

# **Something for Everyone:**

**The impact of the Human Rights Act and the  
need for a Human Rights Commission**

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# **Something for everyone:**

## **The impact of the Human Rights Act and the need for a Human Rights Commission**

**British Institute of Human Rights**

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**Supported by Comic Relief**

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## INTRODUCTION

In 1998 the new Labour government fulfilled a manifesto promise and incorporated the European Convention on Human Rights into UK law through the Human Rights Act (the Act). At the time, the government said that it intended this to serve as the basis for what it called a “human rights culture” in the UK.<sup>i</sup> The Act came into force on 2 October 2000.

### The BIHR project

The British Institute of Human Rights (BIHR) supported by a grant from Comic Relief commissioned this report to assess the impact of the Act on parts of the voluntary sector, and see what further steps, including the creation of a Human Rights Commission, might be necessary if a human rights culture is to take root in England and Wales. The project does not consider human rights issues in Scotland, where there is already a proposal from the Scottish Executive to establish a Human Rights Commission.

BIHR has a history of work with voluntary organisations, including training and capacity building in the voluntary sector around the Act.

The project was designed to:

- broaden the base of existing awareness and understanding of human rights principles and to encourage support for a UK Human Rights Commission amongst the voluntary sector, and
- provide the Joint Committee with evidence that those who are particularly disadvantaged often do not know, or understand the significance of, the Human Rights Act and how it could positively affect their lives, and demonstrate the difference that a Human Rights Commission could make in this context.

BIHR designed the project to ensure that, whatever the outcome of the parliamentary inquiry, the debate about a Commission involved a wider range of organisations. They also wanted to ensure that more people became aware of the Human Rights Act in particular and human rights principles more generally, specifically in those sectors that are working with some of the most vulnerable people in our society.

This project springs from an understanding of the Human Rights Act as something which is both empowering for individuals and a tool for changing the relationship between the individual and the state. The Act encompasses a set of principles which should ensure that individuals are treated with respect. Some of its principles – particularly the concept of proportionality - can be used as a useful framework to help resolve conflicts between competing rights<sup>ii</sup>. For those in positions of public

responsibility the Act sets high standards to ensure that clients and service users are treated with dignity.<sup>iii</sup>

This research concentrates on the voluntary sector; the methodology is set out in Appendix 1. It focuses on four parts of the sector that work with people that are, or can at certain times in their lives, be considered vulnerable: children, disabled people, older people and refugees and asylum seekers, to provide a snapshot of the impact of the Act. A small number of interviews were also undertaken with the advice sector. BIHR wanted to find the answers to a number of questions.

Since the Act came into force two years ago:

- has respect for people's rights been significantly enhanced?
- have the type of issues and complaints that find their way to voluntary organisations changed?
- has the Act started to produce the change in culture that government ministers talked about during the legislation's passage through Parliament?
- is there a need for a Human Rights Commission to start to create this culture?

BIHR was also interested to know the extent to which voluntary organisations – often important gatekeepers in enabling people to challenge violations of their rights – had understood and taken account of the Act in their own work:

- had there been adequate training and capacity building to help people understand the Act?
- was its influence being felt in policy discussions and campaigns?

Finally, BIHR wanted to find out whether the voluntary sector supported the establishment of a Human Rights Commission and if so:

- how might such a body work with the voluntary sector?
- what kind of powers and functions would it need to sustain credibility?
- would the proposed single equality body be enough to fill many of the gaps in protection for people's rights?
- what impact might the single equality body process have on the type of Human Rights Commission that organisations wanted to see?

This report considers each sector in turn, assessing the impact of the Act on people's everyday lives through the collection of examples known to interviewees of situations where human rights have not been respected. In every case where an interviewee has provided information about an individual case or a specific example, the organisation is not named to avoid the inadvertent identification of clients. Interviewees were not expected to be human rights experts. We sought their input as people who would have evidence of the impact of the Act. The stories they told, and the experiences they shared, were subsequently placed within a human rights framework. A summary of the rights protected by the Act is included as Appendix 2.

It also considers the extent to which public authorities are meeting the positive obligations that may be imposed by the Act; for example the duty to prevent breaches of Convention rights, or to provide information and advice relevant to such breaches, as well as the duty to respond to any breaches that occur<sup>iv</sup>.

The report then considers capacity building within the sector to support the Act. Is the provision of advice adequate to meet the needs of the sector? Are there enough resources devoted to training and development in order to help to create a human rights culture?

Finally it considers the creation of a Human Rights Commission against the background of the government's single equality body project. It considers the role that such a body might have in creating a human rights culture, and the type of powers and functions that it might need if it is to make a difference to people's lives.

The Joint Committee on Human Rights has expressed a wish to "know what difference a commission could make to the lives of citizens of the UK, especially those who do not presently enjoy their full human rights."<sup>v</sup> This report contains at least some of the answers.

## FINDINGS: THE NEED FOR A HUMAN RIGHTS COMMISSION

The research project found overwhelming support from the organisations that participated for a body - whether a Human Rights Commission alone or for an Equality and Human Rights body - to promote and protect human rights. This would meet the need that currently exists for good quality advice, guidance and training on the Act itself. But, just as importantly, it would be able to promote the principles that underlie the legislation in a way that everyone can understand.

The findings demonstrate that there is little serious attempt by any organisation – whether in government or in the voluntary sector - to use the Human Rights Act to create a human rights culture that could in turn lead to systemic change in the provision of services by public authorities.

The Act has simply not had an impact in the sectors that this project considered. Consequently many vulnerable people remain open to abuses of their rights, despite the theoretical protection the Act affords. Without a body of some kind to promote the Human Rights Act and the principles that it contains this situation is unlikely to change. There was overwhelming support for the creation of such a body from participants in the project, and their views using their own words are set out in the final chapter of this report.

There is one recommendation arising from the findings:

- **that the government should establish an independent body capable of effectively promoting and protecting human rights, and should seize the opportunity presented by the Single Equality Body Project to do this by creating an Equalities and Human Rights Commission.**

The analysis that follows pulls together the evidence from the research and sets out a number of arguments for the creation of a body to protect and promote human rights.

### Beyond the legal profession

The absence of a human rights culture – or of even the first green shoots which might grow into a human rights culture – leaves a void. **Many policy staff in voluntary organisations simply do not see the Act as relevant to their work.** It is widely considered to be the domain of lawyers and legal policy staff and very few organisations use it systematically in their parliamentary lobbying or in their work with civil servants for example.

If this pattern is replicated throughout the public sector, it will set up an expectation that the only way to achieve change is through the courts. This is a slow and costly route, and will inevitably mean that more people than necessary will experience poor services before change takes place. None of this is to suggest that individuals should not have the right to challenge violations of their rights in court. That in itself is a vital part of developing and sustaining any human rights culture. But it is not the

only - and probably not the fastest - method of achieving change. And, used alone, it creates a false perception of the Act.

Of course some cases do have the potential to transform an administrative system and have a knock on effect across a range of public administration areas. The independence of Housing Benefit Review Boards has been called into question using the Human Rights Act<sup>vi</sup>. The principles from this case – that elected members who have a vested interest in the outcome of a case because of the financial implications for their council should not sit in judgment - apply to other local authority review mechanisms. Government has indicated a willingness to make such bodies compliant as evidenced by its decision not to oppose certain legal challenges in court. But without a Human Rights Commission to explain to a wider audience the broader principles behind specific cases in a way that is targeted and memorable, change will still be slow.

In any case, legal cases are costly for the service provider, can lead to a view that the Act is principally about attacking the state, and have a knock-on effect of contributing to creating a climate within which our public services are castigated for failing to meet the highest standards.

During the writing of this report, the Prime Minister spoke at Labour Party Conference of the importance of public services meeting individual needs, rather than the “one size fits all” model which is increasingly inadequate for modern Britain.<sup>vii</sup> The Human Rights Act has an important role to play here. Its framework can help those who make decisions about service provision to consider the real needs of individual people, and how these might be met: putting the individual back at the heart of the service.

**Without more attention paid to the promotion of the Human Rights Act and the principles which lie behind it, in a way that makes it accessible to lay people, the vicious circle of unresponsive public services which lead to legal challenges cannot be broken.** One interviewee commented:

*I really can't say to you that one of the options currently that we feel able to put forward to people is the Human Rights Act. We use equal opportunities legislation in that context, so there probably isn't any reason other than, for some reason, the Human Rights Act doesn't appear to have come across in the same way as being a mechanism for change. (Gary Fitzgerald, Action on Elder Abuse)*

He draws a useful parallel with the creation of the bodies to promote equality legislation. No one would suggest that the Race Relations Act could have had the impact it has without the Commission for Racial Equality, or that the Disability Discrimination Act could have had the visibility it does, after a relatively short time in law, without the Disability Rights Commission. Yet the Human Rights Act is a similar type of legislation that cannot take root on its own, without a powerful body to champion the principles that it contains.

## Promotion of the Act to frontline staff

It is clear from the interviews conducted for this project that **in many cases individual members of staff in public services have no understanding of their responsibilities under the Human Rights Act**. In some cases this comes from a lack of information which means that people can be misled about the Act – such as the head teacher who told a parent who wanted special educational needs (SEN) support for their child that they were in danger of violating the child's human rights.

In other cases however, and particularly in relation to personal care provided for both older people and disabled people, the lack of knowledge about responsibilities under the Act is far more disturbing.

It seems that ordinary men and women find themselves in a position of power in relation to vulnerable people and abuse that power without even appearing to realise that they are doing so. Time and again, for example, older people are treated as less than human and experience degrading treatment. One of the most memorable examples of this is the older residents of a care home who were fed their breakfast whilst sitting on the toilet so that staff could get their work done within an allotted timeframe. This situation only came to light because an agency worker objected to the practice.

To continue the argument, it seems clear from the interviews conducted for this project that in some situations older people are not treated with equal respect and are seen as losing part of their humanity simply because of their age. They are not expected to continue to develop as human beings, nor to have the needs and desires that any of us would wish to be able to express.

Yet the Human Rights Act provides a counter to this – and to human rights abuses in the other sectors surveyed - and could be a useful tool for service providers to enable all staff to have an understanding of the type of values that they are expected to uphold. The principles contained within the Human Rights Act are simple. They can be understood by anyone if they are explained in straightforward, non-legal language. They shape the type of behaviour that we would all like to expect if we found ourselves suddenly vulnerable and subject to the care of others.

**The lack of any ongoing concerted promotional strategy for the Act means that staff who provide public services – particularly front line staff – fail to understand what the Act is, the rights that it contains, and the responsibilities that they have to uphold it.** Not everyone agrees that this type of publicity is needed. Indeed the Lord Chancellor, giving evidence to the Joint Committee on Human Rights said:

*We do not need to sustain the same degree of publicity after the Act ... The Human Rights Act is to some degree self-publicising.... The Constitution Unit said.... and it is true.... that litigation itself can play an important role.... Very high profile examples of*

*individuals trying to exercise their rights such as those of Naomi Campbell have generated enormous media coverage.*<sup>viii</sup>

It is unfortunately also true however that most of this coverage – particularly in the tabloid press and broadcast media – does not include an accurate explanation of the way in which the Act is used in such cases, nor of the way that the principles that apply in a specific case might apply in other areas. The “self-publicising” nature of legal challenges has a very small audience, mostly, quite naturally, consisting of legal professionals. It is unlikely that such coverage can ever help to inform care workers, for example, of the principles underlying the Act and the way in which they relate to the daily life of care home residents. Without such a promotional strategy it is likely that inadequate public services will continue to hit the headlines as individuals challenge violations of their rights by staff who have not been provided with adequate training and guidance to understand their responsibilities.

If it is the case that the Act can guide our behaviour it needs something more than legal cases to explain this to busy staff, or to hard-pressed managers. In the absence of a Human Rights Commission, it is impossible to see who will start this process. **A Commission could have a key role, working in partnership with regulatory, training, and industry bodies, to demonstrate that the Act is not simply about avoiding litigation; rather, it gives all staff in the public sector a responsibility to promote and uphold human rights.** After all, it is not a defence under the Act for a service provider to argue that a member of staff broke an accepted policy, and should be personally liable. A Human Rights Commission could help to raise awareness by running appropriate campaigns – alone and in partnership with others – and by ensuring that the Act forms part of the curriculum for relevant professional qualifications.

## **Human rights: a case study**

**The Human Rights Act has something else to offer public service providers. It forms a useful framework or structure within which problems can be solved and risks assessed, and within which the needs of individuals in the provision of public services can be considered.** This may be particularly useful for areas where the rights of one individual may need to be weighed against the rights of others, perhaps leading to restrictions on rights which can be justified using the Act's concept of proportionality. There was little awareness of this framework taking root in the examples provided by interviewees, many of whom drew attention to the fact that the Act was not used to help professionals as they model good practice, develop new services, or assess policies.

During the period in which research for this report was taking place, *Community Care* magazine printed a disturbing case study in a regular column, *The risk factor*, which uses real experiences to illustrate management of risk<sup>ix</sup>. The case study indicates how little impact the Human Rights Act has had on the risk management process: this is just one example of a situation where rights are balanced against each other.

The case involved an 85-year old woman, called Carole Browne for the purpose of the study, who had been living with her daughter who cared for her. Social services had concerns that the care that was being provided was inadequate, felt that residential care would work better and tried to work with the daughter for five years to achieve this. During this five year period, Mrs Browne was regularly found at her home in just a T shirt, in a house without soap, flannels or towels. Her daughter would take her out of day services after an hour to make her take money from the bank cash machine. She would be taken out of respite care by her daughter in the middle of the night. She had medication withheld by her daughter. The police were called to shouting and slapping incidents in the street when her daughter abused her. Eventually in 2000 a new social worker was assigned. Following this the social work team sought a court order for guardianship, and Mrs Browne was provided with residential care, which she liked, and was happy with. But her daughter turned up at the home with her husband, and was found by staff to be inspecting her mother's backside with a flashlight, saying that she was not clean. She was told that she could only visit her mother in the communal areas of the home – and tried to do the same thing there. Eventually she was banned from the home because of her disruptive behaviour, after she tried to take other residents to the toilet.

It is hard to imagine a situation in which a child could be treated in this way for this length of time by parents or carers (who clearly in this case had their own unaddressed mental health needs) without a public outcry or a demand for an independent inquiry when the facts came to light. The case study serves as a useful reminder of the lack of awareness of the Human Rights Act framework – one which involves balancing rights – in a profession which could be well served by it. Had the Act's concepts of balancing rights and proportionality been employed in this situation the outcome might have been very different.

The Human Rights Act would have enabled the social workers concerned to recognise that both parties in the dispute had Article 8 rights to respect for their family life and in Mrs Browne's case to respect for her privacy. But it would also have enabled them to see, quite quickly, that they had a duty to protect a vulnerable client from an abuse of her rights, and that in order to do so they could justifiably restrict her daughter's Article 8 rights to live with her mother without fear of interference from the courts. After all, ensuring that Mrs Browne was comfortable and safe in a residential care setting did not take away her relationship with her daughter. And it would have protected her from five further years of abuse.

Frustratingly, the case study also serves as a reminder of the lack of visibility that the Act currently has. Neither of the social workers, nor the voluntary sector Chief Executive interviewed for the piece mentioned the Act as something that had – or should have – shaped their practice. Nor did the journalist concerned refer to it as a new basis for good practice. A Human Rights Commission could help to raise awareness of the value of a Human Rights Act framework both in partnership with the relevant professional bodies, and in the media. It could for example have provided a comment on this case study, explaining in simple language the difference that it could have made.

One interviewee, Emily Holzhausen from Carers UK echoed this need:

*Sometimes you have a situation where a disabled person doesn't want any help, and wants the person who's caring for them to do everything. The person who cares does round the clock care, incontinence, all those kinds of things. In terms of the balance of one individual against the other, if you discard the Human Rights Act, the law at present favours the disabled person's rights over the carer's rights. But the Human Rights Act actually addresses that. It is an enormously difficult and complex situation, and at some point there needs to be a compromise of rights. So that's where the Human Rights Act is useful.*

**Yet at present, those in the voluntary sector who see from their clients first hand the way in which services are provided were unable to give any evidence of the Act being used in this way.** This could mean that sometimes – as in Mrs Browne's case - difficult or challenging decisions are avoided, because at the moment professionals see no framework that they can use to help them tackle the situation whilst giving due regard to the rights of all those affected by it.

Yet the Human Rights Act, with its concept of balancing rights, is an ideal tool to use. It does not negate the essential humanity of any participant in a situation. But it does help to ensure that one person's rights and freedoms do not override another's so completely that there is little left of the second person's rights or respect for their own human dignity.

## **Guidance and training**

**Many participants suggested that a Human Rights Commission could provide guidance or helpful interpretation of the Act, as well as training.**

This may be a particular voluntary sector perspective. Most of the organisations interviewed for this research deal with what is, not what might be or could be, often with scarce resources, small staff teams, and a demanding workload. The majority of them tackled the Human Rights Act just before, or often after, it had come into force. There was no extensive period of training or preparation – and indeed their training was mostly *ad hoc*. So the provision of information is something for which they may have a particular need.

Liberty and JUSTICE provided the majority of the training for respondents, and this was perceived to be of a high quality. But it is unrealistic to expect two relatively small London based legal organisations to provide training or training materials of the type that public authorities throughout the UK would need if they are to ensure that their front-line staff understood the Act, and their responsibilities under it.

Even the material produced by the Home Office and subsequently by the Lord Chancellor's department, which is relatively clear and easy to understand, will have limited application because of its lack of direct application to different fields of work. Of course general promotional material can only be a starting point to prompt specialist practitioners to think about the application of the Act to their area of work. For example, a social care worker reading through the summary guide might

not immediately see that Article 6, the right to a fair trial, is based on principles that could inform good practice in drafting a residential home's complaints procedure. Nor would they see that Article 3 – explained as the prohibition of torture – could apply to some routine practices in care homes which might constitute degrading treatment, such as methods of restraint, or even the way in which breakfast is served. Information needs to be provided in a way that targets the interests and concerns of those that it is designed to reach.

The same is true for information and guidance which needs to be produced on a rolling basis in response to cases as they pass through the courts. **Interviewees indicated a wish to see good practice guides that could help service providers understand how legal decisions might impact on their area of work.** One respondent drew a direct parallel with the type of information that the Commission on Racial Equality provides for service providers and employers, interpreting a body of case law. Of course many service providers will have their own legal teams who will provide some of this interpretation and advice. But it is not consistent across government departments, local authorities and charities. Legal advice is bound to vary according to whether it comes from someone who intends to defend your existing service against the need for change, or alternatively to push the law to see how far it might go to protect people's rights.

Different government departments will of course have a different perspective on particular issues, depending on the interests which they themselves need to protect. Off the record responses indicate that responses from the Department of Health towards some human rights issues were more positive than those from agencies such as the Immigration and Nationality Directorate. But **many interviewees that had frequent contact with a government department often didn't know if there was a team or unit within that department with sole responsibility for human rights, nor did they believe that managers had a clear understanding of the impact of case law on their area of work.**

This research project has focused on the voluntary sector, and has interviewed mostly lay people, and some lawyers. Some of the lawyers who responded expressed concern at the patchy extent of legal knowledge throughout the country. Most local solicitors are not human rights practitioners, and may have less understanding of human rights principles than lay people who have worked extensively with the Act. For some participants this was a concern. They suggest that in the absence of a Human Rights Commission to take sensible test cases, challenges are made using the Act that have no chance of success, and lack credibility. In some situations these may lead to bad case law. There is a danger that over time, particularly if magnified by the media, this could bring the Act into disrepute.

**In the absence of a Human Rights Commission there is no single authoritative source of advice and information that could help to shape the development of a human rights culture.** A Commission's interpretation of case law is of course open to debate, particularly by others who have an interest in this field. But it would also be able to give a lead – a visible lead – which is badly needed. Although Britain ratified the European Convention on Human Rights in 1951, and had a process of "Strasbourg-proofing" legislation prior to October 2000, human rights concepts are relatively new to this country.<sup>x</sup> Without a body to

nurture them, and to foster development and debate throughout a wide range of organisations, it is unlikely that a human rights culture will develop.

## What kind of a body?

Whilst respondents were often clear that they would like to see a Human Rights Commission which could help to build a human rights culture, they were less specific on the type of powers that it might have. This is understandable. Very few people can be excited by structures. What engages them is the vision of what could be achieved, of the outcome that such a body might produce for their client group.

However it is possible to pull out **common themes that might function as some sort of success criteria for a new body** if it is to gain support. These are drawn from the powers mentioned most frequently by interviewees. The criteria are divided into essential and desirable depending on the frequency with which they were mentioned.

### ESSENTIAL SUCCESS CRITERIA

- It should be **independent from government**, with clear terms of reference. Most respondents assumed that the body would be similar to the existing equality commissions, which are non-departmental public bodies. They wanted its remit to be set out in a way that could be easily understood by a wide range of stakeholders.
- It should **promote human rights**. Promoting human rights would include a focus on the principles that lie behind case law, and which support the application of the legislation. Promotional work might include producing guides to good practice, working with the media to raise awareness of human rights, running advertising campaigns, and working in partnership with other interested bodies to raise the Act's awareness. It could also include producing materials for the citizenship aspect of the national curriculum.
- It should have **the ability to take test cases**. Many organisations referred to areas of their work which they felt could benefit from a test case to see how the Act might impact, but which they lack the resources to do for themselves. In addition a sensible test case strategy could save service providers time and money since they will face fewer individual challenges.
- It should **provide advice and information** about the Human Rights Act. Advice might be provided both to individuals and to public authorities affected by the Act – as well as to private companies that could be considered to be public authorities for the purposes of the Act.

## DESIRABLE SUCCESS CRITERIA

- It could **provide training**. Training could be provided by the Commission alone, or in partnership with a range of other bodies. Importantly it should include training for front-line staff, and be designed to engage their interest.
- It could provide a **mediation service**. Those organisations that had experience of the Disability Rights Commission's mediation service felt that it worked well. The Human Rights Act framework with its emphasis on weighing rights might lend itself quite naturally to such a service.<sup>xi</sup>
- It could **research the implementation of the Human Rights Act**. Respondents were less clear about what this might involve, but it could include audits of public authorities as well as summaries of case law in relevant areas to learn more about trends and enable people to improve good practice.

Participants were clear that in terms of the work programme of any new body, a balance should be struck between case law and promotional work that could have an impact on the lives of many thousands of people, and work that tackles persistent inequalities that are experienced by a particular minority of the population. A good example might be the differential impact of promotional activity aimed at the social care sector to improve working practices in residential care for older people, set against the need to ensure that those with severe mental health needs within the criminal justice system have their rights respected perhaps through legal action. The Commission would need to ensure that it was able to balance its resources and priorities to deliver the most effective programme of work possible.

## Equalities and human rights: the great divide

Since this project was conducted against the backdrop of the developing single equality body project, it seemed sensible to at least start to tackle the divide between human rights and equalities that exists within the UK. We are one of the few countries in the world where the institutions that promote and support equality and human rights lead to a separation of these areas of work, rather than perceiving equality as a fundamental human right and therefore inextricably linked to the human rights agenda. The separation of these two agendas in the past allowed the development of an equalities agenda which has been, in the past, focussed relatively narrowly on individual redress for discrimination, i.e. a relatively narrow anti-discrimination approach. The passage of the Race Relations (Amendment) Act and the growing campaign for a general public sector duty to promote equality is an indication that the anti-discrimination agenda on its own cannot deliver equality and must be combined with a more holistic approach to change. Many equality campaigners have been pushing for this type of change in thinking for some time. But there is still a bigger divide between equality campaigners and human rights campaigners than one might expect.

