework (for example, see UDHR Article 29). Influenced also by religious values, including from Islam and Confucianism, they concluded that for individuals to have human rights it is not enough for the state to refrain from oppressing its citizens; the society in which people live has to function and flourish as well, something that you can't achieve as isolated individuals. One of the implications of that idea is that the state has to positively intervene to address the tensions and conflicts within society, many of which are created by inequalities in power and wealth. Another implication is that for individuals to have their human rights respected other individuals need to accept legitimate limits to their own freedoms in order to create a society in which the right of all can be protected. So although you do not have to act responsibly as an individual in order to claim rights, as those rights are inherent in you from the moment of your birth, if in the course of expressing those rights you reduce or infringe the rights of others the state may have to intervene to limit your rights. But the state should only do this to the extent, and only to the extent, that it is necessary to achieve the social good of protecting the rights of others or the wider community. That, in a nub, is the post-war human rights philosophy.

The David Davis and Conservative party attack on the Human Rights Act plays to the common caricature of rights as nothing but individual, selfish wants and needs; an old idea going back more than a hundred of years to both Edmund Burke and Karl Marx (funnily enough). When New Labour politicians talk of "rights and responsibilities" they sometimes appear to endorse this distortion. They seem to be saying that you only get rights – a term they seem to use interchangeably with wants – if you behave responsibly. This is quite different to the human rights vision which, as I have said, cannot be

effective unless individuals respect each other's rights but which also recognises that rights are inherent in everyone and not, to that extent, contingent on 'good behaviour'.

How much will the proposed Commission on Equalities and Human Rights add to the protection of human rights in the UK? Does it have the powers and tools you think it needs to be effective?

My hope is that the proposed Commission has, at the very least, the minimum powers necessary to be effective. Quite obviously it is not going to have the maximum powers that it could. If I didn't believe the Bill to establish the CEHR would contain the minimum powers that are necessary for it to work successfully, then I wouldn't have engaged or participated in the process to date. If in the end it doesn't, I will be as outspokenly critical of the proposals as anyone. We know that CEHR will not be empowered to support individuals to take Human Rights Act cases but the White Paper indicates it will have an explicit power to intervene in HRA cases and to conduct formal inquiries into the protection of human rights by public authorities. The success of CEHR will, of course, not only be determined by its powers and duties. I think a lot will depend on the political climate when the CEHR is set up, the Commissioners themselves and how the different parts of the Commission operate and work together, which are all things that will emerge over time.

There has been some disappointment expressed that the proposed Commission will "only" have promotional powers with regard to human rights. I think that the powers proposed in the White Paper are much broader than the narrow understanding of promotion as relating to public education only. This in itself is a hugely important and currently neglected function. But the White Paper goes much further. Provided its proposals are reflected in the Bill, we are talking about a body which provides a helpdesk for individuals seeking first order advice about the Human Rights Act, a body which would monitor, audit and disseminate case law to the those public and

I shared the view that it is counterproductive to the goal of creating a culture of respect for human rights to have a highly judicialised system of enforcement

private bodies with responsibility for implementing human rights and a body which can carry out inquiries on any human rights issue and which can intervene in any HRA case. All of those activities come under the mandate that the government has set for the body. Should these White Paper proposals materialise, and I sincerely hope and believe they will, the proposed Commission will be in the business of promoting compliance with the HRA as well as promoting good practice and the values which drive human rights. If this is the case, I think it will have sufficient powers to be effective.

You were one of the driving forces behind the Human Rights Act and were a member of the Government's Human Rights Task Force charged with overseeing implementation of the Act. What were your expectations of the Act and have these been surpassed, met or disappointed?

There was a whole group of us lobbying for the Act from individuals such as Anthony Lester QC who championed this for decades, through to organisations such as Liberty and BIHR. During much of this period I was a research fellow at King's College law school employed by Professor Robert Blackburn specifically to work on models for incorporating the ECHR into UK law. I was privileged, therefore, to be able to work on developing a model for the HRA which, whilst allowing the courts a significantly enhanced role in terms of human rights enforcement, would not overturn the principle in this democracy that parliament should have the final say as to which legislation remains on the statute book.