## **AN EQUALITIES AND HUMAN RIGHTS COMMISSION?**

When the government announced that it intended to consider the creation of a single equality body, some human rights campaigners wondered if this might include a human rights element. This debate has intensified during the time that this research project has taken place. Participants were therefore asked to assess the impact that the single equality body process might have on their work, and to give their views on whether equality and human rights might be combined within one body. Their remarks should be seen in the context of both the government's consultation document on a single equality body, and governmental proposals for the implementation of new European legislation prohibiting discrimination in employment in three new areas – the Employment Directive.<sup>xii</sup>

**The majority of respondents to this research were positive about the idea of an Equalities and Human Rights Commission. Many respondents felt strongly that equality and human rights should be located together.** Most of those who responded positively to this suggestion took the view that human rights standards were the bedrock on which equality rests: equality flows from human rights, not the other way around. They recognised that including human rights in a single equality body could help to end the divisiveness and competitiveness that can exist within the equality framework, where one “ism” is perceived as more oppressive than another. A human rights framework does not allow for a hierarchy of oppression because it recognises that everyone is respected for their essential humanity, no matter who they are. But crucially it also recognises that difference must be recognised and responded to if human rights are to become a reality.

Some however were more cautious. Often their caution came from the fact that human rights are a new area for the UK, one which does not have an accepted place in public debate. They felt that a stand-alone Human Rights Commission was necessary if human rights concepts were to be accepted. Whether this caution would persist if an equality and human rights body became the only political reality is unclear: it is possible that the wish for a body to promote human rights might override the initial caution.

**What is clear is that the debate about the place of human rights in our society and the form which the infrastructure to protect and promote the Human Rights Act takes cannot develop in an informed way without more dialogue between those working in the spheres of equalities and human rights.** Further dialogue might help to clarify the success criteria, suggested in the previous section, and enable those working in the human rights field to learn from the experience of the existing equality commissions. There is also an **urgent need for evidence-based research to enable public policy makers as well as equalities and human rights practitioners to understand more about the gaps that will exist if a single equality body does not include a human rights dimension.**

## **MIND THE GAP: THE SINGLE EQUALITY BODY PROCESS**

For all the respondents, their views about the need for a Human Rights Commission, however it might be structured, came from a powerful belief, based on the kind of evidence set out in this report, that without one, there will be no human rights culture in the UK. **Many of the organisations surveyed felt that the majority of their workload would remain untouched by the implementation of the Employment Directive and the single equality body project unless human rights were also protected**, since equality legislation fails to deal with multiple discrimination issues, and doesn't range widely enough across the provision of public services. The Human Rights Act, on the other hand, because of its focus on the dignity of individual human beings, doesn't place people in different discrimination silos according to their race, gender, or age for example. Instead it treats people holistically, considering all of their needs – and it is directly relevant to the provision of public services.

The single equality body process could potentially lead to a number of different outcomes, the majority of which would have minimal impact on the work of the organisations interviewed for this project. Three possible scenarios are considered to assess the gaps that could remain. The phrase “existing strands” covers disability, race and sex. The phrase “new strands” covers age, religion or belief, and sexuality.

- A single equality body supported by existing legislation in relation to existing strands, and legislation relating to employment only for the new strands. This would have little or no impact on the work of most of the organisations interviewed for this research. They do not work on employment issues. For example the quality of care home provision, enabling disabled people to live independently, providing support for unaccompanied refugee children, or ensuring that children in prison receive an education would be unaffected.
- A single equality body supported by existing legislation in relation to existing strands, and legislation in relation to employment and the provision of goods and services for the new strands. This again would have little impact on the work of most of the organisations that participated in this project. Because of the way in which equality legislation is structured, the existing equality commissions cannot tackle discrimination in relation to statutory services (apart from race equality which has specific legislation addressing this area). So the type of issues referred to in the previous paragraph would remain out of reach.
- A single equality body supported by existing legislation in relation to existing strands, and legislation in relation to employment and the provision of goods and services for the new strands, as well as a new general duty to promote equality across public services. The general duty could include the same type of powers that the Commission for Racial Equality was given through the Race Relations (Amendment) Act, including the production of an equality scheme. It is unclear whether such a scheme could impact on the lives of refugee children, or whether children in prison would benefit. A public sector duty to promote equality would prompt local authorities to consider, for example, older people in terms of the type of services that are provided, such as domiciliary support or residential care. But it might not have the same

clarity of impact in terms of the standards that the services are expected to meet. If the care that older people receive is of the same standard as that provided for other service users, it might meet the standard set by the general duty since there is no discrimination. But the care could still be of a standard that fails to respect people's individual dignity. Or provision of care might be assessed on cost rather than an assessment of individual need. It is not clear how an equality scheme could address this if the policy operates in the same way across a range of social groups. But the Human Rights Act could enable this gap to be closed.

In addition to these options there is also the possibility that any new equality body, whatever other powers it has, could be given the power to use the Human Rights Act to challenge breaches of people's rights. This would, for example, enable a challenge to the discriminatory use of "Do Not Resuscitate" notices in relation to older people or to disabled people. Giving a new equality body the power to use the Human Rights Act could make a difference – at least to some of the vulnerable people whose stories have been told in this report. But children's rights have largely been absent from the discussion about a single equality body, and it is unlikely that they would benefit unless a legal challenge also related to another equality ground – for example the rights of disabled children to an education.

**Giving a new equality body the power to use the Human Rights Act in legal challenges without paying the same attention to the way in which the Act is to be promoted misses a crucial opportunity.** All of the respondents to this research project talked of the lack of a human rights culture, the inadequate provision of information about the Act, the lack of systemic change to meet the Act's high standards, and the continued misunderstanding of the nature of the Act as simply a legal document, rather than a set of principles.

Enabling a new body to take legal challenges will enable people to go to court to claim their rights. For those individuals, that is of course their right, and it can transform their lives.

But it will not help us understand the Act itself – only the Act as it applies to people who face discrimination on particular grounds. It will not help with broader promotion of the Act. It won't help frontline staff understand their responsibilities under the Act. It won't help to promote the human rights framework as one that could provide answers for some of the pressing decisions that those who provide our public services have to make. And it is unlikely to address in any systemic way the challenges for change that are evidenced by the individuals' stories in this report.

It will not help to achieve the type of cultural change that the government has said it wishes to see. Only a Human Rights Commission – or a joint equality and human rights body - which could promote and protect human rights can do that. Without this, the Act will never be seen as offering something for everyone.

## **Background: the story so far**

The Human Rights Act gained Royal Assent in 1998, but did not come into force until October 2000, as the government wanted to give public authorities time to prepare for implementation. No Human Rights Commission was set up, nor was one planned. Similar legislation, such as the Race Relations Act or the Disability Discrimination Act, had been supported by the establishment of a commission to safeguard its existence and explain the law and the principles behind it to key stakeholders such as business and service providers. Many commentators drew attention to the fact that the lack of a Human Rights Commission could lead to the Act being unsupported and potentially misunderstood by the media and the general public, as well as by lawyers and the voluntary sector. Instead, the government established a Human Rights Act Task Force, bringing together key government stakeholders with a group of human rights experts, mostly from non-governmental organisations (NGOs). The Task Force, whose role was to help with implementation, was not intended to be permanent, and was wound up in March 2001.<sup>xiii</sup>

During its existence the Task Force, working with the Human Rights Unit established in the Home Office, offered advice and guidance to Whitehall in its preparations for implementation. The Human Rights Unit produced a study guide (with help from the Bar Council), posters, and a summary guide to the Act in a range of different languages.<sup>xiv</sup> They also established a web site to provide basic information about the Act. A second edition of the study guide was published on 2 October 2002, and a fresh publicity programme promoting 6 free regional seminars for public bodies was launched.

At about the same time as the Task Force was dissolved, the long awaited Joint Committee on Human Rights (JCHR), a committee of both Houses of Parliament, was set up. Jean Corston, the Labour MP for Bristol East, took up the Chair of this Committee and its membership was finally agreed in January 2001. The Committee's membership and terms of reference are included as Appendix 4.

## **The current inquiry**

The JCHR met for the first time on 31 January 2001. One of its earliest decisions was to launch an inquiry into the case for establishing a Human Rights Commission for the UK. Written evidence from interested organisations was requested, although the Committee's inquiry was then interrupted by the general election. Once Parliament was recalled, the Committee's inquiry continued. The Committee has so far received evidence from just 10 NGOs outside the specialist human rights field. The majority of the submissions are from statutory bodies, such as regulators or existing equality commissions, lawyers and legal academics, and legal or policy focused organisations in the criminal justice or citizenship field such as Liberty, Justice, Legal Action Group and IPPR which have a long-standing commitment to human rights. A number of advice providers, such as NACAB, the AIRE Centre and Refugee Legal Centre also made submissions.<sup>xv</sup>

The Committee has held a number of oral hearings to question interested parties, such as the existing commissions, and relevant government ministers. The Committee has also heard evidence from a range of children's organisations – and directly from children themselves in an historic hearing – partly in relation to the question of a Human Rights Commission, and partly in relation to its inquiry into the UK government's report under the UN Convention on the Rights of the Child. On 2 September 2002, the Committee published *The Case for a Human Rights Commission: Interim report*.

## Single Equality Body project

Whitehall is also considering these issues. Another project that will have a profound impact on the institutional infrastructure supporting equalities and human rights promotion and protection has started to make its impact on the policy making process – the single equality body project. This follows from the British government's obligations to implement new EU discrimination legislation, specifically the Employment and Race Directives, and to ensure that it makes provision for anti-discrimination measures in relation to employment to protect individuals who face discrimination because of their age, their religion or belief, or their sexuality.<sup>xvi</sup>

The government has taken this opportunity to start a debate about the future of equality bodies in Great Britain, taking the view that the creation of three new commissions to oversee each of these new strands of equality would add unwanted complexity to Britain's equality infrastructure. The Minister of State for the Cabinet Office, Barbara Roche MP, who leads on this project within government, has already given evidence to the Joint Committee. She outlined the background to the project:

*"I said [at a seminar]... nor did I believe that we can have six commissions dealing with six separate strands of discrimination legislation. So the project that I am leading within Government will consider in detail possible models for a single equality body... this is a complex area and we certainly do not want to rush into anything... therefore I would expect that any new body would not be operative in the lifetime of this Parliament."<sup>xvii</sup>*

In addition she was asked by the Committee why the original consultation document, *Towards Equality and Diversity* contained no mention of human rights. Whilst the Minister explained that the consultation document dealt solely with the implementation of the Employment and Race Directives she did add:

*"I have now announced the start of a project looking at the feasibility of a single equality commission in the longer term. The terms of reference for the project do state that we need to consider the relationship between possible new arrangements for promoting equality and those for promoting and protecting human rights more widely."<sup>xviii</sup>*

*Equality and diversity: making it happen* is the latest consultation document to be issued as part of that process, on 23 October 2002. The consultation document sets out three options that the government intends to consider as it develops the next stage of equality legislation. One option is a single equality body, which could deal with a broad range of equality issues and tackle discrimination on the grounds of age,

disability, race, religion or belief, sex, and sexuality.<sup>xix</sup> In this document the Minister also says that government will continue to give consideration to the issue of linking equality and human rights – but respondents are not asked directly for their views on this issue.<sup>xx</sup>

## **Equality and human rights: part of the same debate?**

The debate about the future of equalities infrastructure has important implications for the establishment of a body dedicated to the promotion and protection of human rights. Indeed the Lord Chancellor himself in his evidence to the Joint Committee made it clear that this was a vital part of the current context:

*“It must be in the interest of your committee to engage itself as you think right with the deliberations of Barbara Roche’s Committee. As I say, the consultation paper uses language which I think you could fairly interpret as indicating a long term Government disposition to favour an integrated equality commission. . . . You may feel that the equality legislation. . . . gives protection for human rights in the specific areas each piece of legislation addresses, that is each statute protects a specific sub-set of human rights or, otherwise put, that those statutes should not be seen in a restrictive box marked “Equality” but should be seen as part of a larger box marked “Human Rights”.*

It is unsurprising therefore that the JCHR’s *Interim Report* in its final two paragraphs makes it clear that the arrangements for promoting equality and promoting human rights are closely linked. The Committee notes:

*We conclude that it would be a serious omission for the Government’s forthcoming consultative proposals on a single equality body to fail to give full weight to the element of the project’s terms of reference relating to the promotion and protection of human rights. If any proposals for measures to protect and promote equalities fail to address the relationship between those powers and functions and arrangements for promoting and protecting human rights, they are likely to be incoherent, incomplete and ineffective.”<sup>xxxi</sup>*

It is against this background that the research took place.

## THE EVIDENCE: CHILDREN

In the past year the general public in the UK has been shocked by two high profile cases relating to the lack of adequate protection for children's human rights. The lengthy and detailed reporting of the hearings at the Victoria Climbié Inquiry chaired by Lord Laming has been followed by reporting of the murder of two year old Ainsley Walker by her parents.<sup>xxii</sup>

Yet the idea that children have human rights is not yet universally accepted, despite the existence of the UN Convention on the Rights of the Child, which the UK government has ratified. Even a cursory glance at the media frenzy that ensued after the discussion of proposals by the Scottish Executive to make smacking against the law would demonstrate differing attitudes to this area.

International legal processes under the Convention on the Rights of the Child do offer an opportunity for voluntary organisations to promote children's human rights. Many organisations contributed their own reports to the Committee on the Rights of the Child as they investigated the government's record on children's human rights; probably the most comprehensive of the many submitted early in 2002 was that from the UK Children's Rights coalition. The Committee's response to the UK government's record was published on 4 October 2002 and was particularly critical in relation to the number of children in prison and the type of detention they face, the treatment of asylum-seeking children and the lack of protection for children against physical violence from their parents. It was also critical of the lack of an independent children's rights commissioner for England. The Convention on the Rights of the Child is an important legal document, and a Human Rights Commission might be expected to consider it in its work. But for the purposes of this project interviews focused instead on the Human Rights Act.

### Children's human rights

Many of the interviewees were able to provide evidence of areas where children's rights have not been protected since the Human Rights Act came into force, despite the change in practice that it might have brought. The following rights protected by the Act are particularly relevant to this section and Appendix 3 contains more examples of case law relating to children's human rights.

- Article 2 – the **right to life**. This gives the absolute right to have your life protected by law. Everyone in the UK has this right.
- Article 3 – the **right to be free from torture, inhuman or degrading treatment**. This is an absolute right – it is not possible for it to be limited for any reason. Inhuman treatment could include serious physical assault, or prolonged sexual and emotional abuse, particularly in relation to children. Degrading treatment can include ill-treatment that is grossly humiliating – bullying is a good example of this. The degrading treatment does not have to be intentionally degrading. Its impact is what matters – and it may have a more severe impact if it affects someone who is vulnerable in other ways, perhaps because they are a child. So, for example, poor conditions in a care

home, or in a young offenders' institution, might in some cases constitute degrading treatment, or perhaps even inhuman treatment.

- Article 8 – the **right to respect for private and family life**, home and correspondence. This is a broad right that also includes what the courts have defined as “bodily integrity”, the idea that others cannot interfere with your body unless you consent to the interference, for example by signing a consent form for an operation. This right can be limited in certain circumstances. It also might impact differently on various members of a family. For example a father or mother has the right to see their children following a divorce, and the children have a right to see their absent parents. But this right could be limited if one parent is guilty of violence or abuse towards the child.
- Article 14 – this is known as **the non-discrimination clause**. It ensures that people can enjoy all their other rights without discrimination. Children are not specifically mentioned in article 14, but case law has established that they are included by the phrase “other status” which has broad application. Article 14 is not free standing: it must be linked to another right to be used in court.
- Article 2, Protocol One – **the right to an education**. This should ensure that no-one is denied access to the education system. It also makes it possible for parents to seek an education for their children which is in line with the parents' religious and philosophical beliefs.

Two of these rights – article 3 and article 8 – are particularly important for public bodies in relation to children's human rights. The Human Rights Act can in some situations impose a special duty – called a **positive obligation** – to protect rights. This can apply to harm that one individual might cause another, even though the harm is out of the direct control of the public body concerned. So for example a local authority has a positive obligation to ensure that it protects the children within its care from harm that might be caused to them by their parents. The local authorities charged with protecting Victoria Climbié and Aileen Walker failed to meet this obligation – in both cases the children died despite being known to be at risk because the local authorities failed to ensure adequate protection for their article 3 rights to be free from inhuman treatment and their right to life protected by article 2.

Providing adequate resources forms an important part of demonstrating that positive obligations have been met and could also apply, for example, to the provision of medical facilities to help treat and support children with severe mental health problems who might prove a danger to themselves, or to others. It might also apply to local authorities who need to ensure that they provide housing and other support for older care leavers who might be particularly vulnerable to homelessness and subsequently to abuse from adults – a potential violation of their article 8 and article 3 rights.

## CHILDREN'S HUMAN RIGHTS: INDIVIDUAL STORIES

All of the following examples that people provided had occurred since October 2000. They came from face to face interviews, and from a range of written reports and other material provided by interviewees. Additional material has come from *Community Care* magazine, which is running a campaign called "Changing Minds" to improve services for children and young people with mental health problems. Often the examples listed relate to the article 8 rights of children; sometimes, more worryingly, to article 3 rights as outlined above.

*A twelve year old boy living in a children's home a long way from his brother and sister had not seen them [his siblings] for months. He wanted to know if he could visit them. His social worker kept being changed, and he didn't know his key worker's name. He felt lonely, isolated, and didn't know what to do next.*

*A 15 year old girl in a secure unit told staff of being forcibly restrained and hit, of having food withheld, and of being locked in her room for long periods of time.*

*A mother has been trying to get a secure psychiatric placement for her foster son. He has Asperger's syndrome and an IQ of 48. He was asked to leave a special school after abducting a six year old boy. This followed the development of a sexual interest in babies and young children. At his next school he attacked a member of staff with an axe. He says he wants to kill babies, smears faeces on photos of babies and masturbates in front of his foster mother and her two other foster children. He has strangled the family rabbit. The child psychiatrist says he does not have a mental illness, and social and educational services in his local area say there are no in-patient facilities for his age group.*

*A child with two alcoholic parents had run away from home a few times, and on returning would be "battered". No help had been offered to this child from any statutory service or from school despite the fact that the child said "there's no soap in the house and all my clothes are too small. ... People call me names and make fun of me."*

*A 15 year old girl took an overdose, then threatened her mother with a knife. She began staying out until 3 am. After her second overdose, her mother took her to hospital. The girl told the doctor she was hearing voices that told her to hurt herself and hurt her mother. She saw a family therapist and a psychiatrist. The psychiatrist spent 15 minutes with the girl before discharging her. Her mother believes this is because there were no beds available locally.*

*A child who had been in public care in one council area funded by another council was reaching 18, and the original borough would cease funding their placement at that point. So the second borough said "well go back then". The child had been living in the second council's area for five years, between the ages of 13-18. The child had friends, and a college place. If we hadn't intervened they would have been homeless – thrown out of the care home, and neither council's housing department would have taken responsibility.*

## CHILDREN'S HUMAN RIGHTS: SYSTEMIC PROBLEMS

A child's right to an education, protected by Article 2 of Protocol 1 to the EHCR was, understandably, a particular concern for many of the organisations that participated in the project and was seen as a systemic problem. Many interviewees felt that, in practice, this right was routinely breached for children who are excluded from school because of the low level of support that replaces school provision. The Office for National Statistics reported that almost 10,000 children were permanently excluded in 2000 – 2001. Others pointed to the particular difficulties experienced by teenage girls who become pregnant, or to the discrepancy in educational outcomes for children who are in public care, both of which raise broader social exclusion issues and indicate that for some of these children the right to an education is theoretical rather than real. Children in public care should not receive a lower standard of education from others simply because they are in public care. In such situations, article 14 which prevents discrimination on the grounds of "other status" could be usefully deployed as a negotiating tool for those working with public policy makers and service providers.

*Children who are excluded from school, particularly children who are looked after or who may have had a lot of moves, may not be in full-time education, and they have a small amount of tutor time... the education department doesn't have to provide full-time education, but just some time. (Alison Murphy, ChildLine)*

*Where children are in inpatient units because of their mental health problems, in many of those units the education is not good. Often this is because local education authorities don't properly fund and resource the education in those units. The kids are not getting what they really ought to get. .... (Dinah Morley, YoungMinds)*

*The right to education is particularly a problem around young carers. The fault lies with local policy, where the focus becomes so much on the young person, and around supporting them in their caring role, that they excuse missing school, because it's OK to miss school because you're looking after a disabled parent. (Emily Holzhausen, Carers UK)*

*You can keep still going to school, but you won't get your income support, so it would be a choice between buying your baby clothes, or getting your maternity grant and going to school. But the main problem with education is child care. So once you've had your baby, there's this idea that all young mothers should go back to school and education, but in lots of places there isn't the child care provision. (Marianne Foxwell, Maternity Alliance)*

*63% of children leave public care without a qualification, compared with 6% of the general population. They come in to public care through breakdown in family circumstances; despite public views that they may have done something wrong to come into care. Over 90% come into care through no fault of their own. They follow the normal curve of distribution in their ability, so how can that lack of qualifications be the case? Two types of approach from professionals are not helpful, firstly if you take the line that this person's got so much going on in their head we have to sort that out before we can worry about education, you miss the point that liaison with a peer group*

*at school can help the child. Secondly teachers may have low expectations and say "I don't want to chase her for her homework to be in, because she's in care". (Susanna Cheal, The Who Cares? Trust)*

Another key area mentioned by many interviewees related to children in prison where the conditions that they experience give cause for concern in relation to both article 3 and article 8. This might relate to the treatment that they receive in young offenders institutions to manage their behaviour which could be considered degrading, or if they are in prison, the seriousness of the risks posed to them when they share accommodation with adults. The Children's Rights Alliance for England (CRAE) provided the most up to date information on the numbers of children in prison in *Report to the Pre-Sessional Working Group of the Committee on the Rights of the Child*.<sup>xxiii</sup> At the end of December 2001 there were 2,235 15, 16 and 17 year olds detained in prison service accommodation. 289 were on remand awaiting trial. 245 were 15 years old. Most of them were placed in young offender institutions. But adult prisons provide "overflow" accommodation and this is particularly true for girls. The Chief Inspector of Prisons drew attention to this in June 2001 when he stated:

*I draw attention yet again to the abomination of finding unsentenced children accommodated in dormitories with serious criminals.*<sup>xxiv</sup>

NSPCC expressed their concern:

*Obviously their right to family life has to be curtailed, because they're not at liberty any longer, but there is not enough attention paid to the fact that they are still children, and still should be having links maintained with their family. This is not given sufficient priority. (Barbara Esam, NSPCC)*

CRAE has also drawn attention to the lack of education for children in prisons, and cite a report from the Howard League which found that:

*Boys with special educational needs such as emotional and behavioural difficulties were being placed in solitary confinement in prisons as a response to their behaviour.*<sup>xxv</sup>

The NSPCC also had concerns about the way in which children were treated elsewhere in the criminal justice system, particularly in relation to giving evidence in court.

*When a child has been abused and has to give evidence in criminal proceedings, the defence will do whatever they can to discredit them. They will often use information from their background that is not relevant. If there is a history with Social Services they will use it. This is often nothing more nor less than an invasion of privacy. If the information is not actually relevant to the case, it only serves to distract from the real issues and that is certainly against the interests of justice. (Barbara Esam, NSPCC)*

The mental health needs of children, particularly those detained under mental health legislation were also an issue:

*There are issues around the very tiny number of children who are detained under the Mental Health legislation. We're saying no child or young person should be detained under the Act other than through an assessment that's made by a child psychiatrist. At the moment, as a child you can be assessed by an adult psychiatrist, and sectioned. Our view is that's against their human rights if you like, but it also means that the person who's assessing them may not have a proper understanding of children's developmental issues. They may be seeing something that they're interpreting with an adult viewpoint as psychotic, which could be a developmental issue, and therefore not something that you would section the kid for. (Dinah Morley, YoungMinds)<sup>xvii</sup>*

## **CHILDREN: POSITIVE OBLIGATIONS TO PROTECT RIGHTS**

Some of the systemic failures identified by interviewees related to the positive obligations that the authorities may have to protect children's rights. Failure to intervene at an early stage to protect children's rights to private and family life or respect for bodily integrity protected by article 8, or to be free from degrading treatment protected by article 3 can lead to the type of high profile failure by social services that have attracted media comment in recent months. This might mean providing a more comprehensive service to cover evenings and weekends, or ensuring that procedures are followed through to make sure that follow up checks take place. Services need to take account of the needs of the children that use them, ensuring that they can provide protection for the children's human rights when they need it most.

*In terms of social services, it's a patchy response, especially when it's out of hours, at night-time and weekends and public holidays. That's often the time when some children are perhaps at the most risk - and particularly boys who often call when their problems have already reached crisis point. (Ute Navidi, ChildLine)*

*One of the concerns of local authorities is the isolation of foster care; we don't know what's going on. 70% of children [in public care] are in foster care. It was always intended that children in foster care should have visits from a social worker to support them, and that the social workers or link workers were supposed to be different from the one that supported the foster family. In this way, the child had the opportunity to come forward with difficulties. I think children are in great danger, because of the shortage of social workers. The recruitment is right down, so you can see that some difficult issues for children that are emerging might be overlooked in the allocation of resources to the much more serious cases. (Susanna Cheal, The Who Cares? Trust)*

*We know of a young man who has been in public care between the age of 10 and 18. During that time there was a 3 year period during which he was moved 35 or 40 times. The level of disruption and insecurity is astonishing. He didn't know how to challenge this: he has participated in a video for us to help others. (Keith Harrison, adult support worker, Article 12) [Article 12 is an organisation led by children. They have to employ an adult support worker because they are not old enough to be Trustees of the organisation.]*

A particularly difficult balance to strike is the need to meet the positive obligations the Act imposes to respect the child's right to family life which can often make

situations more complicated. The Human Rights Act provides a useful framework within which such decisions can be made to ensure that children's human rights are protected.

*We hear of children who are to be treated for a mental health problem where families are dismissed. Sometimes that's appropriate, because what's going on in the family is causing the problem. But where it concerns us is when someone's over 16, and then the parent doesn't have to be consulted. That parent has probably been the carer of the child through a very difficult period, and can frequently find themselves outside the loop of the child's care. So that all the experience they've had, all the interpretation they're able to offer, as to what's going on with the child that they've seen for so long, is not valued. It's important to respect those family links. (Dinah Morley, YoungMinds)*

*There are some really difficult situations which involve family separation – for example where a single mum meets a new partner, and has children with him. Then that family separates – perhaps because the mother has mental health problems for example. The stepfather will look after his own kids, but not the stepchild, who usually ends up in public care. Then the stepfather gets a new partner. That's usually the time that all contact with the child's stepfather and brothers and sisters stops. The right to family life becomes complex in these circumstances but social workers could take the extended family structure into account when they prepare the care plan. (Yvonne Spencer, Children's Legal Centre)*

*When children are placed for adoption very often families are split, because it's felt that different sets of adoptive parents may be more suitable for different siblings. I think it needs to be made a much more rigorous requirement that children have the opportunity to be linked to other people in their natural family. This is important because whether children have natural parents or adoptive parents those parents are not going to live as long as their siblings, and they do need some family links, if it's safe for them to have them of course. (Susanna Cheal, The Who Cares? Trust)*

Interviewees also highlighted areas where it was easy for the authorities to say that an issue had been tackled – for example around bullying – where the policies and the reality failed to match up. Schools need to ensure that they have policies in place to deal with bullying if they are to meet their positive obligations to protect the child's article 8 rights. Yet over 20,000 children called ChildLine to talk about bullying between April 2000 and March 2001 – 17% of all calls - and staff reported that they saw no change in the level of calls which they received on this topic during 2001-2. Voluntary organisations are often in a good position to judge the awareness of service providers to a new law or standard, particularly when they work with those whose lives should be made easier by the changes.

*Schools do have a statutory obligation to have a bullying policy in place now, but there are lots of nice shiny bullying policies on shelves that don't see much of the light of day. What we hear from children and young people is that it is still a major issue in their lives. (Alison Murphy, ChildLine)*

## Level of awareness of the Act

Many of the organisations interviewed were quite clear that their mission was wholly or partly to promote and protect children's rights. The Children's Rights Alliance for England and ChildLine both gave evidence to the Joint Committee on Human Rights in the summer of 2002. One organisation, Article 12, even takes its name from the relevant article in the UN Convention on the Rights of the Child that safeguards children's rights to participation in decisions affecting their lives.

*We work with a number of other campaigns, and if human rights aren't included, we would bring them in (Keith Harrison, adult support worker, Article 12)*

*We may use human rights in some of our consultancy work where we're developing services for local authorities or health authorities because it may be a way of drawing to their attention that they are quite remiss in what they fail to provide. We did offer some training on the human rights implications for children's mental health. (Dinah Morley, YoungMinds)*

*Part of our role coordinating as the Alliance is to be the spokesperson on rights, and to make sure that the language, of rights is used. We're very conscious that the Human Rights Act does apply to children as well, though I think a lot of people don't realise that. (Veronica Plowden, CRAE)*

*I can confidently say that we are paying more and more attention to the human rights of children and young people than ever before. (Ute Navidi, ChildLine)*

Others identified gaps in their thinking where the Act had not become an accepted part of their work, or saw problems with using human rights arguments – particularly in relation to the perception others have of the Human Rights Act.

*In the Climbie case, our submission referred a lot to the Children Act, but was not cross referenced to the Human Rights Act. Also we would be careful about using it overtly in campaigning directed at the general public, rather than professionals as there's a perception that it would be an own goal. (Bill Badham, Children's Society)*

*There is a reluctance to use the language of rights at the moment, not only in government but also in some parts of the voluntary sector. That's partly because the government is working increasingly in partnership with the voluntary sector, so the voluntary sector is rather reluctant to use that language if the government doesn't wish to, and they prefer the language of welfare and needs. (Veronica Plowden, CRAE)*

*Local government is exercised about fulfilling various targets and outcomes attached to particular policies, like Quality Protects, Education Guidance. They are linked to children's rights under the UN Convention in the sense that children have to be healthy and well, they need an education etc. I don't think the overarching Human Rights Act has yet been fully absorbed. (Susanna Cheal, The Who Cares? Trust)*

Interviewees were also asked about the awareness that children themselves might have about the Human Rights Act and its relevance to their lives. Had there been

any work to make the issues relevant for children since the initial schools' competition?<sup>xxvii</sup> Or does children's awareness of their human rights really only stand a chance with the introduction of the new citizenship curriculum from autumn 2002?

*Awareness of the Human Rights Act among the population is low. So it's not surprising that children don't know about the Act. And age discrimination has often meant age discrimination towards the other end of the age spectrum. Until this September children have not been taught in a very explicit way about their rights. .... We have great expectations that rights issues, whether it's the Human Rights Act or the UN Convention [on the Rights of the Child] will be taught. We are developing our own materials at the moment which will be launched later in the year, in which we are looking at the issue of respect. (Ute Navidi and Alison Murphy, ChildLine)*

*The young people we meet have no or little understanding of children's rights issues. (Keith Harrison, adult support worker, Article 12)*

Some interviewees pointed out that there was little informed understanding of the Act from staff and policy makers providing services for children; rather a low level general awareness which was often ill informed, and sometimes completely wrong.

*While lawyers may need to take on particular legal challenges, it is vital that practitioners draw on the Human Rights Act to champion and advocate best practice. But I am not sure how far this is actually happening. (Bill Badham, Children's Society)*

*If you said [to local authorities] are you aware of the Human Rights Act they would say yes, but they wouldn't necessarily have thought it through in their work context. The voluntary sector agencies that we come across are much sharper. (Dinah Morley, YoungMinds)*

*A parent called us to say that her child's school weren't providing SEN support which she was pushing for. The head teacher told the mother "you are infringing your child's human rights". When the mother phoned us she was frightened of being taken to court because of what the head teacher had told her. (Yvonne Spencer, Children's Legal Centre)*

## **Evidence of good practice**

Some interviewees were able to identify evidence of good practice where public policy or service provision had taken account of the Human Rights Act, although not often explicitly. In one case a separate phone line for children run by ChildLine and funded by the Department of Health caters for the needs of children in public care, to help them gain information about their rights, and seek help if they need it. It is interesting that in many cases it seems to be the voluntary sector that perceives gaps where good practice is needed, whether or not these services are publicly funded, or funded by other donors.

*For children who live away from home in local authority care and in boarding schools for example ChildLine has a separate line that is funded partly through the Department of*

*Health so that we can give them priority in terms of access to our service. Every day around 4,000 children call ChildLine but lack of funds means that only 1,800 of them will get through to our counsellors for comfort, advice and protection. The special line is a way of prioritising a particularly vulnerable group of children. (Ute Navidi, ChildLine)*

ChildLine also identified police performance as an example of good practice capable of meeting positive obligations to protect children's human rights – particularly their article 2 or article 3 rights:

*The police always act. In the past we did a piece of research and the police came out as really being very good at responding when our counsellors refer a child who's say, in a phone box, or where that child needs immediate protection. (Ute Navidi, ChildLine)*

Other organisations provided examples of instances where support exists for children to find out about their rights, and raise issues about the care that they receive:

*The whole thing about a children's rights officer – that's very positive for young people. But sometimes I would question how seriously their views are taken. (Keith Harrison, adult support worker, Article 12)*

*We are running a project funded by Essex County Council to represent children in care in Essex. Children can find out their rights. This service also enables us to ensure that children's views are taken into account when decisions are made by the authority affecting their lives. (Yvonne Spencer, Children's Legal Centre)*

## **General conclusions**

From these interviews it seems that the Convention on the Rights of the Child still has top priority for children's rights organisations, particularly this year when the UK government appeared before the UN's Committee on the Rights of the Child. The Human Rights Act has not yet made much of an impact on work and thinking in this sector apart from in those organisations that conduct legal casework on behalf of children. Of course, it is inevitable to a certain extent that children's organisations will focus on a convention designed specifically to protect the rights of their client group, and argue for its incorporation within domestic law. But this focus has obscured the use that could be made of the Human Rights Act.

It is clear from participants' interviews that the Act has failed to have much of an impact in the public sector, evidenced by stories of continuing individual violations of children's rights. It is logical to assume that for as long as the Act fails to be used as a framework or model of good practice by those planning and devising services, individual violations will continue to take place, causing distress to the children concerned, and leading to potential compensation claims in the future.

The principles underlying the Human Rights Act could, if better understood, make a significant impact on improving children's protection from abuse and degrading treatment. The Act could provide a useful framework within which difficult decisions

about care plans, adoption and fostering could be taken. And it could transform the debate about children who are excluded from school. Of course disruptive children do not have a right to prevent their classmates from accessing their right to an education – but nor do they themselves forfeit this right by virtue of their behaviour.

Many organisations in this sector appear somewhat unconfident at engaging in Human Rights Act based campaigns - even in organisations that are explicit about their role in promoting children's rights and who regularly apply the Convention on the Rights of the Child. In part this appears to be due to a fear that public perceptions of the Act are unfavourable, and it would therefore produce a backlash in campaigning terms. But it also appears to be due to a lack of understanding about what the Human Rights Act could offer to those working to protect children's human rights.

This lack of confidence leads to a missed opportunity to use the Act as part of a range of arguments that can be made to policy makers to enable changes to take place in a way that would improve children's lives.

## THE EVIDENCE: DISABLED PEOPLE

Many disability rights campaigners have long defined themselves as civil rights or human rights activists, particularly those involved in organisations run by and for disabled people. The aims of an early attempt to force anti-discrimination legislation onto the statute books were explicit in its title: the Civil Rights (Disabled Persons) Bill.<sup>xxviii</sup>

Eventually in 1995 the Disability Discrimination Act (DDA) was passed, followed in 1999 by the Disability Rights Commission Act which set up a new equality body to promote and enforce this legislation. The Commission started work in April 2000, and though it has vigorously promoted and enforced the DDA, it cannot take cases under the Human Rights Act. The Disability Rights Commission published a guide to the Human Rights Act in September 2000. This guide, *The Impact of the Human Rights Act on Disabled People* has been in constant demand since publication, demonstrating the interest from this sector in the Act's potential to enable disabled people to claim their rights. In the light of the single equality body project, the disability rights sector is particularly interesting since it is one where existing discrimination law and human rights law intersect.

### Disabled people's human rights

Many of the disability organisations that were interviewed for this report made it clear that they would, in most cases, use the Disability Discrimination Act in order to help disabled people gain access to their rights. However, many were also aware of individual cases or circumstances that could be considered to be violations of the Human Rights Act where the DDA would not be applicable. The following rights are particularly relevant to this section, and Appendix 3 contains more detail about relevant case law.

- Article 2 – the **right to life**. This gives the absolute right to have your life protected by law. Everyone in the UK has this right. A failure to protect the right to life – for example by denying treatment to a disabled person, or using a DNR notice (do not resuscitate in the event of severe medical trauma) because of judgements made by medical professionals about quality of life would be a violation of human rights.
- Article 3 – the **right to be free from torture, inhuman or degrading treatment**. This is an absolute right – it is not possible for it to be limited for any reason. Inhuman treatment could include serious physical assault, or prolonged sexual and emotional abuse. Degrading treatment can include ill-treatment that is grossly humiliating – for example through poor quality care in residential settings. The degrading treatment does not have to be intentionally degrading. Its impact is what matters – and it may have a more severe impact if it affects someone who is vulnerable in other ways – perhaps because they cannot communicate easily. So poor quality care such as denying a disabled person food as a punishment, or systematically preventing

a disabled person from making decisions about how they will spend their day could constitute degrading treatment.

- Article 5 – the **right to liberty and security of person**. This prevents a person's liberty being withdrawn through arrest or detention except in specific circumstances – for example to prevent a crime, after a crime has been committed, or after conviction by a court. This is particularly relevant to people with mental health problems who can be detained under the Mental Health Act.
- Article 6 – the **right to a fair trial**. This applies to both civil rights and criminal matters, and requires adherence to principles of natural justice – such as the disclosure of evidence to both sides in the case, an ability to question witnesses, and to be heard by an independent tribunal. Disabled people who appear before the courts, or before a benefit tribunal, may be able to rely on this right if the process does not take account of their specific needs, for example for communications assistance, or frequent breaks to prevent them becoming exhausted when giving evidence.
- Article 8 – the **right to respect for private and family life**, home and correspondence. This is a broad right that also includes what the courts have defined as “bodily integrity”, the idea that others cannot interfere with your body unless you consent to the interference, for example by signing a consent form for an operation. This right can be limited in certain circumstances. It also might impact differently on various members of a family. A disabled person who needs care to stay in their own home could in some circumstances challenge a decision not to provide adequate support using article 8 particularly if the decision is based on cost, not on an assessment of need. This is because the Act requires consideration to be given to the needs of the individual in order to be sure their private and family life and home life is respected.
- Article 14 – this is known as **the non-discrimination clause**. It ensures that people can enjoy all their other rights without discrimination. Disability is not explicitly mentioned within this article, but is included under the general phrase “other status”. Article 14 is not free standing: it must be linked to another right to be used in court.

Article 2, 3 and 8 rights are particularly important and as a consequence the Human Rights Act can in some situations impose a special duty – called a **positive obligation** – to protect these rights. This can apply to harm that one individual might cause another, even though the harm is out of the direct control of the public body concerned. The concept of positive obligations applies to the provision of domiciliary care for disabled people, enabling them to stay in their own homes – showing respect for their article 8 rights - rather than be forced into residential accommodation against their will. And individual care providers may need to ensure that they have effective staff training to prevent treatment of disabled people that could meet the threshold for degrading or inhuman treatment under article 3. When disabled people are treated in a way that violates their human rights, they should be

able to challenge these violations – in a court if necessary – since providing a remedy for violations of human rights is an essential part of the concept of positive obligations.

## **DISABLED PEOPLE’S HUMAN RIGHTS: INDIVIDUAL STORIES**

All of the examples that people provided had occurred since October 2000 – most had occurred between July 2001 and September 2002. They came from face to face interviews, and from a range of written reports and other material provided by interviewees. There are a wide range of examples that demonstrate that the Human Rights Act is not being used to impact upon the everyday lives of disabled people. Many of these examples were related the lack of attention that was paid to people’s own individual needs. In many cases this related to a lack of protection for, or understanding of, disabled people’s article 8 rights to respect for their private and family life, including the concept of bodily integrity.

*I know of a man with autism and a physical disability, who’s lived in a care home, run by a voluntary organisation, for 27 years. From time to time the home increased the client’s fee – and the local authority eventually found itself five years in arrears in relation to fee increases. Eventually the voluntary organisation said “pay the fee, or we’ll terminate the placement”. Although this was a contractual dispute over fees we advised the client’s parents that their son had rights under community care legislation and the Human Rights Act. They were able to argue that the local authority had failed in their obligation to assess their client’s needs as they hadn’t attended any of his assessment reviews. We argued there was a possible violation of his Article 8 rights to his home and family life, and potentially of his Article 3 rights as well, given his autism and the traumatic effect of any major change were he to be removed from his care home.*

*We have a client who needed support at home through a care package. He was a middle aged man, and the care package had operated successfully for 11 years. He had personal care to help him in the mornings with dressing and showering and then some care at night. He had a neurological condition so he also needed passive exercise to help his muscles. One carer had looked after him. Then the new Manual Handling Regulations came into force, and it needed two people to do the same job – which increased the cost. His local authority assessed him and decided this didn’t constitute personal care and they withdrew the service and left it all to his wife. We advised him to use the complaints procedure and to cite Article 8, and the lack of respect for his private and family life.*

*We advised a woman with progressive Multiple Sclerosis. She’d been married for 50 years (she was 72 years old) and her husband was her main carer – with a care package to help. The local authority said they couldn’t afford to pay for 2 carers once the Manual Handling Regulations came into force, so she would either need to go into a home, or pay the difference for her care – and they gave her 2 weeks’ notice to choose. We advised her to use Article 8 arguments in making a complaint under the complaints procedure: the authority had paid no attention to her individual needs.*

*There was an issue came up where a father – a deaf man - was told he had cancer, and it was his seven year old daughter who relayed that information because he couldn’t*

*understand his doctor and there was no interpreter. You can imagine the emotional effect on the child and the family.*

*We know of a man in his mid 20s with severe challenging behaviour and autism: he was in a care situation and was the only young man there – or one of very few – who hadn't been sectioned. His psychiatrist had put his mother under pressure to consent for him to be given psychotropic medication, but she was very unhappy about this because of the adverse side effects for him when he had previously been prescribed such medication. His mother came to us and said that she believed that an appropriate behaviour support programme would manage the behaviour without the need to resort to drugs. This was backed up by independent expert assessment. He was given compulsory medication without his consent – as was the case in Bournemouth. Fortunately the client was moved to an alternative placement where his needs can be more appropriately met.<sup>xxix</sup>*

*If deaf people are arrested, because of the shortage of sign language interpreters they can be held in custody for a lot longer than would be the norm. There was one example, about a year ago, when six people who had blocked the street as part of a demonstration were arrested. Five were deaf and one was not. They got to the police station. The person who wasn't deaf was interviewed straight away and released, he was given bail. The deaf people had two extra days in the station while they were trying to find interpreters for them. When the court case came up, and they challenged the process, the whole case was dropped.*

*We've heard of somebody who has been kept excessively in seclusion in Ashworth High Security Hospital in circumstances that are contrary to the Mental Health Code of Practice. The court held on appeal that the practices weren't illegal – so that in effect people can ignore the Code of Practice. That's a very significant decision because almost everything that relates to the proper care of detained prisoners is in the Code, not the Mental Health Act.*

## **DISABLED PEOPLE'S HUMAN RIGHTS: SYSTEMIC CHALLENGES**

As well as these individual examples, many respondents also identified more systemic problems that did not seem to have changed since the Human Rights Act came into force. Again, disabled people's article 8 rights to privacy and in some cases their article 3 rights to be free from degrading treatment are most at risk. Some respondents felt that the time taken by social services to make decisions could in itself constitute degrading treatment because of the severe impact that it has on the lives of particularly vulnerable disabled people who often have complex needs. Others believed that the persistent failure to allow disabled people control over their own lives certainly violated their article 8 rights to privacy, and might, on some occasions interfere with article 3 rights as well. Interviewees also raised Article 6 issues – the right to a fair trial – in relation to benefit tribunals, both in terms of the tribunal process itself which did not always deliver equality of access for the disabled person, as well as the climate within which decisions are made, which on occasions did not present an appearance of independence.

*Quite often we hear of circumstances where people with severe learning disabilities are left in situations where there is considerable mental and physical pressure on both them and their carers. There are long time delays in carrying out their assessments, drawing up appropriate care plans and agreeing service provision. The failure to provide appropriate and timely care and support could in some cases amount to a violation of the client's personal integrity – both physical and psychological integrity. We think that Price might relate to this area, particularly in relation to articles 3 and 8. (Elaine Kay, DLS)<sup>xxx</sup>*

*In relation to care homes, people have their time organised for them. The sort of things you want to do in your own home can't happen. Things like transport provision are usually for the convenience of the provider, not the user. We know of cases [in residential settings] where people have been left in their own excrement, where they are put to bed at five o'clock in the evening, where they are not allowed to watch TV in the evenings. (Andy Rickell, BCODP)*

*As it is at the moment the person who takes charge of you when you go into hospital, when you're compulsorily detained or are likely to be compulsorily detained, the person who has all the say is somebody called your nearest relative. That is statutorily defined: there is a list of people that it can be – you can't choose. So, even though your mother might be your abuser who is causing your mental health problems, she probably would be the next of kin, and therefore have all the say over whether or not you are detained, and whether you're released. You can object – but people aren't always in the frame of mind to do so. (Rowena Daw, MIND)<sup>xxxi</sup>*

*I was just discussing with a benefit agency about providing a sign language interpreter for somebody and they said "oh, we haven't thought of that"... I mean it isn't a universal provision. Some areas will provide someone. And also civil court issues – if you are in the criminal court system, you've the right to an interpreter. Within a civil court system, you've not. You have to provide your own interpreter, which is a very big difference. (Jeff McWhinney, BDA)*

*In relation to benefits appeal tribunals, I'd question whether people get a fair trial. There are prejudices from the appeal panel: people say things like "are they putting it on?" I know of one person who was quite ill at the time of the hearing and gave confused answers where that was said. Training can't overcome the prejudices that people have it seems. (Andy Rickell, BCODP)*

*The Double Prisoner research project identified deaf people in prison, who rarely get parole, these prisoners tend to serve a longer sentence than hearing prisoners. When they come up for parole review, people say, "well, you haven't made any attempt to improve yourself while you've been in prison, you've done no courses, you've done no training". Well they haven't because there's no interpreter provided, and they're stuck in that vicious circle, and they end up staying in prison longer. We've raised this with the Home Office on several occasions, but we haven't had a positive response. (Jeff McWhinney, BDA)*

*RNIB is doing some work on audio description in criminal trials – where objects are being shown or where a video is being shown. It was raised when a court wanted some*

*audio description. The courts had never thought about it before, or the implications under article 6. So we will take that work forward. (Catherine Casserley, RNIB)*

*We are aware that research institutes have access to health records that are not anonymised and that researchers are able to read about a named patient's personal mental health records. (Rowena Daw, MIND)*

People First have produced material on the Human Rights Act for their members which contain examples of situations they have been told about where people with learning difficulties have been denied the ability to make choices for themselves. For example:

*Kenny is scared to accept offers of drinks when he is outside of his group home because the manager has said residents are only allowed to have two cups of tea a day.*

*Simon was told he must tidy up his room when the staff told him to, otherwise he would be sent to the long stay hospital.*

*Debra has to go to bed at 9 pm, get up at 7am and have a bath straight away – just because the staff say so, not because she wants to.*

There is also evidence of discrimination against people with specific disabilities in the provision of services, and in these circumstances article 14 may be applicable:

*Direct payments are not usually given to people with mental health problems, and that is potentially a Human Rights Act problem. We treat it as a Human Rights Act issue. (Rowena Daw, MIND)<sup>xxxii</sup>*

The British Deaf Association (BDA) had particular concerns about the status of British Sign Language, and believe that article 14 may be applicable in relation to the discrimination deaf people experience in relation to lack of provision for their first language to be used. Article 14 specifically refers to "language" as one of the grounds on which discrimination is prohibited.