At the time there was a rather elite, but nevertheless active, debate between those who believed that the only bill of rights (or incorporated treaty) worth having was one which was fully enforced by the judiciary who should be empowered to overturn statutes if necessary, and those who took a contrary view. Crudely put, the latter argued that as bills or rights or their equivalents can never aspire to the precision of technical, 'black letter' law, they should be enforced differently. From this viewpoint, as the

purpose of bills of rights is to provide a legal framework within which to interpret other laws and policies, there will always be debate about where the boundaries between different rights should lie and the most appropriate place for those decisions to be made is the democratic sphere.

I was mostly somewhere in the middle of much of this debate but I ultimately came down on the side of the 'democratic sphere' as I shared the view that it is counterproductive to the goal of creating a culture of respect for human rights to have a highly judicialised system of enforcement. In our culture, where there was no appetite for enhancing judicial power, no people on the streets demanding that there should be a Bill of Rights enforced by the courts, it would have been counterproductive for the Human Rights Act to appear from on high and suddenly people find that parliament which they think they have some influence over (however small) can no longer change the laws because judges have the final say. I was worried that this would lead to a backlash comparable, perhaps, to the one we have seen with the European Union constitution. I wasn't convinced there was enough of a groundswell supporting human rights to survive that kind of backlash. As a result I was mostly involved in developing the model reflected in section 3 and section 4 of the Human Rights Act which has given an enhanced interpretive role to the courts but does not allow them to overturn Acts of Parliament. My expectations about how the model would work have been largely fulfilled. Like everyone else, I haven't always agreed with every single judicial interpretation of the relative weight that should be given to section 3 and section 4 of course, but I think their intersection has opened up the space for dialogue and debate which I was very worried would be closed down by a fully judicially entrenched HRA.

The other crucial part of the model was the proposal for a joint parliamentary committee to scrutinise legislation for compliance with the HRA. This was a proposal I first worked on at Liberty when drafting The People's Charter, which was an early attempt at developing a

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'democratic approach' to entrenching rights. One of the legitimate criticisms of the HRA is that if the courts do not have the final say to determine acts of parliament, the government of the day will, because parliament is so weak under our voting system. Therefore it was essential to have a parliamentary committee – a joint one which the whips could not easily control – so that MPs would intervene in the debate about the balance between conflicting rights and so forth and put pressure on the government in the process. I think the members of the Joint Committee on Human Rights have excelled themselves in the credibility, respect and influence they have achieved.

None of this, of course, means that we have got the perfect results in human rights terms that we wanted, and of course the initial failure of the courts to overturn the 'detention without trial' provisions of the anti-terrorism legislation could be put down to the model that I championed. However, when talking about a broad framework like human rights, what you have to do is create a situation where the climate can be changed and I think the combination of the various official reviews, the Joint Committee's reports on the Anti-Terrorism, Crime and Security Act and the SIAC and subsequent cases (which wouldn't have been heard before the Human Rights Act and which succeeded at the first level) have created a pressure for change. Although we are operating in a very difficult climate, which has tested the credibility of the HRA model of the extremes, I feel it has stood up reasonably well to the scrutiny.

What would you hope to have changed, either in a work context or otherwise, in ten years time?

I hope that the Human Rights Act, or potentially a successor to it, will begin to fulfil the foundational, inspiring role that the American Bill of Rights fulfils – even at times like this. I hope it will come to be understood as a set of ethical values which provide a sort of bottom-line framework within which we can debate, discuss, protest, argue and judicially intervene on laws and policies that we don't like.

I hope, too, that the Commission will be up and running (and running well), partnering and supporting organisations like BIHR doing crucial work on the ground. The work BIHR currently does in promoting 'good human rights practice' within the public and voluntary sectors won't go away but in fact will become more important once the Commission is operating, in helping to translate the human rights framework to terms that can be absorbed by a wider group of society than lawyers and human rights specialists.

Speaking personally I hope I will be at least semi-retired, having a good time and watching a younger generation try to iron out all the difficulties that we now face, taking the human rights debate forward into a new era. I am getting too old to have a utopian vision of ten years from now. I know there will still be huge injustices and that the people with least power will suffer the most and those with most power will get away with the most, but I hope that we will be able to feel more confident that we have achieved an enduring, foundational bill of rights.

Francesca Klug will be speaking on 'Britain's proposed new equality and human rights commission' on 9 February 2005. For details please see the Events Calendar in this issue of BIHR Brief.

Human rights news

Establishment of a new Commission for Equality and Human Rights

Among a number of concerning initiatives such as sweeping new police powers, extended use of anti social behaviour measures (including the naming and shaming of children), and new 'anti terrorism' measures, the Queen's Speech in November 2004 contained a note of optimism in the form of the announcement of the bill which will pave the way for the establishment of a new Commission for Equality and Human Rights (CEHR).