*The Council of Europe Charter for the protection of regional minority languages is an ideal framework for the inequality of sign language users to be addressed on a pure linguistic basis. The Council of Europe have suggested that sign language is not included in that because it's based on the spoken language. So the recognition of sign language is a debate that's been thrown back and forth. They say it's not a human rights issue because it's a disability issue, and then you move to the disability side, they say, well no, it's not really a disability issue, because it's a language issue, and we do tend to get bounced back and forth between the two. But users of sign language could be bigger than the Deaf community that use it because children of deaf parents acquire sign language as a first language from their parents and then acquire English later for instance. Linguistic human rights are a big issue for any minority that has not been addressed in any legal framework apart from the Council of Europe's Charter. (Jeff McWhinney, BDA)*

In addition disabled people still find it difficult to exercise their right to vote, although this is protected by the Human Rights Act (article 3, protocol 1 of the

ECHR protects the right to free elections). Many of the interviewees referred to the report *Polls Apart 3* as a good example of the way in which disabled people are unable to access their right to vote.<sup>xxxiii</sup> As its name indicates, it is the third such general election survey. The report contains many examples of disabled people's experiences of polling day, for example:

*I had to shout from outside two sets of doors to try and get someone to help. Eventually another voter asked someone to come out to me. There was no provision at all for disabled people. I had to vote in a car park and pass my vote to a stranger to put it in the ballot box (I hope they did). To top it all it was raining and I had to wait outside during all this.*

Free elections also involve the ability to stand for office. The BDA is supporting a deaf person who had wanted to stand for Parliament at the 2001 general election and had been prevented from doing so due to the law on election spending which does not take account of disabled people's specific needs.

*At the last election a deaf person stood for one of the three main political parties as their prospective parliamentary candidate and was told he would have to meet the cost of an interpreter out of his campaign funds. The Home Office has a clear guide to the restrictions on a campaign budget – it's really for campaign leaflets, posters and mailings. But he would have had to use that to meet the additional costs of a sign language interpreter: he wouldn't be allowed to go over it meaning that he has less money to spend on campaign leaflets, posters and mailings. It was even more discriminatory as during the last election four years ago, exactly the same thing happened, and it was going to be looked into, and it obviously wasn't, because it happened over again. This is like saying to deaf people – just do not stand for election! (Jeff McWhinney, BDA)*

## **DISABLED PEOPLE'S HUMAN RIGHTS: POSITIVE OBLIGATIONS**

Interviewees also provided examples to support their fear that the positive obligations that public authorities might have under the Human Rights Act were not being met. For example, the improper and discriminatory use of "Do Not Resuscitate" orders could be a failure by NHS trusts to meet their positive obligation to protect article 2, respect for the right to life. In addition some respondents identified areas where a lack of resources or information that is accessible could make it impossible for positive obligations to be met in a meaningful way, or where, once a violation had occurred, there was no appropriate legal remedy available. Women on mixed-sex wards may be particularly vulnerable to abuse if they have mental health needs, and positive obligations to protect their article 8 rights to privacy may apply. Bullying in schools or residential accommodation can also be a violation of article 8. The BDA identified a specific issue where lack of understanding and information about British Sign Language could lead to decisions that fail to take account of the positive obligation to protect the right to family life in relation to custody cases. It is ironic that this decision may have arisen through a wish to protect the human rights of the child involved.

*It's a significant challenge I think for all disabled people to secure the privacy that they might need, or for a school to protect a child from bullying. Disabled people as a constituency are far behind the parlance of human rights. It becomes the norm that it is acceptable for a teacher to intervene in a very lukewarm way if one child is, or a teacher is, exercising behaviour that can be construed as bullying. It's just endemic. (Kate Nash, RADAR)*

*Where an authority has contracted out provision of care services to a private or voluntary sector provider, and some of the care practice in a particular care home amounts to possible violations of Article 3 or 8 rights individuals would have difficulties in seeking their rights. This is because such a care home would not under current law qualify as a public authority to enable action to be taken against them under the Human Rights Act and yet the positive obligations that the authorities have towards their individual clients aren't being met. For example, with residential placements what happens if social workers systematically fail to turn up to the individual's one review a year – how can they monitor the situation and know what's going on? (Elaine Kay, DLS)*

*A big area is mixed-sex wards. Women with mental health problems on mixed-sex wards because of their vulnerability and often sometimes their lack of inhibitions as well, which is part of their condition, just should not be on mixed sex wards. It just should not occur. The government has a target to reduce if not to eliminate that. And I presume the Human Rights Act applies. (Rowena Daw, MIND)*

*I think in custody cases often the social services children's team and the social worker of the deaf, don't communicate with each other. British Sign Language is very visual so if a person disagrees with what's being said in a case conference or something like that, a hearing person can maybe put their case across in a strong verbal way. But a deaf person, if they try to put their case in a strong way, can come across as very aggressive, or can be read as very aggressive through a misinterpretation of the language which includes expression through body mannerisms. This can make the situation a lot worse, particularly in situations like custody cases. There was a deaf man who was quite angry, and was doing this sort of thing, and it was noted down, but it didn't mean that he was actually going to hit somebody, he was expressing his anger. (Jeff McWhinney, BDA)<sup>xxxiv</sup>*

*We continue to hear of DNR notices on the hospital beds of disabled people where it may be perceived that they [non-disabled people] have longevity of life or a more valuable life than somebody with a chronic health condition for example. We also know of a disproportionate amount of disabled people on trolley waits within hospitals. We know of individual disabled people who have died as a result of being on a trolley wait. (Kate Nash, RADAR)*

*There is absolutely no change in relation to DNRs [do not resuscitate orders]. Nothing has changed. (Andy Rickell, BCODP)<sup>xxxv</sup>*

Since the police seem reluctant to investigate instances where disabled people have been assaulted, there may also be a failure of the positive obligation to provide a legal remedy for human rights violations. It appears that people with learning disabilities in particular may be regularly seen as unreliable witnesses. Both Rachel Hurst and Andrew Lee discussed the Donal MacIntyre programme broadcast on UK television in November 1999. This programme, together with additional unbroadcast

footage, showed people with learning disabilities being threatened and abused by care home staff, though no police action has subsequently been taken. In fact Kent Police accused MacIntyre of wasting police time. During the course of this research Donal MacIntyre won his libel action against Kent Police, who have subsequently apologised to him. An independent report into the residential home concerned said:

*Most of the staff seem to have accepted the culture where restraint and control that sometimes involves pain and always deprivation of personal rights is appropriate for people with disabilities<sup>xxxvi</sup>.*

Andrew Lee and Rachel Hurst provided more examples where despite evidence of criminal acts no action was taken to bring an offender to justice.

*We know of a person beaten up on his way to work. His family are trying to get the police to be interested but the police have told his brother that he [the victim] is an unreliable witness. After they did nothing, he was beaten up a second time. This happens even in very serious cases. There is a NHS hospital we know where there has been serious abuse. We wanted to set up a People First group there. The authorities didn't follow up the allegations; instead they allowed the NHS to investigate and now the evidence from those people can't be used in a court case. We think the police should investigate and take a case forward unless it is proven that someone is an unreliable witness. (Andrew Lee, People First)*

*We've got a case of a young black man, who's severely autistic, we've got medical evidence that he was beaten black and blue in the home, his grandmother took him away. The CPS said initially they would take the case on, but then they withdrew, because they said he couldn't give evidence. Of course he couldn't give evidence: you aren't required to give evidence in a criminal matter. (Rachel Hurst, Disability Awareness in Action)*

## **Level of awareness of the Act**

Public authorities are only part of the audience for the Act. It is also important to know how those working in the voluntary sector, and their clients, understand this new law. So, every respondent was asked to help give a temperature check of their sector by expressing a view about levels of general awareness of the Act. They were also asked if their organisation used human rights arguments in their work.

*We're using human rights arguments all the time at the moment in terms of changing the Mental Health Act where human rights issues come up all the time. There is a committee looking at the composition of Mental Health Review tribunals, and we've been consulted about that, we've been using human rights arguments in those consultations. (Rowena Daw, MIND)*

*People are aware of it, but they don't understand it – for example the type of thresholds that have to be reached. They also don't understand how it interacts with public services that are contracted out. (Elaine Kay, DLS)*

*The kinds of users who contact us, not necessarily for specific legal advice, but for semi-legal advice, if you like, show quite a good awareness of the Human Rights Act. They often have unrealistic expectations of it, and the area that they mostly know about is to do with how they can be treated against their will. So it's more at that general level of something that they consider to be a breach of how they understand human rights... although they may have an unrealistic expectation of how helpful the Act might be. (Rowena Daw, MIND)*

*We work with Rights Now, which is the UK campaign for comprehensive non-discrimination legislation. We feel that the Disability Rights Commission should have the right to take cases under the Human Rights Act I think the vast majority of disabled people don't quite understand the difference between human rights and civil rights. Because of the long period of education and consultation that's going on around non-discrimination legislation, they understand that very well. But there is nothing that's happening in the mainstream world that is teaching them about the particular relevance of human rights and the Human Rights Act. (Rachel Hurst, Disability Awareness in Action)*

*Our mission is to secure by all democratic means our human and civil rights.... They are two sides of the same coin, and rights are in everything we do... The media exposure of the Human Rights Act and the Pretty case has brought rights into the open but not in a way that is positive for disabled people.<sup>xxxvii</sup> (Andy Rickell, BCODP)*

*Our members would think of human rights as about bullying – they would know about that experience, but not necessarily about the Human Rights Act. (Andrew Lee, People First)*

*What we're looking at is specific issues for disabled people that they be treated equally, to live their life free from discrimination. And that covers a lot of things. So we don't tend to rely on the Human Rights Act itself, though we do use the term human rights but in a slightly different context. We'd like people to get a mind set of not saying, "well can I have this right?" but "it's your human right". We'd like to get that thinking around civil rights out there (Haqeeq Bostan, RADAR)*

Levels of awareness in the sector may rise now that RADAR has introduced a human rights award intended to "honour excellence in the service of human rights". The first winner will be announced on December 3 2002.

## **Evidence of good practice**

Some organisations were also able to provide evidence of good practice where they considered that public authorities - sometimes inadvertently – had policies or procedures that met Human Rights Act standards, or took account of any positive obligations that they might have.

*One of the positive things that is improving is around patients' councils and rights to advocacy, people's right to information and right to make complaints which is Human Rights Act stuff is improving. (Rowena Daw, MIND)*

*I believe that in employment the scheme that funds interpreters - access to work - has been very good. It releases the potential of deaf sign language users, it's good practice, and a lot of deaf people are using that scheme. (Jeff McWhinney, BDA)*

Complaints procedures are often perceived to be biased because they are conducted by officers from within the same local authority department that would have to meet the cost of providing care. These decisions of course can be challenged in court and it is this access to court which guarantees compliance with article 6 rights to a fair trial. However given that disabled people often find it hard to challenge violations of their human rights in court, it would be sensible (and good practice in terms of avoiding expensive legal cases) for complaints procedures to be based on the principles of natural justice that article 6 contains, particularly "whether the body in question presents an appearance of independence"<sup>xxxviii</sup>. One respondent had evidence of good practice here:

*Some local authorities make sure that they have complaints investigating officers who are independent of the authority. For example Surrey has an Advocacy, Mediation and Independent Investigation Service. That's good practice. The Valuing People policy document and the Care Standards Act are examples of government good practice. (Elaine Kay, Disability Law Service).*

The Care Standards Act,<sup>xxxix</sup> referred to here, has led to sets of minimum standards for care homes – both for older people and for younger adults and adult placements – which clearly draw on well-established human rights thinking. For example, standard 17 relating to personal and health care support for young adults reads "the registered person provides sensitive and flexible personal support to maximise service users' privacy, dignity, independence and control over their lives."<sup>xl</sup>

Despite this it is interesting to note that in the set of minimum standards for care homes for younger adults and adult placements, a set of suggested policies and procedures that should be developed is included as Appendix 3. Care homes are required to have policies covering many areas – including all equality legislation – but there is no mention of the Human Rights Act.<sup>xli</sup> Nor do the new codes issued by the General Social Care Council for staff and employers mention the Act.

People First raised the issue of inspection of care homes. They felt strongly that teams of inspectors should include people with learning difficulties as best practice since this helps to present an appearance of independence. But they could only think of one local authority where this was the case.

*People with learning difficulties don't trust the assessor. They would rather talk to someone with learning difficulties themselves. You could have a team of people who go in, including people with learning difficulties. But you would have to look at the training that's provided in terms of length and accessibility. (Andrew Lee, People First)*

## General conclusions

It is unsurprising that the focus of disabled people's organisations is the Disability Discrimination Act, after long years of campaigning to have this legislation added to the statute book. It is clear that time, effort and energy has been spent promoting the Act to disabled people – as well as to service providers and employers.

But there is a gap which the Human Rights Act should fill, which may in part be caused by the inability of the Disability Rights Commission to take cases under the Human Rights Act. This gap means that there are still many examples of situations where individuals have not been treated with the respect that they deserve. This is particularly evident in relation to the decisions and policies of care providers - whether the care is based in people's homes, or in a residential setting.

Once again there is a lack of awareness from service providers that the Human Rights Act could provide a useful framework to shape good practice, and enable better decision making. It is perhaps unsurprising that many organisations suggested that disabled people continue to seek remedies from the courts for poor treatment. Individual remedies will always remain an important part of protecting people's rights – but fewer individual cases might be brought if the Human Rights Act's full impact was felt, stopping the problems before they start.

The failure of equality legislation to tackle discrimination in the provision of statutory services means that there is little that the Disability Rights Commission can do to tackle entrenched attitudes within the criminal justice system. It may be that Donal MacIntyre's programme did more to move this debate forward than the Human Rights Act has done. Welcome though this is, it is a strategy of leaving things to chance that is not designed to safeguard the rights of disabled people to be free from assault and abuse, and cannot adequately protect their human rights.

## THE EVIDENCE: OLDER PEOPLE

The human rights of older people have been a hot media topic during 2002 – though not usually portrayed as a rights issue. For example the closure of care homes unable to meet the standards set out in the new Care Standards Act has received much coverage often from media commentators critical of the government for what they perceive as more “red tape”.

The interviews conducted for this report suggest that the Human Rights Act has so far made no difference to the quality of care in residential homes. It may be that the implementation in the future of the delayed Care Standards Act standards relating to older people – which have many parallels with the principles contained within the Human Rights Act – will have more effect. But a much broader range of issues arose during these interviews, with independence and respect for older people’s right to make choices about their lives as the central theme. Access to benefits, access to transport, and access to good domiciliary care services are all necessary in order to allow older people to make the same kind of choices about their lives that the rest of us simply take for granted.

In addition to organisations that work directly with older people, one interview with Carers UK was conducted for this part of the research: older people are disproportionately likely to be carers, or to be cared for at home by a close relative.

### Older people’s human rights

Interviewees provided a wide range of examples of situations which illustrate a lack of respect for older people’s human rights. The rights which occur most frequently in this section are set out below and Appendix 3 provides more detailed examples of relevant case law.

- Article 2 – the **right to life**. This gives the absolute right to have your life protected by law. Everyone in the UK has this right. A failure to protect the right to life – for example by denying treatment, or using a DNR notice (do not resuscitate in the event of severe medical trauma) because of judgements made by medical professionals about an older person’s longevity of life would be a violation of their human rights.
- Article 3 – the **right to be free from torture, inhuman or degrading treatment**. This is an absolute right – it is not possible for it to be limited for any reason. Inhuman treatment could include serious physical assault, or prolonged sexual and emotional abuse. Degrading treatment can include ill-treatment that is grossly humiliating – for example through poor quality care in residential settings. The degrading treatment does not have to be intentionally degrading. Its impact is what matters – and it may have a more severe impact if it affects someone who is vulnerable in other ways, perhaps because they are frail. So poor quality care such as systematically failing to protect an older person’s dignity whilst helping them to dress or wash, or feeding them breakfast whilst they are seated on the toilet could violate their

article 3 rights. It is not acceptable to treat older people differently and provide a lower standard of care if that care would be inappropriate for any other age group.

- Article 6 – the **right to a fair trial**. This applies to both civil rights and criminal matters, and requires adherence to principles of natural justice – such as the disclosure of evidence to both sides in the case, an ability to question witnesses, and to be heard by an independent tribunal. The principles which inform article 6 rights could form good practice to inform complaints procedures in residential care settings, though these do not need to be article 6 compliant if decisions can be challenged in court.
- Article 8 – the **right to respect for private and family life**, home and correspondence. This is a broad right that also includes what the courts have defined as “bodily integrity”, the idea that others cannot interfere with your body unless you consent to the interference, for example by signing a consent form for an operation. It also protects the right to privacy. This right can be limited in certain circumstances. It also might impact differently on various members of a family. For example an older person who needs domiciliary care to stay in their home rather than be moved against their will into residential accommodation might rely on their article 8 rights. If they receive care from a family member, their carer may also be able to rely on article 8 rights, particularly if the care that they are expected to provide is round the clock, and has a detrimental impact on other family members. Decisions about the provision of care should be based on an assessment of need, not based on cost. Failure to assess individual needs may not ensure that article 8 rights have been considered during the process.
- Article 14 – this is known as **the non-discrimination clause**. It ensures that people can enjoy all their other rights without discrimination. Age is not explicitly mentioned within this article, but is included under the general phrase “other status”. Article 14 is not free standing: it must be linked to another right to be used in court. Some lawyers believe that “postcode care” where the application of resources varies around the country is a breach of article 14: different local authorities have very different policies on costs and care.

Article 2, 3 and 8 rights are particularly important and as a consequence the Human Rights Act can in some situations impose a special duty – called a **positive obligation** – to protect these rights. This can apply to harm that one individual might cause another, even though the harm is out of the direct control of the public body concerned. The concept of positive obligations applies to the provision of domiciliary care for older people, enabling them to stay in their own homes – showing respect for their article 8 rights - rather than be forced into residential accommodation against their will. And individual care providers may need to ensure that they have effective staff training to treatment of older residents that could meet the threshold for degrading or inhuman treatment in relation to article 3.

The threshold which must be reached for treatment to be considered degrading under article 3 is particularly relevant to this section of the report. It is defined as:

*Treatment or punishment that arouses in the victim a feeling of fear, anguish and inferiority capable of humiliating and debasing the victim and possibly breaking his or her physical or moral resistance<sup>xlii</sup>.*

## **OLDER PEOPLE'S HUMAN RIGHTS: INDIVIDUAL STORIES**

In the overwhelming majority of cases, the examples raised related to older people's article 3 rights to be free from degrading treatment and 8 rights to respect for their privacy and their home and family life. Time and time again, the interviews covered the same ground: stories about older people who are treated with a basic lack of respect and dignity that should be accorded to any human being.

*I was dealing with an issue just last week, of a man in his 80s, in a nursing home, who needs assistance to get dressed, and uses a catheter. That man was made to sit with absolutely no clothes on in a double room with 5 members of staff, a mixture of male and female staff, for over 25 minutes whilst they took turns to do the bits that they needed to do, with the door wide open leading into the corridor. The man was sitting there with nobody speaking to him. One was coming in to wash him, another one was coming in to change his catheter bag, another one was coming in to change his medication, and he was just left sitting with absolutely no clothes on whatsoever in the middle of this congregation taking place around him, with people walking past the door. In the end the man messed himself, was then rolled over onto his side, whilst they proceeded to put a towel underneath him, and then wash him, on the bed, still with no attempt made to protect his dignity.*

*I was dealing with another situation recently where two care workers were dealing with an elderly man who'd had a very serious brain trauma, but was still able to understand and communicate. These two individuals were talking over the head of this man about the possibility of providing him with physiotherapy, and one was saying to the other, "you wouldn't want to give him physio, look at the state he's in, he would lash out, it just wouldn't be worth it, why bother wasting time on him". This was over the head of the man. And that man was being asked questions by one of them and was responding as best he could, so it was quite clear that he understood, and yet he was being treated like a lump of meat. His feelings and his dignity were just being totally ignored.*

*I was personally involved in a situation just before I left local government where somebody needed to be discharged from hospital; she needed assistance 4 times a day, 7 days a week, and that included assistance out of bed, onto the commode, etc. She was mentally very alert, and the fact that she needed assistance didn't mean that she wasn't aware of her circumstances. The local authority decided that it couldn't afford to send somebody in 4 times a day, 7 days a week, they could only send somebody in 3 times. So the coercive argument put to her was, "if you want to come home and not into a residential home, then you have to come home with a package that means that we put you into an incontinence pad and you don't get your third visit, and you then sit there, wet in an incontinence pad, until somebody comes in the evening, and then*

*changes the pad". And she's not incontinent. She has been asked to cooperate with something that was really, really undignified, or to go into a residential home.*

*My mother who has Alzheimer's was on the ward for a week before she had a bath and then only because I asked. I was told "she didn't ask for one". She has advanced dementia, is very deaf, and hardly speaks.*

In addition, Help the Aged made available their 2001 *SeniorLine Report*. The Senior Line is a free telephone advice and information service run by Help the Aged for older people. Some examples are included below. Once again they cover a wide range of issues, including the issue of right to respect for private and family life from the perspective of the carer, as well as the older person who needs care. Some of them show clear breaches of what could be understood as positive obligations to protect people's right to life, their right to be free from inhuman or degrading treatment, or their right to privacy.

*The caller's 58 year old sister cares for her 74 year old husband and works full time. She cannot manage the "physical" care needed, though her husband receives some home care. He wants to go into residential care. The social worker came to reassess him but told him before doing the assessment that "the council has no money left for anything". Her suggestion was that the caller's sister and husband should contact Relate. [Relate are a voluntary organisation dealing with relationship help and counselling support]*

*The caller's mother has been asked to leave her residential care home because she complained about a member of staff who would not attend to her in the night. She wanted to go to the toilet so she rang the buzzer but the staff member didn't come for about half an hour, by which time it was too late. The care worker left her in her wet night clothes, took the buzzer from her and threw it across the room.*

*The caller's mother is 89 and confined to bed. She has been assessed as needing residential care and is currently in respite care having developed bed sores after spending three weeks in bed prior to her admission. Her Social Services Department has refused to fund her care due to lack of resources. She has been told to leave the home tomorrow with a minimal care package of one hour each morning and evening – for the rest of the time she will remain in her bed. It is intended that incontinence pads will be provided for her to use when she wants to go to the toilet, although she is not incontinent.*

*The caller is a care worker in a residential care home. A resident was prescribed morphine as part of her palliative care. The home did not supply the medication and the resident died in pain, crying. No resident has their medical needs noted and many residents are not receiving the correct medication.*

*The caller's mother is resident in a care home. The caller noticed a few weeks ago that her mother's legs were very swollen and asked if the GP could be contacted in order to examine her. The manager said that the home's policy was that a GP would only be sent for if 5 residents required medical attention.*

*Caller's aunt recently moved into a residential care home. On her first visit to the home, the caller helped her aunt to the toilet. She was shocked to find on the back of the toilet door, a list of residents, details of whether they were given incontinence products and how often, and at what time of the day, they were allocated for "toileting".*

*The caller's mother was visited by her care manager and someone else, with less than 24 hour's notice. The other person was not properly introduced or identified, but partially undressed her mother to assess her ability to dress. The caller's mother felt intimidated, frightened and violated by the experience.*

*The caller is worried about her parents who are 85 and 79. They live in a Housing Association flat and have been told that it will be demolished. The consultation process has been very limited, with no information available about tenants' rights to challenge the plans. The caller's parents have been advised that they will not necessarily be re-housed in the same area. They were told that if they refused to move they will be taken to court and evicted by the police.*

And Counsel and Care's work on the appropriate use of restraint in care homes presented examples of poor practice which seem to be commonplace.<sup>xliii</sup>

*An agency worker told us about going into a home at breakfast time. She was instructed to get the residents up and onto their commode. She was then told to feed them breakfast. When she started to get the residents off their commodes first she was stopped. The routine of the home was that residents ate their breakfast while sitting on the commode and the ordinary men and women who worked there had come to accept this as normal.*

*An appalled agency care assistant told us of going into a residential care home to cover a night shift. Each resident's room door was marked with a green or red sticker and the care assistant was "inducted" into the culture of the home by being told to ignore the call bells from the doors marked with the red sticker as otherwise he would be run off his feet all night.*

## **OLDER PEOPLE'S HUMAN RIGHTS: SYSTEMIC CHALLENGES**

Those interviewed also pointed to systemic failings to protect older people's rights. Many of these have been regularly reported on in the past, yet little seems to have changed. For example, Help the Aged's report *Friday is Pay Day* suggested that over half the residents they surveyed did not receive their full weekly Personal Expenses Allowance from the manager of their care home. Yet this is their property (and as such protected by article 1, protocol 1 of the ECHR) and as one participant in a Help the Aged focus group put it:

*I've always had money – check your keys, check your wallet before you go out. It makes me feel normal<sup>xliiv</sup>*

Other issues were raised directly by interviewees, and ranged from the inadequacy of complaints procedures to the general standards which are set for older people's care and how these differ around the country, leading to differential treatment –

something which article 14 could help to prevent. The Alzheimer's Society had particular concerns about the use of covert medication, which has been raised extensively with health professionals as an issue – and still remains one. They were also concerned with issues relating to treatment without consent due to lack of mental capacity. Article 8 can relate to issues of consent: treatment without consent violates the principle of bodily integrity unless it is in extreme circumstances.

Complaints procedures were a particular source of concern yet because decisions made by independent panels can be challenged in court the panels themselves do not need to be article 6 compliant. Many older people will not have access to the resources to help them challenge decisions made by complaints panels – and for them the lack of article 6 compliance at this initial stage is a very real issue. So it is clearly good practice for the panels' constitution and work to be informed by these principles in order to avoid expensive legal challenges.

*The right to a fair trial, if you [can] extend it into decisions about welfare benefits and that sort of thing, I have to extend it into the failure of complaints procedures. (Gary Fitzgerald, Action on Elder Abuse)*

*I've had to attend a review panel for an older person. It goes to a so-called independent panel that will make a decision on your complaint, and I have contested the actual independence of that panel. There were two county councillors, who've also got vested interest in the outcome of the complaint because there were financial implications, and someone from the voluntary sector who was Chair of the panel, but they had a financial relationship with that local authority too, so I'm now questioning under Article 6. (Paul Martendale, Counsel & Care)*

*People in a care home with dementia who are there, supposedly with their consent, don't have any rights or safeguards at the moment. If they were sectioned they would have much better safeguards, under the current proposals anyway, much better. But it's a whole group that's completely ignored. And locked doors are quite common. (Julia Cream, Alzheimer's Society)*

*At the moment the law doesn't recognise mental capacity, there is no definition. People without capacity, or fluctuating capacity, don't have any rights. This crosses the whole spectrum from learning disabilities, mental health, head injury, dementia: we're all clubbing together to urge for new legislation around mental capacity. So the things that come up for us are things around decision making on medical treatment, disagreements, covert medication came up quite a bit recently, particularly around neuroleptic and narcotic drugs. Sometimes getting professionals to intervene when there's clearly a problem, but they say.... "well, if the person hasn't asked for me to come, I can't do anything about it". If we had a health proxy, then your carer would have to be consulted and they could make decisions on your behalf if you can't because of capacity – for example end of life decisions around medical treatment. That would be a decision that health professionals would hopefully make in consultation with carers. (Julia Cream, Alzheimer's Society)*

*One of the good things about our piece of research, Nothing Personal, is that it looks below the various blanket statements on charging and looks at what the policy actually is in 6 different local authorities. And they have very different practice, it varies*

*enormously from one authority to another. You get "postcode care". The government has just introduced Fair Access to Care guidelines, but it's not in a position to dictate, it doesn't have that power with local authorities, it can only try and persuade. It can't legislate for what local authorities do, because it's down to local discretion. (Tessa Harding, Help the Aged)*

*We see authorities refusing to do [needs] assessments, even though they have a statutory obligation to do so, because a person has capital. They say, "oh, we're not assessing you, because you've got money". Well that's not correct. It's needs first, then the money. There are all sorts of issues around the quality of the assessment, or how the assessment is actually done, and we spend a great deal of time advising people. (Margaret Mattingley, Counsel & Care)*

*These drugs [neuroleptics]] should not be used for people with dementia, except in exceptional circumstances, yet the use of them on old people is going up and up. It's a clear correlation it seems between lack of experience, lack of training, and poor staffing. When people don't know how to cope, they just put them all on neuroleptics. It's absolutely a violation. And it's covert, we picked up the issue of covert medication because of this issue. (Julia Cream, Alzheimer's Society)*

*The general standards which are expected for older people are lower, less demanding, than those which are expected for younger people. It depresses everybody's expectations, staff and older people alike. The idea that you ought to be able to be independent, and carry on with activities that you are interested in, which everybody would accept if you were talking about a physically disabled adult, a permanently ill adult, or someone with learning difficulties, somehow or other, because you're old, it doesn't apply any more. Your interests don't matter any more. Your quality of life doesn't mean the same thing. As long as you're comfortable and safe, that's what matters. It's as though you've stopped being a whole human being. (Tessa Harding, Help the Aged)*

*There are some routine examples [of degrading treatment] that you come across periodically, and there's a pattern to them. One of them is being examined by a doctor or a GP in the middle of a common area, where other people are passing through, in and out. Another one is having some sort of treatment or some invasive care whilst the door is wide open to the corridor. Often a resident who is becoming forgetful is losing the sense of where they are. I think they start to lose the sense of the same expectations that they may have had elsewhere. That unfortunately contributes to these routine forms of care which we would find degrading in other circumstances. (Ray Avards, Counsel & Care)*

## **OLDER PEOPLE'S HUMAN RIGHTS: POSITIVE OBLIGATIONS**

Some of these systemic failures relate to the positive obligations that local authorities might be placed under through the Human Rights Act – for example to take necessary steps to protect the right to life, the right to be free from inhuman or degrading treatment, or the right to respect for private and family life, even when the risks come from individuals outside the authorities' control. This can extend to

providing a legal remedy when such situations occur – for example being able to take a case to court to challenge an independent review panel's decision. Respondents also provided examples of situations where local authority practice addresses financial issues before an assessment of individual's needs which could in some circumstances lead to degrading treatment – for example where older people are not provided with the care that they need and as a result sit in their own excrement until it is convenient for their care worker to pay the last visit of the day. Almost every respondent raised the issue of the lack of provision for domiciliary care, which forces older people into a residential care setting against their will, and fails to meet the positive obligation to respect home and family life protected by article 8. Bullying and abuse in care homes could constitute a violation of human rights – certainly of article 8 rights and in certain circumstances, perhaps also article 3 rights if it is persistent and institutionalised.

*I have to say I've also personally dealt with situations where as a home care manager within the last 12 or 18 months, I was being asked to cooperate with locking somebody into their house, because there was a danger of them wandering. Rather than dealing with the wandering, they wanted to lock them in the house for 18 hours in the day, with nobody there to make sure they were safe and secure, if there had been a fire they would have been.... Because we wouldn't cooperate with that, the pressure was that if they walked out of the house and got run over by a bus that would be our fault. That's detaining and restricting. We have had situations where people have been deliberately moved upstairs when they've got a zimmer frame because they can't negotiate the stairs, as a means of keeping them in the house. (Gary Fitzgerald, Action on Elder Abuse)*

*I've come across very recently somebody being locked out of his own room. I was in a scheme that was talking about people having their own flats, and leading an independent life, but actually the staff were locking that man in, because he might sleep during the day, and then in the evening would be up and wandering. So they were trying to deal with his disorientation by restricting his freedom of movement to go in and out of a flat that was a tenancy in his name. For his own good and for the good of others was their argument. (Les Bright, Counsel & Care).*

*Married couples don't want to be separated when one of them needs a high level of care and the local authority won't pay for an adequate level to go into somebody's own home. One of them basically is forced into the residential setting. Periodically there are the most heartbreaking stories about couples being forced to separate – you may remember one recently about a man trying to kidnap his wife from the nursing home. (Tessa Harding, Help the Aged)*

*The feeling that one gets from social services, is "what are you talking about, the person's got dementia". We say, it doesn't matter whether the person appears to have no memory, or appears not to remember who their husband or wife is, you've got the other person as well, in the picture, and you must maintain the contact. It never fails to amaze me, the way people become depersonalised once they enter the care system. To try to get a comprehensive assessment that actually bears any relation to the person - well I think I've seen one! (Chris Greenwood, Counsel and Care)*

*A classic example that we get all the time, and where we do advise on the Human Rights Act, is in relation to charging. The charging procedures are run by local authorities, and the complaints procedures are run by local authorities, but it's not until you get to a very high level of maladministration that you can start taking a case or going to judicial review so your initial right to a fair hearing is arguably challengeable under that kind of structure. (Emily Holzhausen, Carers UK)*

*You were asking about protection from other people's actions. My colleague had a situation where the care home had said to someone "you have to sit in the day room all day", where actually that person was getting a lot of abuse from other residents. They were trying to leave, and the care home said "no, you've got to stay there". (Julia Cream, Alzheimer's Society)*

*There are situations where someone's living in squalid and unsanitary conditions and the reason for that is because they can't get any services: we are really concerned about that. Services at home can be much better for younger adults. You might well argue a positive obligation on the local authority to support the person in a social setting. (Stephen Lowe, Age Concern)*

*Same sex partners have enormous problems in information provision. They are discriminated against, because where someone who is married, or a relative, will be allowed access to private information about a patient, crucial information that they need to know in order to care for somebody, a same sex partner will have to explain their relationship. When they say "Are you married to this person?" people find having to divulge very private information very difficult. Quite often they're not given the information that they need because of that. (Emily Holzhausen, Carers UK)*

*There is a problem with Powers of Attorney that are not registered or nobody checking that it needs to be registered. We get a massive number of issues around Powers of Attorney, around people taking control of others' finances, not with their wishes and not with their agreement. (Gary Fitzgerald, Action on Elder Abuse)*

*What happens if an elderly person soiled themselves and the carer wasn't able to lift them and move them - there was only one care worker, so the older person had to be left in their own excrement because of the manual handling regulations? The carer won't raise that as a human rights issue, but it's something that we would argue that was, potentially. (Emily Holzhausen, Carers UK)*

*The greatest concern is the approach and attitude of the Crown Prosecution Service, who will invariably make a decision that because of someone's age they're too vulnerable, too frail, and it is not in the public interest to proceed with a prosecution. Even when that prosecution is for activities that are really quite atrocious and outrageous. For example we had a case of Margaret Panting of Sheffield. 78 years old, Margaret left sheltered housing accommodation to go and live with her son-in-law - who'd just had a heart attack - and her three grandchildren, to care for them. Five weeks later Margaret was dead. She had somewhere between 150 and 200 injuries on her body, and they ranged from anything from cigarette burns, through to cuts which the coroner described as could only have been done by a sharp instrument, such as a razor blade. Nobody is to be prosecuted or convicted as a result of this, because the family insist these were all injuries caused by her falling over or her own forgetfulness.*

*The coroner has stated this is not possible, they were not self-inflicted, but because of the system that we've got, nobody will admit responsibility, nobody will point the finger at anyone else, nobody is to be charged. So Margaret Panting not only would have suffered five weeks of God knows what, but will also go to her grave with absolutely no justice. (Gary Fitzgerald, Action on Elder Abuse)*

## **Level of awareness of the Act**

Many interviewees felt that the Human Rights Act had not had an impact in the social care field – or at least not one that was meaningful to staff. Counsel and Care staff regularly train in care homes, training both care workers and their managers. They had never encountered a single member of staff that had received training on the Human Rights Act, and their responsibilities under it. Other respondents felt that other legislation – particularly the Care Standards Act – encompassed many of the principles expressed within the Human Rights Act, and felt that more could have been done to link the two pieces of legislation.

*The Human Rights Act didn't come across in social care in our experience in the same way as the Care Standards Act did. The Care Standards Act very clearly is focused at engineering the change of culture, the change of thinking, the change of practice. The Human Rights Act, when the publicity came out didn't link in with, for example, somebody within a care home being refused the right to leave their room because they're incontinent. I haven't got the feeling people placed the Human Rights Act at the centre of planning thinking. I don't think that's because there's an objection or there's a resistance to the Human Rights Act, I think it is about the way in which it has been presented. There was no reason why the Care Standards Act and the Human Rights Act shouldn't have been very closely linked together; it would have made perfect sense in terms of effecting culture change. It would have been very logical. But I can't say that I saw that. I think we probably saw one piece of literature on the Human Rights Act when it came out. Everything else was in the media, and the media had a particular slant on it. (Gary Fitzgerald, Action on Elder Abuse)*

*I think it's very difficult to know how best to make use of the fact that the Human Rights Act now exists, and that it ought to apply comprehensively across the board to older people. There is very little evidence of people using it to take up individual complaints, and it's quite difficult also to use in terms of dialogue with local authorities, or Primary Care Trusts. The potential is great, but without there being a human rights culture out there it is very difficult to make it real in any sense. (Tessa Harding, Help the Aged)*

Interviewees felt that service users or clients had very little understanding of the idea that they had any kind of rights at all (for example via a complaints procedure in residential accommodation) let alone rights that were protected by the Human Rights Act. Many mentioned a generational difference in attitude by older people towards the whole concept of "rights". Some suggested that the awareness shown by service providers was not much better.

*They don't just not know what their rights are in Human Rights Act terms, they don't know what their basic rights are in terms of the services that they receive from local authorities, from the voluntary sector, how and when they can make complaints, what they can do to get redress. (Gary Fitzgerald, Action on Elder Abuse)*

*People use it much more I think as part of their general complaint, they're not sure it's a human rights issue, they're kind of vaguely mentioning it, without really knowing. (Julia Cream, Alzheimer's Society)*

*No, our members are not that aware. But the campaigners who come to me, some of them do make human rights arguments and are very keen to take human rights cases. (Emily Holzhausen, Carers UK)*

*I suspect if you said Human Rights Act to somebody in local government social services, and I have to talk social services more than anything else, there would be an intake of breath in terms of fear, but a total lack of knowledge of what does it actually mean. (Gary Fitzgerald, Action on Elder Abuse)*

For those who ran helplines, or provided advice, there was sometimes a reluctance to refer people to the Human Rights Act, because it is perceived as a purely legal remedy, rather than one which can create cultural change. Age Concern however had found it a useful tool in relation to closure of care homes.

*I really can't say to you that one of the options currently that we feel able to put forward to people is the Human Rights Act, because of the link with the need to take legal action in order to get redress. We use equal opportunities legislation in that context, so there probably isn't any reason other than, for some reason, the Human Rights Act doesn't appear to have come across in the same way as being a tool, a mechanism for change. (Gary Fitzgerald, Action on Elder Abuse)*

*We have a briefing on care homes closures – we get a lot of enquiries about home closures, mainly from the press and from local Age Concern groups, so it sets out the current legislative position both pre and post the Human Rights Act (Stephen Lowe, Age Concern)*

*We produce fact sheets and we would just talk about what the facts are. It would only be if we were going to get into advocacy that we might start to talk about human rights and how it might affect you. (Paul Martendale, Counsel & Care)*

And in those cases where the Human Rights Act had been used, it was more easily used by individuals to challenge the process in areas other than healthcare.

*There's much more legislation to protect people's finances than there is their own health and welfare. One of the examples that my colleague brought up was someone who used the human rights legislation to get their driving licence back, they'd challenged their GP's decision making which worked quite well. (Julia Cream, Alzheimer's Society)*

## **Evidence of good practice**

Interviewees could identify very little good practice that showed evidence of the impact of the Human Rights Act. Some felt that there was work that had been done that, although not prompted by the Act, might help meet its high standards.

*The Public Guardianship Office have actually done some tremendous work trying to improve knowledge of Enduring Powers of Attorney, but at this point that hasn't impacted where it needs to. I'm confident it will, because they're very good leaflets and literature, but right at this moment, the extent of abuse of Powers of Attorney, and stealing, is quite extensive. (Gary Fitzgerald, Action on Elder Abuse)*

Counsel and Care have themselves produced two guides for care homes, one on sex and relationships and another on minimising the use of restraint. Both of these, though not explicitly informed by the Human Rights Act, certainly reflect its underlying principles, particularly with regard to balancing different rights against each other. They are thoughtful examples of ways to help care staff reflect on their behaviour.<sup>xlv</sup>

## **General conclusions**

Participants from this sector presented overwhelming evidence that older people are routinely treated with a lack of dignity and respect that would simply not be accepted in relation to other social groups. It seems that many of those working in care settings have no idea of the principles that the Human Rights Act contains, nor do they understand their role in promoting or upholding these.

Some participants explicitly compared the Human Rights Act with equal opportunities legislation, which has become accepted in the care field as a standard that has to be met. It is clear that there is some way to go before the Human Rights Act is accepted in a similar way. It currently seems to have no bearing on many of the decisions that are made in relation to older people's lives, and has certainly not had any impact for those who participated in this research in generating systemic change.

In other sectors, service users are becoming more assertive and seeking individual remedies. In this sector, that seems not to be the case, apart from in relation to care home closures, perhaps because people lack resources or support to do so, and because they come from a generation that does not naturally think in terms of rights. This means that change is likely to be even slower, with older people suffering violations of their rights for longer, since providers will not even have the incentive of legal challenge to make them think about their practices.

## THE EVIDENCE: REFUGEES AND ASYLUM SEEKERS

The degree of protection afforded to the human rights of refugees and asylum seekers has been under constant debate for most of 2002 – in the media, during the local government elections, in Parliament, and at a European level. Organisations working in this field found the presentation of accurate information about such a vulnerable group of people difficult to present against frequently background noise. It is often even harder to make the case for protection of their human rights to the general public.

Yet this is despite the fact that there is no difference in the protection afforded by the Human Rights Act between a UK citizen and a citizen of any other country in the world. It applies to anyone living within the UK's borders, regardless of their circumstances or nationality. Equally there is nothing in the Human Rights Act that prevents a nation developing and implementing an immigration policy; this can involve detaining people during the processing of their asylum claim, and deporting them if their status is unfounded or they have overstayed the time they were given leave to stay in the UK, within a human rights framework.

### Refugees' and asylum seekers' human rights

The most significant rights protected by the Human Rights Act that relate to refugees and asylum seekers are outlined below, and Appendix 3 contains more detailed explanations of case law. Of course, the 1951 UN Convention Relating to the Status of Refugees is itself a human rights document. But for the purposes of this report, interviews focused only on the Human Rights Act.

- Article 2 – the **right to life**. This gives the absolute right to have your life protected by law. Everyone in the UK has this right.
- Article 3 – the **right to be free from torture, inhuman or degrading treatment**. This is an absolute right – it is not possible for it to be limited for any reason. Inhuman treatment could include serious physical assault, or prolonged sexual and emotional abuse. Degrading treatment can include ill-treatment that is grossly humiliating – for example through poor quality care in residential settings. The degrading treatment does not have to be intentionally degrading. Its impact is what matters – and it may have a more severe impact if it affects someone who is vulnerable in other ways, perhaps because they are in a strange country, alone, and unable to speak English. Article 3 also prevents the UK government from deporting anyone to a country where they might face torture.
- Article 6 – the **right to a fair trial**. This applies to both civil rights and criminal matters, and requires adherence to principles of natural justice – such as the disclosure of evidence to both sides in the case, an ability to question witnesses, and to be heard by an independent tribunal. The principles which inform article 6 rights apply to decisions made by Immigration Appeal Tribunals.

- Article 8 – the **right to respect for private and family life**, home and correspondence. This is a broad right that also includes what the courts have defined as “bodily integrity”, the idea that others cannot interfere with your body unless you consent to the interference, for example by signing a consent form for an operation. It also protects the right to privacy. This right can be limited in certain circumstances. It also might impact differently on various members of a family. The allocation of accommodation to asylum seekers could interfere with the right to respect for family life if it involves sending different members of the family to different parts of the country, or even if it does not take account of the family's particular circumstances, such as the child's education, or a course of medical treatment.
- Article 14 – this is known as **the non-discrimination clause**. It ensures that people can enjoy all their other rights without discrimination. Refugee status is not explicitly mentioned within this article, but is included under the general phrase “other status”; but “language” is specifically cited as grounds on which discrimination is not permitted. Article 14 is not free standing; it must be linked to another right to be used in court.

Article 2, 3 and 8 rights are particularly important and as a consequence the Human Rights Act can in some situations impose a special duty – called a **positive obligation** – to protect these rights. This can apply to harm that one individual might cause another, even though the harm is out of the direct control of the public body concerned. So for example a refugee family that is re-housed under the dispersal policy but suffers persistent and serious racial harassment may find that this breaches their article 8 rights to respect for family life and perhaps even article 3 rights in extreme circumstances. Families that are dispersed and re-housed in accommodation that is clearly unsuitable for their needs may be able to claim that the positive obligation to respect their right to family life has not been upheld. And where one family member is facing deportation, despite having close family ties to this country (for example a wife and children) in some circumstances, the positive obligation to respect family life may prevent the deportation taking place. These circumstances are rare since the courts often decide that where the children are young, they can easily adapt to life in another country.

Refugee Action sought a legal opinion from Nicholas Blake QC in February 2002 in relation to the Human Rights Act and their work under contract to NASS, as well as the treatment of refugees and asylum seekers more generally. This opinion sets out expert legal thinking in relation to the Article 3 rights of refugees and asylum seekers. It is a useful context against which to consider many of the examples that follow. Nicholas Blake writes:

*A public authority should recognise the special needs of asylum seekers and use best endeavours to take those needs into account. If it fails to do so and thereby causes intense personal suffering to clients by requiring them to live in wholly unsuitable accommodation that degrades or humiliates them, the potential application of Article 3 cannot be excluded, particularly if there is a background of racial intimidation. All the particular factors that make asylum seekers vulnerable should be carefully considered:*

*inability to speak the language, clear identification as a foreigner or asylum seeker, mental health or physical vulnerability, young children.*

## **REFUGEES AND ASYLUM SEEKERS' HUMAN RIGHTS: INDIVIDUAL STORIES**

Interviewees supplied examples of refugees or asylum seekers known to them or to their organisations where they felt that human rights had not been adequately considered or protected. Some of this information is taken from *A case for change: how refugee children are missing out* provided by the Refugee Council.<sup>xlvi</sup>

*XX was 14 when he came to the UK as an unaccompanied child from Sierra Leone. He was already fluent in English. After waiting seven months for a place in school, he had to take the only place he was offered which was in a project for children whose behaviour had led to exclusion. He receives one and half days' education in key skills and has no prospect of getting qualifications.*

*XX was 15 when he came to the UK. He was eventually placed with a foster family. When his uncle appeared, social services said they could live together, even though his uncle did not have permission from his landlord. XX had to sleep in the floor in his uncle's room. A year later, XX has indefinite leave to remain. His uncle has left the country. The landlord has thrown XX out of the house, and social services have refused to help him. He was discovered after he had been sleeping in a car.*

*We've got a case of a young woman who had been trafficked and been working in the sex industry and she was accepted by the police and by social services as under 18. The police were treating her as a minor, but the Home Office official quite literally took one look at her and said I don't believe she is under 18. But everybody else was treating her as a minor.*

*A family of Iranian asylum seekers including 2 young children had contracted scabies from old and dirty carpet in their NASS provided accommodation. The family had previously approached the accommodation provider but nothing had been done.*

A recent report *Mothers in exile* from Maternity Alliance reports interviews with pregnant women who either have refugee status or are seeking asylum, contains many disturbing reports of the way in which women and their babies are treated, many of which may also constitute human rights violations, particularly of article 8, the right to respect for family life.<sup>xlvii</sup> In addition to the examples below the report also cites a case where a decision was made without an interpreter present to perform a Caesarean section on a non-English speaking woman without her consent. This was despite the fact that the hospital in question was in London, with an interpreting and advocacy service and access to Language Line.<sup>xlviii</sup> The concept of bodily integrity contained within article 8 means that consent should be sought before such a procedure if it is possible to do so.