Sarah Cooke, Director of BIHR, said in response: 'The new CEHR will be able to promote equality and human rights as central to the improvement of public services, particularly for vulnerable and marginalised people, and to take steps to enforce compliance where the action of public authorities is found wanting.' In the tight schedule of legislation to be processed in this Parliament it is hoped that the government will recognise the importance of maintaining progress on the CEHR Bill and publish full details shortly.

Mental capacity bill published

The long awaited Mental Capacity bill started its passage through Parliament in July 2004. The bill allows for lasting powers of attorney to let people choose someone to make decisions for them about healthcare, finances and personal welfare, should they lose capacity in the future. It also enables patients to create 'living wills' to make advance decisions to refuse treatment. Critics in the House of Commons expressed concerns that this would allow 'back door' euthanasia through the withdrawal of food and fluids. Ministers insisted that the bill will not change the laws on euthanasia but would improve safeguards and announced that they will table amendments to this effect when the bill reaches the House of Lords stage in early 2005.

The Government has stated that the Mental Capacity bill is intended to place patients at the heart of decision-making. Whilst broadly welcoming these underlying principles the Joint Committee on Human Rights (JCHR) has said that a number of human rights issues are raised by the legislation. The JCHR flagged up their concern about the lack of procedural safeguards for informally admitted patients, particularly in light of a recent judgment from the European Court of Human Rights. In *HL v UK*, the Court in Strasbourg found that the 'Bournemouth Gap' was not compatible with the requirements of Article 5 of the European Convention on Human Rights. The JCHR have urged the Government to bring forward proposals for filling this procedural gap during the passage of the present bill.

Burke case gives balance of power back to the chronically ill

A ground-breaking judgement concerning the treatment of patients with degenerative illnesses has placed the disabled at the heart of the decision process. In 2004 the High Court found in favour of Leslie Burke, who suffered from a degenerative brain condition meaning that at some point in the future he would need to receive food and water via artificial nutrition and hydration. Mr Burke challenged the existing General Medical Council (GMC) guidance on the grounds that it could allow food and drink to be withdrawn against his wishes when he could no longer speak. He wished to be fed and provided with appropriate hydration until he died of natural causes, and did not want doctors to decide whether his life was worth living.

The High Court held that if a patient is competent, or has made an advance directive, the decision as to where his or her best interests lie should rest with the patient. If a patient is incompetent and there is any dispute over treatment, this should be

referred to a court, with a strong presumption in favour of preserving life. Mr Justice Munby's judgement, which referred extensively to Baroness Hale's Sieghart Lecture (see p6), put the issue of human dignity and the right of self-determination at the heart of the debate. The GMC has appealed the decision and the case is expected to come before the Court of Appeal in early 2005.

Lords rule against indefinite detention of terror suspects

In December 2004 the House of Lords found that the indefinite detention of foreign terror suspects without trial under the Anti-Terrorism, Crime and Security Act 2001 was unlawful. The Law Lords ruled by an 8-1 majority that the government's provisions were unlawful under the Human Rights Act, which incorporates provisions of the European Convention on Human Rights (ECHR), as they discriminated unlawfully against foreigners. Lord Hoffman said that there was no 'state of public emergency threatening the life of the nation', the only basis on which governments are entitled to opt-out of the right to liberty contained in article 5 of the ECHR. He went on to state that the real threat 'in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these'.

The government is currently considering a response to the ruling and it is expected that an announcement will be made shortly before Parliament considers whether or not to review the measures in the 2001 Act in February 2005.

Government reviews UK's international human rights obligations

Following an inter-departmental review of the UK's position under international human rights instruments, the government decided to ratify a number of international conventions and protocols. These include the Optional Protocol to the Convention on the Rights of the Child relating to Children in Armed Conflict, which raises the minimum age for direct participation in hostilities from 15 years to 18 years of age; and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, which provides for submissions to the Committee by groups and individuals regarding breaches of the Convention.

A number of important human rights instruments remain unratified, notably the right of individual petition to the International Covenant on Civil and Political Rights, the UN Convention against Torture and the International Convention on the Elimination of All Forms of Racial Discrimination; Protocol 12 to the European Convention on Human Rights which gives a free-standing right against discrimination; and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. The Joint Committee on Human Rights is currently considering the government's review. BIHR has submitted a response to the JCHR welcoming the new developments, but urging the ratification of these further instruments without delay.