*Sometimes there is a problem when they don't give me milk for two or three days and she is vomiting because I have to give her the milk we buy for adults.*

*There is no place to wash the baby or to wash or dry her clothes. I can't take my baby's clothes and wash them in the bathroom because the men are always there. The men touch the ladies. The bathroom is very dirty.*

*They [midwives] said "oh we are so tired and she is just lazy... Oh that African food they eat, they want to poo all the time". I wanted to ask them is it just African women who poo when they give birth? I was embarrassed, but what could I do*

*My husband has problems with his spine and with his disc. He only lies down. I have to help him go to the toilet. He can't hold even one kilogram of weight in his hands so he can't help to carry the child. They were supposed to give me a room in the hotel on the ground floor but we are living on the second floor and my husband has to use his hands and knees to go upstairs – he crawls.*

## **REFUGEES' AND ASYLUM SEEKERS' HUMAN RIGHTS: SYSTEMIC CHALLENGES**

Interviewees also identified persistent systemic failures to protect the rights of refugees and asylum seekers, particularly their article 3 and 8 rights. In many cases these examples illustrate administrative systems that are clearly designed for the convenience of those who operate them, rather than with any thought to the lives of those who are governed by them, or systems that fail to recognise that some refugees and asylum seekers, at least in part because of their experiences in their home country, may have special needs which fail to be met. In other cases, the failures can have profound effects on the lives of pregnant women, or young people, who may be particularly vulnerable given the factors identified earlier by Nicholas Blake QC in his opinion for Refugee Action and are therefore deserving of greater protection.

*Those who are in NASS accommodation, for example, when they get status, [Exceptional Leave to Remain which guarantees the right to remain in the UK] they have two weeks in which to find themselves new accommodation and support. Of course they can't do it. So we have all these people who've got the right to remain in Britain being made homeless because they can't stay in the hostel or the hotel, they can't afford to pay, and they can't find anywhere else to go. (Cheryl Monteith, Refugee Support Centre)*

*Last week, we had people staying on the concourse for night after night after night. We had families there for five nights in a row. Apart from the sheer hell of trying to keep your children around you and not lose them, and not get into trouble, and being badgered by the authorities, they're given the relevant forms at Heathrow, but they don't actually enter our system until we accommodate them. So by the time they come to us, and we actually get them into our system, which again doesn't happen the same day now, it can take quite a few days. (Elizabeth Little, RAP) [Applicants for asylum have 10 days to apply. If they do not meet this deadline their application is automatically declined and they enter the appeal system]*

*There's no forward planning in the sense of thinking, right, we've got a pregnant mother here, who is an asylum seeker and doesn't speak English, is not going to be able to access these resources on her own, and if she's being moved into another detention*

*centre or another NASS provided accommodation, to make sure that there are arrangements in place for her when she gets there. (Sarah King, Maternity Alliance)*

*The fundamental thing is that any issues that arise are always perceived as “this is what asylum seekers say to get away from where they don’t want to be”. Now that perception extends to racially motivated attacks. It doesn’t seem to matter that there have been two murders at least and there is a clear increase in physical attacks on people. In relation to the NASS system, it completely works on paper. The experts say “people do this, then that”. But people are human beings. They don’t do this, then that. And what are you going to do when they don’t? It seems you can’t ever acknowledge that people are individuals. (Alison Fennay, Refugee Council)*

*We try very hard within our capacity to ensure people are getting their human rights in the broadest sense in emergency accommodation, but we’re aware, particularly for pregnant women and mothers with young children, that the nutritional standards are appalling, and that the amount of money that NASS gives us to pay providers is grossly insufficient. (Elizabeth Little, RAP)*

*There’s a journalist that is interested in this subject and she asked for a photographer to be able to go into one of the detention centres to photograph the women who we’d been talking to. The Home Office said, “well it would be absolutely impossible because there are no pregnant women or babies detained, so it won’t be possible for your photographer to meet any”. We know they’re all over the place, and I’ve been going round interviewing them, but there are officially none, so - there are officially none. I met someone a couple of weeks ago, an asylum seeker, who was in XXXX this year, which is one of the places where I interviewed some women last year, and she had heard me talking about the work that I’ve been doing, and said she felt as though I was talking about her life, it was so exactly the same. That was just absolutely dispiriting to think that a year on, with all the problems that we found, that they’d actually done nothing. She was the typical, vulnerable pregnant woman on the 14th floor walking up and down the stairs, totally on her own, coping with issues of HIV and there was absolutely nothing there for her. There is a lack of recognition that these women have lives, or that they matter. (Jenny McLeish, Maternity Alliance)<sup>xlix</sup>*

## **REFUGEES’ AND ASYLUM SEEKERS’ HUMAN RIGHTS: POSITIVE OBLIGATIONS**

Some of the interviewees’ examples related to the positive obligations that the UK may have in some cases to protect the human rights of those who seek asylum, or who have been granted refugee status. These examples are particularly disturbing when they relate to children’s article 8 rights to respect for family life, which seem routinely to be ignored, to a disregard for the persistence of racist violence, or to the lack of recognition from the Home Office for a wide range of practices that might constitute torture or inhuman treatment. In some cases individuals were at risk of being returned to countries where their lives could be at risk.

In other cases the interviews highlighted gaps in the system, which are only filled through voluntary organisations which provide services. An example of this would be the work done by organisations such as the Refugee Support Centre and the Medical Foundation for Victims of Torture. Both provide counselling and therapeutic support

which is not routinely provided by the NHS, including a family therapy service for foster families who try to help refugee children rebuild their lives and whose own family lives are put under strain through this situation.

*A father and son were relocated from London to Middlesbrough – the father has AIDS, and the son was so disturbed when he arrived in the UK initially that he was thought to be unable to speak. After one to one help from the school for a whole year, he had started to learn to interact with others again. The father got the dispersal order, though there appeared to be no knowledge that he had a son. He was then given 3 days to pack his bags, and relocated to a “sink” estate. Then they suffered a violent racially motivated incident and were moved again: the father was then terrified to leave the house. The son has suffered a major relapse. When the case went to court, the judge found that the decision to remove the family from London was unlawful because it didn't take account of the child's needs.*

*A family dispersed to Newcastle were housed in what became known as “number 44”. They experienced horrendous racist abuse, and lived in fear of attacks. They decided eventually to go back to their home country where they had also experienced persecution. Shortly afterwards a different refugee family, with a different ethnic background, were housed in the same accommodation. This family also suffered racist abuse and intimidation, including a petrol bomb through their door, before the local authority took action.*

*The most recent asylum appeal that I've been involved with was with an Iraqi Kurd, he was claiming that he would be a victim of persecution. His girlfriend had already been killed after they had an extra-marital relationship. Although that would appear to fit within the refugee convention, there was a possible argument that it was not a convention reason, it wasn't clear that his situation necessarily fitted into those groups. That's when the human rights point becomes clear. We were arguing that, certainly Article 3, and maybe Article 2, or Article 8 would be infringed if he were returned to Kurdistan.*

*We know of a girl that we thought was 12. She was holding a teddy bear. In the age dispute NASS said they thought she was over 18 and she was clearly pretending, otherwise she wouldn't have been holding the toy.*

*Some people have been in a torture situation, but they haven't been physically harmed. So for example one man had been arrested because his father was a politician, and they couldn't get his father, so they got him. They didn't inflict any pain on him, physical pain. They put him in a cell and tied a corpse to him. The Home Office did not recognise that as torture. But in fact this man was having nightmares, he was having flashbacks, he was in a horrible state when he came. He went to his doctor and his GP gave him pills to calm him down, gave him advice about sleeping. And then he came to us.*

*By and large because NASS never expected that people would come here with special needs, they didn't really make any provision. These are the most desperately needy people you could ever come across, and yet they fall off the edge. This is a good example. There was a 24 year old man came in a wheelchair with his brother who was 18; the younger brother was the carer older brother. They were both Palestinian*

*refugees, who'd come from a Syrian refugee camp where they'd been for five years. Our hotel, the only one we had at that time, didn't have any ground floor accommodation for him, and so we applied to NASS, to ask if there was something else. The long and short of it was that he stayed on the concourse for about three nights. Eventually we got him into the hotel, and there was a problem about who could help him, because he needed two people. So eventually we managed to get an interpreter of ours to help the brother to transfer him, but then of course there were narrow doors, and so he couldn't get to the toilet. For the four days that he was on the concourse, he didn't eat. He was so worried about his catheter, that nobody could change it, that he wouldn't drink and he became very ill. He got sores because he couldn't move, which became infected. We got the health people to look at him, and that was hard work. We tried all the local authorities, but nothing. Eventually he could stand it no longer, and he applied to go back. That's about the worst example that I can think of, but we've had quite a lot of others.*

*We see the foster carers, and we have problems. For example with boys from Kosovo, they have a vision of how women are, and so the foster carer, she has hell with these boys. They're boys of 13, so they're men in their own eyes, and they'll give instructions. "I want my dinner, now", that sort of thing. And she has other children of her own, and she's trying to bring them up as she brings up her own child. We have quite a few cases where we're trying to stop the relationship breaking down.*

One interviewee gave an example of a situation where a local authority failed to ensure that the standards they would set for their own staff or residents in order to meet these obligations were upheld for those who were far more vulnerable.

*We had one hostel... it was in XXX, set up for refugees. One of our clients lived in this hostel, and he was in fear, he was from Eritrea and he'd been bullied by someone from Albania. When I went to speak to them it turned out that this Albanian had formed a little clique of Albanians, of Turks, and Kurds. There were four of them and they just terrorised all the black refugees in the hostel. Something quite funny had happened, because there's one Afro-Caribbean worker, and she'd had words with them, with these Albanian refugees. "You can't behave like that here. It's not acceptable. And if you go to places like XXX [a local area with a large population of African and Caribbean heritage] and say the things you're saying here, you will not be safe". And true enough, he went to that area, and racially abused someone, and got thoroughly beaten. The hostel expelled him, because his behaviour was unacceptable, and he went to the council, who then forced them to take him back. Because he was so violent, and they couldn't let him room with anybody, he ended up having the best room in the hostel. I just thought that was so bad.*

Interviewees had particular concerns about the positive obligations that might exist in relation to children, particularly in instances where their age was disputed and they were placed with adults, or where they were dispersed away from the local authority responsible for their care. In both situations, children could be vulnerable to abuse of their article 8 rights, particularly in cases which led to sexual abuse or violence. In addition a lack of healthcare support could in some circumstances lead to a breach of article 2, the right to life.

*A young person will claim they are under 18. The immigration authorities will disagree – they look you up and down and decide. They have the power to determine age. They should refer you to the local authority, but if they also disagree, you are returned to immigration who bring you to us. So we might have somebody who is disputing their age, living in our accommodation. They could be 16. And we're placing them with adults. (Elizabeth Little, RAP)*

*With unaccompanied children, they are the responsibility of the local authority. What happens is that most are actually dispersed to another local authority, say from Kent to Newcastle. There is very little follow up between the two. So there might be issues with foster parents. Newcastle might have over 1,000 unaccompanied children who have been dispersed. But they won't know they are there until they end up in a B&B. The responsibilities for ensuring that the Children Act responsibilities are met remains – usually – with the transferring local authority. (Alison Fennay, Refugee Council)*

*Because local health primary care services have been overwhelmed for a long time, you'll find for example that somebody who comes in with, say a kidney infection wouldn't get treated properly. They could end up losing the kidney. We've had people in that situation. We've had women who've not been treated properly after having children, or during pregnancy, who have chronic gynaecological problems that go on for years, which can be attributed to lack of care when they had the baby. The local services are overwhelmed, and have been for a long time. And people are not clear enough about their rights. I think in this area [London] it's not a question that health departments say "they're not entitled to a service", it's just by sheer default. I know in some parts of the country, where they're less used to refugees, they'll say, "oh, they're not entitled to NHS treatment". (Elizabeth Little, RAP)*

## **Levels of awareness of the act**

All of the interviewees working in this sector were acutely aware of the Human Rights Act. Many of them had clients whose legal advisers had recommended that they use the Act to challenge deportation orders, or particular treatment within the NASS system. Others were working under contract to the Home Office, and had been made aware of the Act because it could have implications for their own organisation. Refugee Action's legal opinion had a dual purpose; it was partly to determine their liability under the Human Rights Act for those services that they provided under contract to NASS, although the organisation also wanted it to move forward the debate about the way in which refugees and asylum seekers are treated. Many of the interviewees made it clear that they still use human rights points more as a way to resolve individual cases than to achieve systemic change through influencing policy documents or operational practice.

*I suppose occasionally we would raise general human rights arguments if we were making a general policy point. But it tends to be much more on an individual basis. Obviously there are a lot of practitioners who are making constant use of human rights arguments, but there are a lot of others [practitioners] who really don't understand it at all. (Alisdair McKenzie, Asylum Aid)*

*We wanted to get this opinion done, we looked around the voluntary sector and we felt just as we felt over the Stephen Lawrence inquiry, there weren't enough voluntary organisations responding, however good they thought they were. Certainly under the Human Rights Act, the key question, first of all, was, were we a public authority, under the right circumstances, and what did that mean for us? (Sandy Buchan, Refugee Action)*

*We wouldn't [use the HRA]. We're not an advice giving agency other than general help under the quality mark rules... and so we will refer people to solicitors and we'd be expecting them to take up legal rights arguments. (Elizabeth Little, RAP)*

*We had a client from XXX; he didn't understand English and the Council were guilty of gross maladministration. Even when we wrote them letters, they didn't seem to have read the letters, and they just kept sending him bills. They said he owed them some three thousand pounds, when he was on full housing benefit. In that case I made strong representations to the council, and I cited administrative law and the Human Rights Act. (Cheryl Monteith, Refugee Support Centre)*

However respondents were clear that hardly any refugees or asylum seekers were aware of the Human Rights Act until they were told about it by their legal advisors. It was certainly not a factor in their decision to come to the UK.

*There's a very low awareness I think. It may increase later on. The University of Wales have done some research for the Home Office. It considers the motives of people arriving, and it has established that asylum seekers have absolutely no idea of welfare benefits or the sort of thing that they may or may not get here. (Sandy Buchan, Refugee Action)*

*Very little [awareness] I would have said. Most people come with a fair degree of ignorance of this country anyway, and even if they are competent professional people, as many of them are, they are so traumatised and exhausted by the time they get here that their ability to get themselves together, even if they are lawyers themselves, is less than it would be if they were at home. (Elizabeth Little, RAP)*

## **Evidence of good practice**

Interviewees found it very hard to identify any good practice in this field. One interviewee identified some local GPs and hospital practitioners who routinely thought about the needs of the refugees that came into their surgery – but even in these cases good practice could quickly turn to bad without careful attention paid to the individual's circumstances.

*One doctor in a hospital has referred somebody, and he phoned up and said, "Do you have anyone who speaks Croatian?" So I said "yes, we have someone who speaks Serbo-Croat". He said "no, I just want Croatian". I said to him, "look, it's the same language". So he said "OK, well can you do an appointment". I did the appointment but the person didn't turn up. So I phoned the GP and said, "you know, we'd set aside this time, and the person didn't turn up, do you know why?" He said, "oh yes, because I told him the person who was seeing him would be a Serb, he didn't seem very keen".*

The Refugee Council had good reports of police action in the case of racially motivated attacks.

*In my experience I have to say the police have been brilliant, which is a very general statement, but they have taken a much stronger lead. Their response has been pretty positive on the whole. (Alison Fennay, Refugee Council)*

## **General conclusions**

The numbers of individual challenges to the UK's asylum system is not new. What is clear from these interviews, however, is that participants believe many of these legal challenges come as a result of poor awareness of the Human Rights Act from staff working for the Home Office, the Immigration and Nationality Department (IND), or the National Asylum Support Service (NASS). This leads to delays in the process of deciding applications and to expensive individual cases, which clog up the system causing still more delays.

In addition, the lack of any broader awareness of the Act by the general public leads to a resentment of this client group when they do rely on it to claim their rights – particularly from parts of the media - rather than an understanding of our obligations to protect the human rights of vulnerable people. This is of particular concern in relation to children, especially unaccompanied children, who are at particular risk of harm if they do not receive a minimum level of help and support.

The Convention rights protected in UK law by the Human Rights Act do not prevent countries from determining their own immigration policy. However they do set a standard which that policy should reach so that it operates in a way that recognises the dignity of the individuals who seek asylum whilst a country determines their claims. At present, those who participated in this research felt there was little awareness of human rights thinking in the operation of the process. Nor did they believe that the Human Rights Act has really made an impact in the appeal system, or the design of the asylum process.

## THE ADVICE SECTOR

As well as considering individual sectors within the voluntary sector, interviews were carried out with four organisations that provide advice to others, or represent organisations that provide advice.

The National Association of Citizens Advice Bureaux (NACAB) and the Law Centres Federation (LCF) between them have a presence in many towns and cities throughout England and Wales. The Federation of Independent Advice Centres (FIAC) are an umbrella co-ordinating body for independent advice centres, often small and specialised in their area of work. The Child Poverty Action Group (CPAG) provide training and advice for welfare rights organisations on a wide range of benefit issues, as well as advice on how to use the Human Rights Act in relation to social security matters.

The purpose of these interviews was to see whether the Human Rights Act had made its presence felt in their casework or requests for assistance, and through this to gauge awareness of the Act amongst some of the most disadvantaged people in the country.

### Levels of awareness of the Act

NACAB work to ensure that individuals do not suffer through lack of knowledge of their rights and responsibilities or of the services available to them, or through an inability to express their needs effectively. Whilst the national office would lobby around particular policy areas with central government individual Bureaux challenge poor practice on the ground. The Human Rights Act could be seen as relevant in a number of areas, although NACAB felt it had limited impact.

*It might be used around access to justice, employment rights, discrimination, and certainly around community cohesion as a campaigning tool. But human rights doesn't add value – it's easy to say but it doesn't take things forward. We would tend to rely on the language that government departments use and measure practice against that although of course we could in addition use the Human Rights Act. (Nicola Simpson, NACAB)*

NACAB has also used the Human Rights Act internally, as part of the work that has taken place for the *Bridging Communities* project, which has provided a race equality action guide for Citizens Advice Bureaux.

The Law Centres Federation encourages the development of publicly funded legal services for those most disadvantaged in society. There are 52 law centres nationally, and LCF is their representative voice. Awareness of the Act amongst law centre workers is good, and LCF's national conference in 2000 helped to raise this awareness.<sup>ii</sup>

*I would think they're pretty good, because there are lawyers on the ground but I'm not sure whether it's clients coming in asking for advice or whether it's the lawyers*

*themselves that are interpreting the nature of the query that comes in, thinking "I think there is probably a human rights aspect to this case". I suspect that it's the latter. Immigration has been the biggest area, but there are others coming through. (Lynn Evans, Law Centres Federation)*

Individual law centres support this view.

*Some clients have an awareness of what their human rights might be in a general sense but very few are aware that the ECHR might benefit them... It is far more usual for us to realise that the HRA may be useful to the client once we have investigated the case. (North Kensington Law Centre)*

*A few more assertive clients occasionally mention the HRA but almost never pertinently. (Community Law Centre, Carlisle)*

LCF have also used the Human Rights Act in their lobbying work with government:

*We've used the argument that if they are introducing legal aid for employment tribunals in Scotland, through the Human Rights Act, then surely you should be using it [in England and Wales]. Why don't you apply the same standards? (Lynn Evans, LCF)*

The Federation of Independent Advice Centres has 900 members, some of whom are small community organisations. Often, members are very focused on delivering the advice service, with little time for additional learning:

*People who felt themselves to be disadvantaged or discriminated against have set up in their front room, got a small grant and there are usually 2 or 3 people running it. Most of our members will have started up in a similar way. Some of them have become very large and well-funded but many of them are still at that end of the continuum. They won't know a great deal about the Act at all. (Steve Johnson, FIAC)*

Interestingly, FIAC are much more aware of the long term potential of the Act, and don't believe that the "big bang" theory of instant awareness is necessarily the only way forward. CPAG felt that caution over judicial activism was also having an impact.

*As I think was said when the Act came out, the implications and the use to which it might be put in any particular case will only become apparent over quite a long period of time. People, almost by accident, will realise that there is perhaps this angle to try in a particular case, and perhaps give it a go. (Steve Johnson, FIAC)*

*One can see sometimes - it's not unique to Social Security - that the judges will find another way of deciding the case, which avoids them having to grapple with the human rights points, or make a decision on the human rights points. (Stuart Wright, CPAG)*

CPAG felt that some rights were more user friendly than others:

*Article 6 is used a lot more and with a lot more confidence by advisers because essentially it's a bolt-on to the natural justice arguments that people have made previously, so they feel more comfortable with it, and decision makers feel more comfortable making decisions based on it. So I think it's used more, and has led to more*

*favourable decisions, which perhaps wouldn't have gone the way they have gone prior to the Human Rights Act coming into effect, but they're not anything groundbreaking necessarily. (Stuart Wright, CPAG)*

## **Casework**

From NACAB there was a perception that the Human Rights Act has yet to make its presence felt in relation to individual casework on behalf of clients, providing more of a focus for the national organisation.<sup>iii</sup>

*They don't pile in in relation to the HRA, but we do use it as a lever to get wider change rather than helping simply Mr or Mrs Smith. It's probably more effective at achieving systemic change than in individual complaints... People tend not to flag up the Human Rights Act issues, when they come in it isn't always obvious that their complaint has this dimension. (Nicola Simpson, NACAB)*

CPAG backed this approach, but saw little evidence of the HRA being tackled in any systemic way in the government departments with which they dealt.

*We held a conference on the Human Rights Act shortly after it came into effect looking at the HRA and social security. We had people there from the Lord Chancellor's department, and they'd done a huge amount of work, and had to be praised for getting the Human Rights Act sorted out, having it implemented, training judges. But then my sense is that, once it was all out of the way, they breathed a huge sigh of relief and said, "great, we've done it". That's perfectly understandable. It's a human reaction to it. But I did ask them at the conference, what's being done about having an audit, a yearly audit or a five yearly audit or whatever, to see where things are, what problems have arisen and have they been addressed, what are the particular channels to have those problems addressed, are they aware of them so they're not necessarily going to court. There wasn't any answer. (Stuart Wright, CPAG)*

CPAG's advice line provides help for caseworkers across a wide range of social security issues. It does not deal directly with the public. But it has seen a significant increase in human rights related enquiries.

*A significant minority of the calls we get are asking about human rights questions. There'll be quite a number of calls we get in which people will say, "is there a human rights issue here?", because they simply don't know. So that has to be explored with them, and the answer usually is no, there isn't one. Or you will get people who will phone up who will have reached quite a detailed stage in their preparations for a case on which they've developed the human rights arguments, and they're seeking some support or additional information in relation to that. (Stuart Wright, CPAG)*

Law Centres around the country supplied examples of the types of cases that they have handled where the Human Rights Act has been useful. In many cases, immigration issues did indeed form the majority of the caseload. Respondents talked positively about the way in which the courts used the Act, but were often critical of the Home Office. Others raised fair trial issues in relation to appeals processes, more general points about degrading or inhuman treatment, and some issues which

showed a failure to place due weight on positive obligations that the authorities may have. Some law centres have also started to use the HRA in relation to employment law cases, presumably in relation to employers in the public sector, though this is unclear from the examples provided. In order to avoid accidental identification, specific law centres have not been named in this section of the research.