UN voices 'grave concerns' over violations of children's rights in Britain

Jaap Doek, chairman of the UN committee on the rights of the child, has called for the government to 'increase considerably' its efforts to implement the Convention on the Rights of the Child. Following the inspection of UK performance in 2002, the committee made 78 recommendations for improvement, but in the past year progress has only been made on 17. In a report published in November 2004, referred to by Mr Doek, the Children's Rights Alliance for England drew attention to a number of

concerns including continuing high rates of child poverty, unnecessary jailing of juveniles and the withdrawal of rights from child asylum seekers. The UK is not due to be examined by the committee again until 2009 but Mr Doek has said that this was 'too long to wait for children whose human rights are being violated today'.

New reports on Elder Abuse

Campaigning group Action on Elder Abuse (AEA) has published a report entitled 'Hidden Voices: Older People's Experience of Abuse'. This follows an inquiry into Elder Abuse earlier this year by the House of Commons' Select Committee on Health, which noted a severe lack of research on this important issue, and revealed that there may be 500,000 older people being abused in England at any one time.

Drawing on the evidence of nearly 7000 calls to its helpline over a six year period, the AEA report explores the issue of elder abuse, revealing statistics such as: 40% of 80 to 89-year-olds suffer abuse; 46% of abusers are relatives and 34% are paid care workers. Health Minister Stephen Ladyman said: 'we will look seriously at the recommendations and we will continue to work with AEA to ensure this issue is not forgotten.'

Asylum Policy 'Racist'

In December 2004, the Law Lords ruled that the government's immigration rules racially discriminated against Roma seeking entry into the UK, overturning earlier appeal and high court decisions.

The case was brought on behalf of six Czech Roma refused entry into Britain. The scheme began in July 2001 but is no longer in operation since the Czech Republic joined the European Union in May 2004. Under the scheme, British immigration officials were stationed at Prague airport to screen all passengers travelling to the UK with the aim of detecting asylum seekers and stopping them from boarding. A monitoring scheme revealed that Roma people were 400 times more likely to be rejected than non-Roma. Roma were routinely treated with more suspicion and subjected to more intensive questioning.

Baroness Hale said that the operation was

'inherently and systematically discriminatory and unlawful'. Immigration officers should have treated all passengers in the same way, only using more intrusive questioning if there was a specific reason.

Human rights in the voluntary sector

The Institute for Public Policy Research published Human Rights: who needs them? Using Human Rights in the Voluntary Sector by Frances Butler in December 2004. The book sets out a practical vision for how voluntary organisations working on behalf of socially excluded and vulnerable people can use the Human Rights Act to further the interests of their client groups. It gives practical examples of using human rights principles outside a litigation context, especially in advocacy and development work with service providers at the local level as well as in policy and campaigning. The work was funded by Comic Relief and copies are available from l.durante@ippr.org.

Editorial

In late 2004, the government published a new mental health bill withdrawing the previous bill published in 2002. In introducing the new bill, Rosie Winterton, the health minister, whose Department has written about the bill in this newsletter, stated “The revised Bill represents the first major overhaul of the legislation since the 1950s and is an integral part of the Government’s wider strategy to improve mental health services for all; reflecting developments in human rights law and providing a legal framework in line with modern services and treatments.”

However Paul Farmer, chair of the Mental Health Alliance, a coalition of over 60 professional bodies and non-governmental organisations, has said the bill’s proposals would “force professionals to bring too many people in for compulsory treatment, damage the trust that is so vital between doctors and patients and lead to a bureaucratic overload on an already overstretched system.” Many mental health campaigners are particularly concerned about the widening of the criteria for detention, provision for compulsory treatment in the community and the ‘invention’ of a new condition called dangerous, severe personality disorder.

BIHR conducts free training on human rights for those in the voluntary sector who are at the front line of supporting and advocating on behalf of people with mental health difficulties. Through this work we are struck by the frequency with which we come across everyday practices which have implications for the dignity and human rights of those receiving mental health services. This ranges from problems over restraint methods, to circumstances in which treatment is provided without consent, to confidentiality, to application of blanket policies that do not allow the voice and circumstances of individual service users to be taken into account.