*The major area in which human rights come into play is in the immigration and asylum unit. The courts are aware of human rights and tend to apply the ECHR properly. However we tend to find that the Home Office in their decisions relating to asylum do not apply human rights correctly in most cases. They have often refused claims for asylum – rejecting even ELR – on human rights on clear cut cases. These will hopefully be overturned at appeal and the correct leave given. The Home Office do not seem to have grasped article 3 at all!*

*We have many examples from our work in immigration. These are mostly cases in which we are arguing a violation of article 2 or article 3. We had a case of a young woman – aged 18 – with very advanced HIV. She was receiving treatment in the UK which had halted the progress of the disease. If she did not receive the treatment (which she could not have done if returned to her country of origin) she would certainly die within a short period. The Home Office took the view that removal would not violate articles 2 or 3 and maintained this view up to and including the appeal hearing. Fortunately the Adjudicator disagreed with the Home Office and our client was allowed to stay in the UK.*

*In terms of article 3 we dealt with an older man in a residential care home. He had severe learning difficulties and was prelingually profoundly deaf, with little speech and little capacity for communication. He broke his hip and needed surgery, and was in great pain. The operation was repeatedly refused on the grounds that he could not give the required written consent, and Mencap's representations were ignored. We used legal aid to apply for a "best interests" declaration from the High Court.*

*We have a borough council dealing with discretionary housing payments – top up money – where the appeal is an internal panel of councillors. Whether this is a sufficiently independent forum to ensure a fair hearing is unclear.*

*We have seen severe examples of failure to deal appropriately with bullying in schools. One child became so mentally ill and suicidal after bullying that they were admitted to a mental hospital under a section for more than 6 months.*

*One of our clients, a Christian, was told that he would have to work Sundays in future. He has not done so for 8 years, and he refused. We wrote to his employer citing the HRA, as well as arguing a unilateral variation of contract, and they have now relented and agreed he does not need to do so.*

## **General conclusions**

Participants in the research indicated that there was a lack of client awareness of the Human Rights Act, even two years after it came into force. Those clients who are aware of the Act have quite unrealistic expectations of what it might achieve, or a misguided understanding of its contents which is perhaps understandable given that there has been very little promotional activity which has targeted the general public. However, legal advisors working for these advice agencies were able to provide help and advice to enable people to claim their rights.

It is clear from the majority of interviews in this sector that there has not been a significant level of systemic change, using the Act as a framework for good practice. Instead, individuals are still relying on cases, with a cost to service providers in terms of time, money, and reputational risk. Once again, the failure of caseworkers operating our immigration policy to properly understand human rights issues leads to legal challenge. But there are other areas where advice providers are using the Human Rights Act to make change happen. The reliance on individual cases, however, means that change will be slow, and future legal challenges remain a risk.

## CAPACITY-BUILDING AROUND THE HUMAN RIGHTS ACT

Every interviewee was asked about training and guidance to provide a pattern of the type of help and training available, and the best sources of information and up to date advice on the Human Rights Act.

The majority of advice, training and support was provided to the voluntary sector by the voluntary sector. Some organisations were aware of the work that the Home Office Human Rights Unit (subsequently moved to the Lord Chancellor's Department) had undertaken to promote the Act, mentioning the leaflets, posters and workbooks that were provided, although no-one attributed this directly to the Home Office. They will presumably be made aware of the revised version of the study guide produced in October 2002.

*My colleague thought that the guide book, or work book that goes with the material is useful. But more could be made of examples. (Julia Cream, Alzheimer's Society)*

On the other hand many organisations spoke of "just" receiving mailings and nothing else, and were unclear of the source: on describing the materials it became clear that it was the Home Office pack. The perception from the voluntary sector as a whole was that no information from government, or from any body connected with government, had been provided, nor was there an awareness of any capacity building more generally. Others had not realised that there was any information about the Act available in languages other than English.<sup>liii</sup>

*There was no significant publicity that we picked up at a local level across the country. There was certainly no national awareness programme that we were linked into at all. (Gary Fitzgerald, Action on Elder Abuse)*

*I haven't seen any publication about human rights in other languages. That's quite important because the people that we work with don't speak English. (Cheryl Monteith, Refugee Support Centre)*

### Training prior to October 2000

The period prior to 2 October 2000 offered the voluntary sector an opportunity to prepare for the Act's implementation, working to prepare the public sector by highlighting Human Rights Act issues that could arise, and thus raise standards in service provision. Yet there seemed to be very little evidence of a sector based approach to training, and very few examples of organisations working together, across their sector, to provide training and development work. Many organisations undertook their own in-house training; others used the wide range of training courses that were available. The National Council for Voluntary Organisations held training workshops on the Human Rights Act and distributed information, though no-one interviewed for this project had participated in the forum. Instead, more specialist training was frequently mentioned, often provided by either Liberty or JUSTICE.

Within the disability sector some organisations had undertaken their own in-house training. The Disability Law Service turned to Legal Action Group and the Public Law Project. The British Deaf Association attended training run by the Northern Ireland Human Rights Commission, intended for organisations in Northern Ireland. BCODP ran a seminar for members to raise awareness of the Act, and others in this sector referred to the Disability Rights Commission publication on the implications of the Human Rights Act for disabled people.

*That was well circulated. It ran through its print run in double quick time. It's a very good document. (Rachel Hurst, Disability Awareness in Action)*

RNIB took the view that they could be considered to be a public authority and therefore needed to raise awareness in-house for different reasons – to avoid violating people's human rights themselves.

*We went round the different directors and talked to them about the Act, we tried to help them identify particular issues. We also produced a very brief card which went to all the staff members, called something like "don't be wrong about human rights", just to flag up that it was coming in and that it might have implications either for their client group or for RNIB services. (Catherine Casserley, RNIB)*

The Children's Rights Alliance for England also used the in-house seminar method to pass on information to staff and members. ChildLine include the Human Rights Act in the general training that their advisors receive rather than focusing on it separately. Other children's organisations found the contrast between the HRA and the Children Act interesting.

*We held a series of seminars, with Save the Children, on how the Human Rights Act applies to children, based on briefing papers across a range of policy areas. This was not exactly training, but we wanted to identify breaches of children's rights which should be protected, and look at ways of enabling children to take cases. (Veronica Plowden, CRAE)*

*There was no training provided – but there had been some for the Children Act when that came into force. Our priority was an internal audit to ensure we complied with the Act in areas that we act as a public body – Radcliffe did that. By June 2001 we had done a "training the trainers" event for regional managers, but only 2 of the 9 used it as a plank to go on and run regional events. (Bill Badham, Children's Society)*

In the asylum sector, the only mention of external training was that which was provided by the Joint Council for the Welfare of Immigrants (JCWI), which RAP used for its staff. Others mentioned only generic training. Refugee Action had also sought advice as to whether or not they could be considered to be a public authority, and circulated the legal opinion from Nicholas Blake QC to their staff, the refugee sector generally and on their website. The Refugee Council's training was intended to generate less enthusiasm for the Act, rather than more.

*To make people aware – in some ways it was about dampening down expectations to a certain extent because people were thinking it would stop vouchers, stop other things happening. (Alison Fennay, Refugee Council)*

Organisations working with older people varied in their approach. Carers UK retain Luke Clements, a respected solicitor specialising in care issues as their part-time legal advisor, and he provided training for staff. Help the Aged had an in-house training day run by an external provider, and also attended other conferences, specifically one run by IPPR before the Act came into effect. Age Concern provided training for its helpline advisors, as well as for other staff, and now incorporates the Human Rights Act into other training programmes.

NACAB provided training and guidance for its advisors and volunteers. The Law Centres Federation held a conference to promote the Act to its members, and circulated the Home Office booklets widely. Individual law centres provided their own training, and the central office briefing circulates other training that is available.

*We haven't done anything ourselves because Liberty and Justice were doing a great job on sorting the training out. (Lynn Evans, LCF)*

## **Guidance and problem solving since October 2000**

Interviewees were also asked where they would turn if they had a question or problem about the Human Rights Act that they were unable to answer. Almost every organisation that participated in this project would contact Liberty, themselves a voluntary organisation, for help. Liberty's advice lines were mentioned in over 70% of the interviews conducted, including by those organisations that would try and take the case further themselves.<sup>liv</sup> It is notable that organisations interviewed for this project saw guidance and help overwhelmingly in the context of helping to take forward individual cases, rather than in the context of achieving systemic change. It is also notable that no-one mentioned the Human Rights Unit in the Lord Chancellor's Department.

*We would tend to go to a more specialised organisation like Liberty. (Steve Johnson, FIAC)*

*We have a joint relationship with the Public Law Project, we can refer people straight to them. (Tessa Harding, Help the Aged)*

A smaller number of organisations would expect to handle the query in house. This might extend as far as finding the answer to a specific problem, but if it involves a new area of law it often ends in stalemate due to lack of resources, or an inability to challenge the issue in court without a victim to take a case. Other organisations were clear that they were not a source of in-depth human rights advice so, whilst happy to help with initial queries, would then simply make a referral: many organisations kept lists of lawyers that they felt were qualified to handle cases in their field. Disability rights organisations would frequently refer individuals to the Disability Law Service, or the Disability Rights Commission and children's organisations to the Children's Rights Centre. Again, Liberty's advice line was constantly mentioned as a source of assistance.

*It just so happens that we have an unusual set of lawyers all of whom are interested in the Human Rights Act. We quite like to get to grips with it ourselves if we can, and we follow the Human Rights Act cases because it's so key to our work. But again and again we find an issue that needs looking at but we can't do anything about it, and that's where we stop. (Rowena Daw, MIND)*

*We have a number of professional journals that we could look at if there was a human rights query. I think in the first place we'd refer to one of those, and then we'd probably refer it on. (Sarah King, Maternity Alliance)*

*If we had any questions I suppose it would be my job to find the answers and I've got a legal background so I'd go and research. But we could also ask our local law centre, or the Refugee Legal Centre. (Cheryl Monteith, Refugee Support Centre)*

*We have a longstanding arrangement with Winstanley Burgess and we also have housing consultants that people can call on. (Sandy Buchan, Refugee Action)*

*We would probably go to Liberty. They are the only organisation in the way that I see it that has the credibility. I could feel confident that they knew what they were talking about. If I couldn't actually get information on the phone from them then I have access to the library so I'd probably go and use that. (Catherine Casserley, RNIB)*

## **General conclusions**

Strategies for the provision of training and ongoing guidance in the voluntary sector are *ad hoc*. Rather than a criticism this fact indicates the size of the gap that a Human Rights Commission might fill. Organisations that participated in this research were in almost every case dependent on individual members of staff with a specific interest in the area to raise the profile of the Human Rights Act. Where this has happened, the results have often been beneficial, but it is still a strategy of leaving training to chance.

There is also a lack of consistent legal advice on new case law, and its impact on the sector's work. The Leonard Cheshire judgement was a landmark judgement in its definition of a public authority which could potentially impact on many of the sectors surveyed – yet only one interviewee raised this during the research. Without a well-funded and consistent source of advice, the voluntary sector will remain unaware of many significant developments in case law.

Those organisations that did have strategies for seeking help and advice tended to rely on Liberty. Liberty is itself a relatively small campaigning organisation and it must be difficult for staff to meet the demand that they appear to face from the voluntary sector.

Many organisations indicated that even where they did have an individual who was both interested in the Act and had the time to keep up to date, they were unable to move the debate about the use of the law forward as much as they would like. This

is due in part to a lack of resources to take cases and in part to the lack of standing given to organisations to challenge poor practice since the Act demands the case be taken by a victim.

## WHAT HAPPENS NEXT?

Participants in the research have provided overwhelming evidence of the need for a body to protect and promote human rights. Their evidence showed:

- Many examples of continuing individual violations with too many consistent patterns emerging for these simply to be isolated incidents.
- Gaps in the provision of training and guidance to voluntary organisations (and to the public sector), particularly in relation to a growing body of case law as the Act is applied in new areas of law, and in how to apply the principles underlying the case law to avoid legal challenge in the future.
- A lack of information or help available to enable voluntary organisations to understand how human rights principles that lie at the core of particular case law decisions might apply across different sectors, and thus inform broader service provision.
- No systemic change, with relatively little evidence of public services changing, or of the policies and guidelines which shape their delivery having been influenced by the Act.
- Unrealistic expectations of what the Act might achieve which can quickly lead to disillusionment without an accurate understanding of the rights it protects and the principles underlying its operation.

The Act alone has – so far – failed to start a process of systemic change, despite the 18 month period which organisations had to prepare prior to the Act coming into force. It seems clear that something else is needed to enable this to happen. Otherwise public sector service providers will continue to be unaware of their responsibilities under the Act and voluntary organisations will continue to lack information to challenge poor practice on a systemic basis, whether through dialogue with local service providers, or through the national policy making process. Instead they will continue to fall back on a strategy that relies on individual legal cases, which are both time consuming and expensive.

The creation of a human rights body – a non-departmental public body that could both promote the Human Rights Act and enforce it - could help to break this vicious circle.

## Should there be a Human Rights Commission?

Participants were asked whether their organisation would support the creation of a human rights body, and if so, why. **The overwhelming majority of interviewees believed that a commission was an essential part of the creation of a human rights culture.** They saw immediately what it could offer to their clients, and to their organisational work, and felt that it could fill a significant gap. Some had good relationships with existing equality and human rights commissions which

contributed to their positive response. Others simply felt that the lack of knowledge and understanding that both their clients and the general public had about the Human Rights Act threatened to undermine the whole concept of human rights.

*I think one thing is that people – the whole community – isn't aware of human rights as anything that's good for them. They think it's something that foreigners are using to extort money and benefits from the system. It needs some publicity, it needs somebody to take it forward: it needs the dissemination of knowledge so that people realise what it's good for – and it's good for them. I think it's really important for them to know that they can use human rights. You know, it's something for everyone; that it's for the good of the people. (Cheryl Monteith, Refugee Support Centre)*

*Yes, an independent watchdog is needed for human rights. Human rights concepts, principles and values were not part of the UK culture prior to the Human Rights Act – we often only pay lip service. There is a real need for promotion and awareness raising around human rights – of how to understand human rights. (Elaine Kay, Disability Law Service)*

*Yes, because of the range of different things that need to be addressed. I mean first of all there's nobody to take on the cases. But a much bigger issue is really around the areas where you're looking to provide a framework for change of practice which gives a set of standards below which things are unacceptable. (Rowena Daw, MIND)*

*We have a good relationship with the Northern Ireland Human Rights Commission. I think, yes, a Human Rights Commission would benefit Deaf people definitely. (Jeff McWhinney, BDA)*

*There is nowhere central for people to go. There's nowhere centrally that's actually pursuing a human rights agenda and ensuring that it's being built into the work with public bodies. I'm not even sure whether it's a governmental function. You need an independent body to promote and enforce the Human Rights Act. I think without that it's pretty meaningless. In a way it's only going through something like this [the interview] that you realise again the potential of it and how little is being achieved because there isn't a single body to push that forward. (Catherine Casserley, RNIB)*

*I think, my gut says yes, we've got to. There is a great part of me that really does warm to the idea of having it all in one. I do think that people who work in non-discrimination need to see the holistic approach of human rights. They often don't, and they get sucked into the legalistic trap. I think human rights activity is deeply important for the whole of British society, and I think we have a chance, if we can use it, to really break down the barriers of what makes us so exclusive. This is a marvellous opportunity, a damn sight better than the Declaration of Independence. (Rachel Hurst, Disability Awareness in Action)*

*If you have legislation and no means to enforce or promote it, you will struggle. Where else is the focus? It means shrewd lawyers take individual cases – and that's not always to the benefit of disabled people. (Andy Rickell, BCODP)*

*It's amazing that you have what is effectively a constitutional law in the Human Rights Act, with no body to oversee it. (Bill Badham, Children's Society)*

*I think it would stop litigation. At the moment staff don't understand, so they dig their heels in. They wouldn't if they understood. The resources that they use in fighting things are more than could be used in meeting their obligations under the Act. (Yvonne Spencer, Children's Legal Service)*

*I think it would be good if there could be a coherent, recognisable body, because, you need something on the ground following an Act to make it hit home. It's only a very few people, probably all the people who listen to the Today programme, who know what any of these Acts are about. Acts need explaining. What do we have an Act for if it doesn't impact on day to day life? In order to check progress you have to have a body to refer to. (Susanna Cheal, Who Cares? Trust)*

*I definitely think there's a need for a Human Rights Commission. Having thought about the other commissions and having actually worked through the lifetime of seeing the Disability Rights Commission being set up, there is nowhere for an individual to go. There's so much misinformation about the Human Rights Act, and that's why we've been very careful about publicising it, because if you just look at the basic words of the Human Rights Act, as a carer, you could read anything into that. You'd end up with overuse of the Human Rights Act which wouldn't necessarily be very helpful for them or for the organisations involved. (Emily Holzhausen, Carers UK)*

*CPAG always filled the role of trying to take the test cases, and quite a number of organisations do feed in to us with the cases, but there are other people where that doesn't happen. If there was some additional filtering that some other body – like a Human Rights Commission - could make, in terms of taking cases forward, not least to know about the cases that were going forward, then I think that would be a great help. And I think in truth it would help the courts and tribunals. (Stuart Wright, CPAG)*

Just one participant felt that the creation of a non-departmental public body was not the right step forward to promote human rights, and instead wanted to keep the emphasis on smaller, more flexible, services.

*I would much rather see a sort of cross-departmental approach to making sure that agencies like Liberty are given support to in turn support people, by use of the Act, in a vigorous and proactive way. The commissions, it seems to me go through the lifecycle of organisations just like every other. There's a storming phase at the beginning, but there is not a great deal of momentum. If the role of promoting the Act is one which government thinks is important, they need to have a strategy for that, but I think not entrusting it to one body. (Steve Johnson, FIAC)*

## **What would it look like?**

Almost all participants had strong views about the type of body that could gain confidence and be perceived as independent of government, often basing their knowledge on the work that has been done by the existing equality commissions, though they were less interested in detailed structures that the body might have.

## POWERS

Those organisations that supported the creation of a human rights body were asked to give their views on the type of powers that it might have. In particular they were asked to consider whether particular powers were more or less important than others. Most respondents wanted a body to have educational and promotional powers, to provide good practice guidance and to take test cases. Unusually the least common was mediation which in the light of the human rights framework with its emphasis on balancing rights could be seen as quite a natural role. One interviewee with personal experience of the mediation process drew specific attention to the drawbacks of this type of negotiation. Many respondents were keen to stress the importance of promotional powers, of the provision of information, which many of them thought was as much if not more important in creating a culture of human rights as enforcement powers. Some wanted a commission to act as a warning system – to act on complaints at an early stage and forestall the need for expensive public inquiries.

*It will have that role of additional training and lobbying that we can't do, also promoting, scrutinising draft legislation. (Lynn Evans, LCF)*

*Raising a banner about what constitutes an abuse of human rights, generally, for the general public, and also for Local Authorities, and I suppose, like the EOC and the other commissions identifying test cases and running those. To be a sort of regulatory type body, to try and enforce and to promote human rights. (Sarah King, Maternity Alliance)*

*The Commission needs to be seen as impartial, objective and independent. It could play an important educative and advisory role and provide effective and authoritative scrutiny of legislation and its executive implementation in conformity with human rights values and principles. There are pros and cons for the Commission itself taking individual cases. (Elaine Kay, Disability Law Service)*

*I would like there to be an intelligent and responsive body that is responsible for enforcement, and there is this relationship between enforcement and if you like, education and awareness raising and promotion. (Sandy Buchan, Refugee Action)*

*To be a source of information, to talk to people about what the Human Rights Act is, and what it does, as well as researching its implementation. It would need to be independent, it would need to have teeth, good funding, and a clear set of terms of reference. (Emily Holzhausen, Carers UK)*

*It should test the law. The Disability Rights Commission have that power, they can enforce good practice. At the moment, for example, with the prisoners, we've been in dialogue with the Home Office for two years without much being done. That's an area where the Human Rights Commission could challenge and support, to get the changes. Also it would be good if it was a one-stop-shop for advice. There is a misconception that human rights equals equality. Which I don't think it is – I think difference is the issue. But people focus on conformity, trying to treat everyone as equally as possible, and I don't think that's it – the focus should be on respect for each other's differences and to celebrate diversity. (Jeff McWhinney, BDA)*

*I don't think that you can have either promotion or enforcement, I think you need both. I think that a Human Rights commission would need to be able to advise members of the public, need to be able to advise organisations like ours, which might be supporting members of the public. It would need to be able to advise service providers, and so on. There are models in the States whereby the Federal Government has this role, the Department of Justice, where it will take up test cases, carefully judged, to cover different kinds of targets and a wide geographical spread, on behalf of the civil liberties of members of the public where it looks as though their civil liberties or various kinds of human rights have been violated. I don't think our legal system makes it quite as easy to operate in that way. But as a model it seems to me extremely powerful. (Tessa Harding, Help the Aged)*

*In terms of publications it would be very useful if there were to be guides to good practice. I can think of lots of types of guides to good practice, which would be very helpful. They make systemic an individual case, and as much as anything that's about information provision. Otherwise a case changes a local situation, but it doesn't change for everyone. (Rowena Daw, MIND)*

*Education and training is one of the most valuable things that there can be, and there is a correlation between quality of training and quality of education and the frequency of abuse: the better the quality of understanding and training, the less abuse. So I would like to see a Commission that actually did promote the concepts and culture of equality and rights. I think, if you look at something like the CRE, there have been individual cases that the CRE have taken that have not only served to resolve the individual issue, but have served as examples that can be pointed to, and do have an impact. When something actually goes through a court and reaches the other end, and there's actually a resolution, it has a cascade effect. There's this ripple of change that takes place as people realign themselves. But, although there is an issue about a Commission being able to take cases forward, I think there is also a huge issue for people being able to access advice, people being able to access information. (Gary Fitzgerald, Action on Elder Abuse)*

*If it existed in order to keep an eye on the promotion of human rights then absolutely. Promoting the understanding of it on a general level, on a specific level, within specific government departments, an understanding of how the Act works – but also taking cases, at least test cases. (Alisdair McKenzie, Asylum Aid)*

*Mediation could work, either in individual cases or where there is a general issue – for example the police treating young people as a problem and not seeing their human rights – you could see different perspectives through mediation. It could also produce materials for the citizenship agenda in schools, giving teachers the confidence to deliver this part of the curriculum. It needs to be inspiring and to allow children to participate. (Keith Harrison, adult support worker, Article 12)*

*The adversarial model isn't one of the most attractive, but when people aren't always conscious of their rights, the process of negotiation [in mediation] means that bargaining power is quite an issue. Disabled people as a collective aren't in a position yet where they have the confidence or ability to be in a position where they can create their own bargains. In relation to reasonable adjustment under the DDA for example, if you've*

*been used to such terrible treatment for years and years you might readily accept something as being better than nothing – “thank you for making that little adjustment”. So it does have its downside. (Haqeeq Bostan, RADAR)*

*I'd want it to be making sure that some of the dreadful things that happen to children never happen again. For example, look at the North Wales abuse inquiry and look at the reluctance to listen to what children said at the time. The inquiry cost millions of pounds and if there had been a Children's Commission and Advocacy Services it would have been so much better for children and a much more productive use of the funding. (Susanna Cheal, Who Cares? Trust)*

Many organisations also wanted to see a human rights body reporting to the relevant committees in relation to international human rights instruments that are not justiciable in the UK: such as the Convention on the Rights of the Child, or the International Covenant on Civil and Political Rights.

## **STRUCTURES**

Only a few organisations had detailed comments to make in terms of structure. The Law Centres Federation, with local bases around the country, felt that a human rights body should have local or regional centres, as is the case with Race Equality Councils. Others felt that flexibility was an important point:

*I do want one, but I don't want it to be gargantuan and institutional. It should be very nimble, and perhaps regional. (Sandy Buchan, Refugee Action)*

NACAB made an important point about the process of forming a human rights body:

*I'd like to see them consult and invest in the process of deciding how they manage their resources – it needs to be transparent. (Nicola Simpson, NACAB)*

Many children's organisations would still want to see a children's rights commissioner within a human rights commission.