We see an urgent need for further work to highlight the positive benefits of applying a human rights approach to the delivery of mental health services. We would like, as a start, to see the production of models of best practice which take human rights into account. We would like human rights training and capacity building to be provided to those who deliver front line services, including the psychiatrists and other health professionals. However, without a legal framework which safeguards the basic rights and dignity of those in receipt of mental health services, vulnerable people will be reluctant to seek the help and assistance they so badly need and those responsible for delivery of mental health services will lack the statutory backing and support they need if respect for human rights in this sector are to be taken seriously.

The reform of the Mental Health Act offers a unique opportunity to improve the care and treatment for people with mental health problems and we urge that the human rights implications of the proposed legislation are carefully considered as the bills work their way through Parliament.

Sarah Cooke, Director

Events calendar

BIHR is committed to increasing public awareness and understanding of human rights. We hold a number of events during the year which are free and open to the public.

Human rights in the 21st century (lunchtime lecture)

Organisers

The British Institute of Human Rights

Speaker

Rt Hon Ann Clwyd MP

Date

8 February 2005

Time

1–2pm

Location

Lecture Theatre, Courtauld Institute of Art, Somerset House, The Strand

Fee

Free

Further information

www.bihr.org

Gypsies and Travellers: Britain's forgotten minority (lunchtime lecture)

Organisers

The British Institute of Human Rights

Speaker

Sarah Spencer, Commission for Racial Equality

Date

11 March 2005

Time

1–2pm

Location

Lecture Theatre, Courtauld Institute of Art, Somerset House, The Strand

Fee

Free

Further information

www.bihr.org

Are you organising a human rights event? If you would like it to be included in the Events Calendar please send details to events@bihr.org

February

Refugee Mental Health

Organisers: Refugee Council

Date: 2 February 2005

Time: 9am to 5pm

Location: tbc – Birmingham, Midlands

Fee: £99 – £149

Further information: www.refugeecouncil.org.uk

Young People, Housing and Homelessness

Organisers: Shelter

Date: 3 and 4 February 2005

Time: 10am – 5pm

Location: Shelter Training, 3rd Floor, Bentima House, 168–172 Old Street, London, EC1V 9BP

Fee: £115 – £165

Further information: www.shelter.org.uk

Britain's proposed new equality and human rights commission

Organisers: The Centre for the Study of Human Rights, LSE

Speaker: Professor Francesca Klug

Date: 9 February 2005

Time: 1.15–2.30pm

Location: Room D202, Clement House, LSE

Fee: Free

Further information:

www.lse.ac.uk/Depts/human-rights/

Tackling the Trafficking of Women and Children

Organisers: Capita

Speakers: Marjan Wijers, EU Expert Group on Trafficking, Anita Tiessen, UNICEF UK, Carron Somerset, ECPAT UK, Superintendent Helene Gould, National Crime Squad

Date: 9 February 2005

Time: 9am–4pm

Location: London

Fee: £150 – £499

Further information: www.capitald.co.uk/conferences

Human Rights and Developments in Criminal Law

Organisers: Human Rights Lawyers Association

Speakers: Michelle Strange, Doughty Street Chambers, Janet Artkininstall, Law Society

Date: 9 February 2005

Time: 6pm

Location: Reading Room, Law Society, 113 Chancery Lane, London

Fee: free for HRLA members, £10 for non-members

Further information: www.hrla.co.uk

The Role of Unincorporated Treaties in English Law

Organisers: Human Rights Lawyers Association

Speakers: Lord Lester of Herne Hill QC and Shaheed Fatima, Blackstone Chambers

Date: 15 February 2005

Time: 6pm

Location: Reading Room, Law Society, 113 Chancery Lane, London

Fee: free for HRLA members, £10 for non-members

Further information: www.hrla.co.uk

Recent Homelessness Developments

Organisers: Shelter

Date: 18 February 2005

Time: 8am – 10am

Location: Shelter Training, 3rd Floor, Bentima House, 168–172 Old Street, London, EC1V 9BP

Fee: £59

Further information: www.shelter.org.uk

Volunteering, Asylum and Health

Organisers: Tandem

Date: 23 February 2005

Time: 11am – 4pm

Location: NCVO, Regent's Wharf, 8 All Saints Street, London N1 9RL

Fee: £50

Further information: www.tandem-uk.com

Human rights under attack

Organisers: The Centre for the Study of Human Rights, LSE

Speakers: David Lammy MP, Dept of Constitutional Affairs

Date: 24 February 2005

Time: 6–7.30pm

Location: Old Theatre, Old Building, LSE

Fee: Free

Further information:

<http://www.lse.ac.uk/Depts/human-rights>

March

Human Rights and Developments in Commercial Law

Organisers: Human Rights Lawyers Association

Speakers: Martyn Hopper, Herbert Smith, Michael Smyth, Clifford Chance

Date: 2 March 2005

Location: Reading Room, Law Society, 113 Chancery Lane, London

Fee: free for HRLA members, £10 for non-members

Further information: www.hrla.co.uk

Miscarriages of Justice: the role of the Criminal Cases Review Commission

Organisers: Institute of Advanced Legal Studies

Speaker: Professor Graham Zellik

Date: 3 March 2005

Time: 6–7pm

Location: Institute of Advanced Legal Studies, Russell Square, London
Further information: Belinda.Crothers@sas.ac.uk

Staging human rights in prison

Organisers: The Centre for the Study of Human Rights, LSE
Speaker: Professor Paul Heritage, People's Place Projects
Date: 3 March 2005
Time: 1.15–2.30pm
Location: D502, Clement House, LSE
Fee: Free
Further information: www.lse.ac.uk/Depts/human-rights

Judicial review and human rights claims in mental health

Organisers: Doughty Street Chambers
Date: 7 March 2005
Time: 9.30am – 2pm
Location: 10/11 Doughty Street, London WC1N 2PL
Fee: £30
Further information: www.doughtystreet.co.uk

Race and Mental Health: Tackling Inequalities

Organisers: Neil Stewart Associates
Speakers: Rosie Winterton MP, Department of Health, Jon Silverman, BBC, Errol Francis, Sainsbury Centre for Mental Health, Surinder Sharma, NHS, Frances Crook, Howard League for Penal Reform
Date: 8 March 2005
Time: 9am to 4.30pm
Location: 4 Hamilton Place, London, W1
Fee: £179 – £399
Further information: www.neilstewartassociates.com/sh173

Re-framing Justice in a Globalising World

Organisers: London School of Economics
Speaker: Professor David Held, Professor Nancy Fraser
Date: 8 March 2005
Time: 6.30pm
Location: Old Theatre, Old Building, Kingsway, LSE, Kingsway, London
Fee: free
Further information: events@lse.ac.uk

Immigration, Asylum and Housing Rights: Update

Organisers: Shelter
Date: 9 March 2005
Time: Full day course
Location: Shelter, Manchester
Fee: £114 – £164
Further information: www.shelter.org.uk

Intolerance and Torture

Organisers: Psychoanalysis@LSE
Speakers: Stan Cohen, Gillian Slovo, Susie Orbach
Date: 9 March 2005
Time: 5.30pm
Location: Room G108, 20 Kingsway, London
Further information: d.gould@lse.ac.uk

Equality and human rights: sibling companions or false friends?

Organisers: Centre for the Study of Human Rights
Speaker: Trevor Phillips, Commission for Racial Equality
Date: 10 March 2005
Time: 6–7.30pm
Location: Old Theatre, Old Building, LSE
Fee: Free
Further information: www.lse.ac.uk/Depts/human-rights

Stepping up to excellence – Mind Annual Conference

Organisers: Mind
Date: 15–17 March 2005
Time: 8am – 10am
Location: tbc – Harrogate, Yorkshire
Fee: £110 – £375
Further information: www.mind.org.uk or conferences@mind.org.uk

An Introduction to Asylum Support

Organisers: Refugee Council
Date: 16 March 2005
Time: 9am – 5pm
Location: tbc – Birmingham, Midlands
Fee: £99 – £149
Further information: www.refugeecouncil.org.uk

Domestic Violence and Housing

Organisers: Shelter
Date: 17 and 18 March 2005
Time: 9am – 5pm
Location: Shelter, York
Fee: £199 – £249
Further information: www.shelter.org.uk

Law and Vulnerable Older People

Organisers: Age Concern
Date: 17 March 2005
Time: Full Day
Location: London City YMCA, EC1Y, London
Fee: £99
Further information: www.ageconcern.org.uk or 01543 503 660

Mental Health and Housing

Organisers: Shelter
Date: 22 March 2005
Time: 9am – 5pm
Location: Shelter, London
Fee: £114 – £164
Further information: www.shelter.org.uk

Please note that the views expressed in this newsletter are those of the individual contributor and do not necessarily reflect those of BIHR.