*The skills, marketing and access that you need to reach children are very different. I would still want to see a Children's Rights Commissioner – and the right government department will be crucial – not in the Home Office which is normally associated with youth offending. (Yvonne Spencer, Children's Legal Centre)*

*ChildLine is less concerned about the exact form the commission should take than about the powers needed to carry out this work effectively. We have spelled some of these out in our submission to the Joint Committee. We're more concerned that the children are heard and their concerns addressed. At the moment we can't see that in any other way except children having their own champion who's independent of government, who really raises children's voices and concerns in all matters that relate to them. That's why we are part of the campaign for a commissioner for all children in the four UK nations with the responsibility of ensuring children's rights are respected and their diverse needs met. (Ute Navidi, ChildLine)*

*The NSPCC wants a Children's Rights Commissioner. I think the concern is that there are just very special needs for children, and that children do get left off agendas. An example of this is the Youth Justice and Criminal Evidence Act, the new legislation, that is bringing in special measures for vulnerable witnesses as well, and because that's a new thing, that's where everybody's attention is going, and although children as witnesses had been ahead of the game, they're now, I think, in danger of falling off the edges because the new stuff is more interesting. There needs to be definitely someone who's speaking up for children. (Barbara Esam, NSPCC)*

For people with learning difficulties the over-riding issue was one of accessibility. If people with learning difficulties are to participate in the work of a Human Rights Commission it must take account of their needs.

*Making decisions is a massive issue for people with learning difficulties. We've just had a consultation on that – and the document [from the Lord Chancellor's Department] wasn't accessible at first. People First members used the Disability Rights Commission to complain. Things must be designed in an accessible way – that means different formats. If it isn't accessible, it's automatically binned. (Andrew Lee, People First)*

## **PRIORITISATION**

Participants were also asked if they had a view on the type of issues that a human rights body should prioritise in order to create a human rights culture in the UK. The responses varied hugely, recognising the breadth of interests in the sector. Many people felt that it could take forward the issues that have been raised earlier in the report as human rights violations and simply referred to these once more: these responses have not been captured in this section of the report. Others suggested a more strategic approach or focused on human rights issues that cut across sectors – for example tackling the ability of people to make decisions about their own lives, which could impact on older people's rights, disabled people's rights and children's rights.

*The kind of cases they should prioritise should be those that affect the lives of thousands of people – things like DNR notices. Everyone's in favour of human rights, but not always when it's the reality of someone else's human rights and that's where they need to focus. (Andy Rickell, BCODP)*

*I think there's a balance to be struck between getting some landmark principles set down and investigated and looking at small marginalized groups of people who might have a collective particular difficulty. (Emily Holzhausen, Carers UK)*

*Stop the bullying. That's our priority. (Andrew Lee, People First)*

*The sort of situation where – like in the Leonard Cheshire judgement – it's possibly up to the local authority to secure a person's human rights through their contract. Someone being placed in a care home by a local authority isn't going to be looking through the local authority contract. It's unenforceable really for a private person taking the case: a Commission could undertake some scrutiny here. (Stephen Lowe, Age Concern)*

*Rooting out discrimination based on age, and I think that would actually go back to the idea that the treatment that you get is determined by a predetermined view that if you're old, the quality of the service you have is not an issue. (Les Bright, Counsel & Care)*

*I think promoting cultural change in the public sector. It comes across strongly that the attitude of people is, "oh, we've got to do it because it's in the Act", rather than seeing it as a valuable thing to do. So promoting the underlying principles of the Act. (Jeff McWhinney, BDA)*

*People who require care are by definition more vulnerable, and so little attention is paid to care compared to health. And yet it is every bit as important and significant to that group of people. But we have no tradition of care ethics, like we have a tradition of medical ethics. I mean at least we know what medical ethics are, the ethics of the care system are never examined in any kind of philosophical or serious way. It could help with that. (Tessa Harding, Help the Aged)*

## **Equality and human rights**

In the light of the single equality body project, interviewees were asked to provide information about the inter-relationship between human rights and equalities issues. They were asked whether outlawing discrimination on the grounds of age, sexuality and religion or belief (in relation to employment) would have any impact on their work. And they were asked about the broader relationship between equality and human rights.

### **IMPACT OF THE SINGLE EQUALITY BODY PROJECT**

For the majority of respondents the evidence that they have provided for earlier sections of the report would simply not be affected at all by the implementation of a European Directive that focused only on discrimination as it relates to employment. Only a couple mentioned specific gaps that would remain if a single equality body was created without a human rights dimension.

*There are some issues where you can't deal with it by mainstreaming equality – for example hate crime. (Nicola Simpson, NACAB)*

*There are real threats from the disability perspective around issues like genetic testing, the right to life and judgements about quality of life – these all involve moral and ethical issues beyond equality concerns. (Elaine Kay, Disability Law Service)*

Others didn't feel the need to refer to specific examples because there were so many: **the overwhelming majority made it absolutely clear that the creation of a single equality body to oversee new legislation preventing discrimination in employment would have no impact on their workload at all.**

The evidence in earlier sections of the report makes it clear that the majority of human rights violations that organisations encountered did not relate to employment, but to the provision of public services – often statutory services which the equality commissions cannot cover without some kind of general duty to promote equality. These include issues such as the abuse of DNR notices on the grounds of age or disability, the right of children in prison to be safe, and to receive an education, the right of older people or disabled people to be free from abuse if they live in residential accommodation, and the right of unaccompanied refugee children to be looked after away from others who might cause them harm.

## **COMBINING EQUALITY AND HUMAN RIGHTS**

Finally, in the light of the single equality body process and the possible creation of a single equality body, participants were asked to give their views on a new option: the creation of an equality and human rights body. Such a body could promote and enforce the 6 equality strands, and an additional human rights strand, as the Lord Chancellor alluded to in his evidence to the Joint Committee on Human Rights.

**The majority of respondents were positive, often seeing equality and human rights issues as closely linked – perhaps more closely linked than they are perceived to be by those working in the equalities field.**

*We at MIND are firmly committed to the notion that we don't want an equality commission, we want a human rights commission. So if it's going to be human rights as part of an equality commission, we would want, obviously, human rights and equalities to go together, but we'd also want a human rights unit that was capable, as part of that body, of doing its own thing. (Rowena Daw, MIND)*

*If there was going to be a single commission, then I would argue for human rights to be in there as well, because that cuts across more than anything all of those issues: it should be embedded in what they do, as well as having a specialism within that body. (Emily Holzhausen, Carers UK)*

*A human rights body should cover all issues of equality as long as there is a distinct arm promoting and protecting children's human rights. The Human Rights Act is the defining framework and other things flow from that, or are operationalised through the different strands. (Bill Badham, Children's Society)*

*The reason I am quite for it is that it means that people are going to recognise the others. There is a terrible divisiveness and for disabled people that is particularly difficult, because you are either a man or a woman, you are either black or white – whereas we straddle everybody. Which is why I think for disability it's actually probably going to be more of a good thing – but none of it's any point unless we have equally strong legislation! (Rachel Hurst, Disability Awareness in Action).*

*I think it would give it a broader remit. I think you need something overarching, because otherwise you get sort of treatment by topic, it allows you more freedom to address the whole issue. (Susanna Cheal, Who Cares? Trust)*

*Yes, if the human rights element isn't subsumed – it's a separate unit or department. (Yvonne Spencer, Children's Legal Service)*

*It brings together the perception of equality, of justice in a way that the individual commissions under the individual Acts don't. There is a tremendous amount of crossover in terms of prejudice, and in terms of discrimination, that isn't effectively dealt with on an individual slot-by-slot basis. When we're talking about human rights or equality, we're invariably talking about a spectrum of abuse, or a spectrum of disadvantage. I don't think if we deal with it on a piecemeal basis, that we're going to be able to deal with the spectrum. You're talking about whole individuals, and it doesn't feel that we're dealing with people as whole individuals if you have to exclusively categorise it, "this is an issue to do with race, and this is an issue to do with gender, and this is an issue to do with disability". It doesn't make sense. That's one point. But an equal point for me is if we learned anything since the Race Relations Act, it is that we've managed to develop a hierarchy of oppression, and a hierarchy of discrimination. What on earth are we doing setting one group of disadvantaged people against another, and saying "you've got to demonstrate that your need is greater than their need if you want to get funding or support"? The logic screams for it being one single body. (Gary Fitzgerald, Action on Elder Abuse)*

Some participants urged caution, believing that an equality and human rights body would simply be too large, and too new to do its job properly; in an ideal world they would like the two issues to be kept separate.

*I can see a sort of a logic for the equalities commissions coming together as one, but they would bring with them some quite focused agendas, and if what I think - and people are hoping for from the Human Rights commission - I see that as having a much wider scope. So I'm not sure the two would match together well. (Steve Johnson, FIAC)*

*I think it needs to focus on human rights. They are two distinct areas – concerning rights that go beyond equality like the right to life. The danger is that the body would become too generalist and not specific enough. (Elaine Kay, Disability Law Service)*

*I'm not sure that human rights is necessarily just about equality. My concern would be that, certainly at the moment, the perception is that human rights is something different, something new. I'd have the concern that if there was an equalities and human rights body, one it would have such a wide remit that perhaps it would never be able to do anything particularly well. Secondly that the human rights issues, the discrete human rights issues, might get submerged. If it was to be set up there'd have to be quite a careful balance in terms of its make up so that the existing equalities bodies didn't just continue on under a different guise, and human rights left outside the door. In theory it's probably the right idea that you have one equalities body dealing with everything, but initially at least, my preference would be for a discrete Human Rights Commission so it could focus on extremely discrete human rights issues, and then if necessary merge into the other equalities bodies. (Stuart Wright, CPAG)*

Some could see both sides of the argument, and didn't come down on either side of the debate, though perhaps recognised the need for pragmatism given the reality of political choices that might be made, particularly in terms of the number of new bodies that might be created.

*Equality and human rights are two sides of the same coin. If it's a strong body it might be OK; human rights might strengthen disability rights. At the margins human rights is often about disabled people. It's about valuing human beings and disabled people are often less valued, so it might make people understand this better. But on the other hand it could also push rights such as the right to life out to the margins as only to do with disabled people. (Andy Rickell, BCODP)*

*I'd say it has its attractions. I think at the moment, the risk is that we won't get a Human Rights commission freestanding, and I'd much rather we had one. I think in the best of all possible worlds it would probably be better to have both. (Tessa Harding, Help the Aged)*

*In an ideal world before a single equalities commission, we'd have an equality bill based on and taking into account not only the various strands of equality that are there but also to try and take account of human rights legislation. (Haqeeq Bostan, RADAR)*

*RNIB has adopted a position in relation to a single equalities body, which is very much about setting preconditions; a single equalities body is something that RNIB has a great deal of concern about. It hasn't finalised its position on what the nature of any body would be. I think it does see some attractions in the model that Lord Irvine put forward, this umbrella body that deals with human rights and then has different strands, but that position isn't finalised, because we don't know enough. Some of the disability organisations have commissioned research, so we're waiting to see what that says. (Catherine Casserley, RNIB)*

*It strikes me that there's an opportunity to do things differently in how we help society recognise, accept, and celebrate human difference in all its forms. It's not about motherhood and apple pie. It's about recognising that different constituencies are at different stages of their journey. With hindsight it can be said that more could have been done by the CRE by way of rights programmes and protection to avoid the alarming incidents and developments that we have seen in recent years. If disability is to avoid such headlines in 20-25 years' time it is essential that we do not just focus on the DDA and anti-discrimination legislation without looking at the entirety of human rights and valuing difference and diversity. Whether it's a single equalities commission or an equalities and human rights commission we would be have to be sufficiently confident that it protects the rights of disabled people and recognises that quite often disabled people need a supportive physical environment just to bring them up to a level playing field. So long as that's the case, and we recognise the fundamental challenges that disabled people face I think it's wholly proper that we think of new models that might protect a range of people's rights (Kate Nash, RADAR)*

The voluntary sector organisations who participated in this research project have given a clear indication that they support the government's lead in relation to human rights and want to play their part in making this real. They stand ready to help public services achieve the high standards that the Act demands and their campaigning and promotional activity can play an important role in creating public acceptance for human rights. If these organisations themselves understand more about how the Act can help to protect their clients - ordinary people whose lives have led them to a

place where their vulnerability means they need help and support – they can work with others to publicise its role.

But they cannot play their part without the information, advice and expertise that a body with the power to promote and protect human rights could provide. Without such a body, the human rights culture to which the government aspired on our behalf will remain out of reach. And one of the boldest legislative steps of any government this century will go unrecognised.

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Jenny Watson is an independent human rights consultant.

## **APPENDIX 1 – METHODOLOGY**

41 participants from 32 organisations took part in the research. They were sent information explaining the project, which was followed up with phone calls to provide an opportunity for any questions that they had to be answered, and to arrange an interview.

A standard questionnaire was used for every interview. Most of the interviews were face to face, and were taped. A smaller number were conducted over the phone, with notes made at the time of the interview. All interviewees were asked to supply copies of any research reports that they felt would be helpful to the project. Interviewees were asked to give their consent for quotes to be attributed to them in person, and were given the opportunity to see and agree either the transcript or the quotes prior to publication.

The research questionnaire is set out below for information.

### **British Institute of Human Rights (BIHR) project An inquiry into the need for a Human Rights Commission**

Thank you for agreeing to participate in this research project, run by BIHR and funded by Comic Relief.

If you would like to think about the questions in advance they are set out below. Some background about the Human Rights Act is provided at some points in the questionnaire to help you link your area of work to the Act. But you are not expected to be a human rights expert to participate in this project!

#### **General**

These questions will help me understand more clearly the work of your organisation and how you currently think about human rights.

- 1 Can you describe briefly the purpose or mission of your organisation?
- 2 Do you use human rights arguments in your work? If you do, can you explain briefly the type of arguments that your organisation would use, and to whom you might make these arguments?
- 3 How would you rate the level of awareness or understanding about human rights amongst your clients, users, or members?

## Human Rights Act – individual rights

This section relates specifically to the Human Rights Act (the Act), and its impact on your field of expertise. Some of the rights listed may be more relevant than others so do feel free to focus more narrowly if you wish.

- 4 The Human Rights Act brought the European Convention on Human Rights into British law. The rights protected by the Act are set out below. Using this list can you think of examples from your work, or from the experiences that you have heard about from your clients, users, or members, which show that public authorities are not complying with the Act?<sup>1</sup> If your clients, users or members had themselves had a deeper understanding of the Act, would this have helped?

The Act protects:

- The right to life – including to an effective investigation if someone dies in the care of a public authority such as in a prison or police station
  - The right to be free from torture, inhuman or degrading treatment – which might include undignified treatment or lack of respect in relation to the provision of care, or within residential care settings
  - The right to be free from slavery
  - The right to liberty and security (not to be forcibly detained unless this is lawful)
  - The right to a fair trial (for example in decisions about welfare benefits, housing, or childcare and custody cases)
  - The right to respect for private and family life, home and correspondence
  - The right to freedom of thought, conscience and religion – including specifically the right to practice your religious beliefs
  - The right to freedom of expression
  - The right to freedom of association – to be able to mix freely with whoever you choose
  - The right to marry and found a family
  - The right not to be discriminated against in relation to these rights (not only due to race or sex, but also religion, language, national origin or “other status” – including disability and sexuality)
  - The right to protection of property (which can include welfare benefits)
  - The right to an education (and one which respects parents’ religious and philosophical beliefs)
  - The right to free elections by secret ballot
- 5 Can you think of examples of good practice which show that public authorities have taken account of the Human Rights Act in their decision making process in relation to any of these rights?
- 6 Public authorities have a positive obligation – a special duty – to act to protect one individual from the actions of another individual in some circumstances, specifically in relation to the right to life, to be free from inhuman or degrading treatment, or respect for private life. For

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<sup>1</sup> Your examples would need to date from 2 October 2000 – after the Act came into force. If you want to supply reports or other written information in answer to this question, or to supplement your answer, I would be delighted to receive it.

example a care home should generally intervene if one resident fails to respect another's right to privacy in some way, and a school should act to protect a child from bullying. Can you think of any examples of occasions where this positive obligation has not been taken seriously?

- 7 When the Act was introduced, what support (if any) was made available to you in terms of training and information about the implications of the Act for your organisation? What would have been helpful to you?

### **Advice provision**

This section of the questionnaire is designed for organisations that provide advice and information to the public, or to their members. We are keen to find out whether your users/clients/members know about the Human Rights Act. Requests for advice are one way of measuring this.

- 8 Does your organisation provide advice to individuals? If so, have you noticed any increase in requests for help in relation to the Human Rights Act? Can you give some examples?
- 9 What, if anything, have you provided for your staff in order to help them deal with this increase in requests for help? What happens if there is a question relating to human rights that your staff can't answer?
- 10 When you receive a request related to the Human Rights Act, who provides you – or your local group/branch/scheme – with legal advice to help resolve the problem?
- 11 By the end of 2006 it will be against the law to discriminate in employment on the grounds of age, religion or sexuality. Do you think that this will have any impact on the requests for help in relation to the Human Rights Act that you currently receive?

### **Human Rights Commission**

The government has asked the Joint Committee on Human Rights, a Parliamentary Committee made up of MPs and peers, to consider whether or not Britain needs a Human Rights Commission. The Commission could play a similar role in relation to the Human Rights Act as the existing equality commissions do for the relevant legislation in their area. The rest of the questions relate to this theme.

- 12 Do you think there is a need for a Human Rights Commission? Can you say why, or why not?
- 13 If a Commission was created, what do you think its role should be? For example it could work to publicise and promote the Act and the principles and values behind it, provide training for public authorities, provide advice to individuals, conduct public inquiries, take individual cases or scrutinise draft legislation? Which of these would be the most important powers/activities in your view?

14 From your organisation's perspective, what would its most important priority be in its first two or three years? What would you want the Commission to bear in mind about your sector and your work?

15 The government wants to create a new single equalities commission.<sup>2</sup> Some people have suggested that this should be an equalities and human rights commission to include a broader range of issues not currently covered by existing equalities law. What do you think about this idea?

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<sup>2</sup> It would combine the DRC, EOC and CRE, and also have responsibility for combating discrimination in employment in relation to age, religion and sexuality.

## APPENDIX 2: KEY RIGHTS IDENTIFIED DURING THE RESEARCH

In order to avoid repetition a summary of the rights contained within the European Convention on Human Rights and Fundamental Freedoms that are protected by the Human Rights Act 1998 is included here, as well as some information about the concept of positive obligations under the Act. This summary is designed for lay people to understand, and is taken from *The Human Rights Act Toolkit: a checklist for managers* to be published by Legal Action Group in January 2003<sup>iv</sup>.

The most common areas identified by interviewees during the course of this research relate to Articles 2, 3, 5, 6, 8, 14 and Article 2 of Protocol 1.

### Rights protected by the Human Rights Act

- Article 2 – **the right to life** gives the absolute right to have your life protected by law. Everyone in the UK has this right – even people who have committed serious criminal offences.
- Article 3 – gives you the absolute **right not to be tortured or subjected to treatment or punishment that is inhuman or degrading**. Inhuman treatment could include serious physical assault. Degrading treatment can include ill-treatment that is grossly humiliating: bullying or severe institutional racism might reach this threshold. Remember that degrading treatment does not have to be **intentionally** degrading. Its **impact** is what is important.
- Article 4 – gives you the **right not to be subject to slavery or forced labour**. This does not mean that you have the right to be paid for everything you do – for example unpaid work as part of a community service order, or in a prison would not breach this right.
- Article 5 – gives you the **right to liberty and security of person**. It means that you should not have your liberty taken away from you through arrest or detention except in the circumstances set out in the article itself.
- Article 6 – gives you the **right to a fair trial**. It applies to both civil rights and criminal matters. It can also apply to dismissal from employment, to the withdrawal of benefit, or to a decision to withdraw a license to practice a profession. The right to a fair trial may be relevant to the disclosure of evidence to two sides in a case, or to the procedures adopted for certain kinds of hearings.
- Article 7 – gives you the **right not to receive punishment without law**. If you do something that was not against the law, or other regulations, at the time, you cannot be penalised for it later.

Articles 8 – 11 can all be restricted in the interests of others.

- Article 8 – you have the right to **respect for your private and family life, your home and correspondence**. This gives us a right to privacy in British law for the first time. It also includes what the courts call “bodily integrity” – no one can interfere with your body unless you consent to it (for example in the case of an operation). Domestic violence, or sexual

abuse, could be a breach of article 8 rights. A fair decision making procedure is particularly important in relation to Article 8 rights.

- Article 9 – you have the right to **respect for freedom of thought, conscience and religion**, which extends to the ability to practise or show your religious or other deeply held beliefs in public or in private.
- Article 10 – you have the **right to free expression**. You can say and write what you like and exchange information freely with other people – as long as it doesn't harm anyone else. For example, people who use the internet to exchange child pornography could not claim that they have the right to do so under the Human Rights Act.
- Article 11 – you have the **right to free assembly and association** in a peaceful way. You can also join a trade union. So this right might give service users the right to protest at funding cuts outside a council meeting for example.
- Article 12 – men and women have the **right to marry and have a family**, in line with national law.
- Article 14 – this is also known as the **non-discrimination clause**. It ensures that people can enjoy all their other rights without discrimination. It uses the idea of differential treatment: whether someone has been treated differently to another person in the same or a similar situation – and if so, whether there is a reasonable justification for this. Difference can be due to “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. Article 14 can only be used if it is linked to another right – it is not free-standing.
- Article 1, Protocol 1 – protects the right to **peaceful enjoyment of possessions**. People cannot take away things that are yours, except in limited circumstances – such as in the public interest for example when gun ownership is restricted. Even in cases like these, a law must be passed to enable property to be confiscated. This article does not prevent a country from having tax laws, though some people have tried to argue that it should. A fair decision making procedure is particularly important in relation to this area of rights.
- Article 2, Protocol 1 – gives the **right to an education**. No-one can be denied access to the education system. This right makes it possible for parents to seek an education for their child which is **in line with the parents' religious and philosophical beliefs**.
- Article 3, Protocol 1 – protects the **right to free elections** which must be free and fair, and take place using a secret ballot. But countries can still impose some qualifications on those who can vote: for example the voting age.

In addition, articles 1 and 2 of Protocol 6 abolished the death penalty in peacetime.

## Positive obligations

The Human Rights Act can in some situations impose a special duty – called a **positive obligation** – to protect rights. This can apply to harm that one individual might cause another – even if that harm is out of the control of your organisation.

This duty is particularly relevant to article 2 and 3 rights because they are considered to be of such fundamental importance, and to article 8 rights since this area is important because of its impact on what the court describes as “intimate interests”.

Positive obligations may impose:

- a duty to provide resources to individuals in order to protect a Convention right. This means that you may need to provide the necessary support to someone to help them protect their own rights.
- a duty to prevent breaches of Convention rights. This means that you may have to intervene to protect one individual from the actions of another.
- a duty to provide information to those whose Convention rights are at risk. This means that you may have to provide more information than you would have done prior to the Human Rights Act, in order to allow individuals to make decisions to protect their own rights.
- a duty to respond to breaches of Convention rights. This means that if rights are violated, you must do something in response.

Remember that the state also has a duty to put in place a legal framework which provides effective protection for Convention rights.

## **APPENDIX 3: CASELAW**

The following cases are some of the most relevant to the sectors surveyed for this report, and provide useful context for some of the discussions.

### **Children**

Perhaps because of their focus on the Convention on the Rights of the Child, many organisations interviewed for this research project had not followed domestic case law in great detail. Those cases which were mentioned, or which provide context for the interviews, are summarised briefly below.

#### **R (P AND Q) V SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Two serving prisoners challenged the long-standing Prison Service policy of separating mothers from their babies, suggesting that it was an interference with article 8 rights (the right to family life) that could not be justified. The Court of Appeal found that the Prison Service should not insist that all children leave the unit by the age of 18 months. In some cases, this policy could have severe implications on the child, and might perhaps mean permanent separation from the mother. The court felt that there could be situations where the interests of the child outweighed any other considerations. In the specific cases in question, after consideration of the facts one appeal was allowed and one rejected.<sup>lvi</sup>

#### **S (MINORS) (CARE ORDER: IMPLEMENTATION OF CARE PLAN)**

This case involved appeals from a decision of the Court of Appeal in relation to two cases involving care plans. The legal issue at stake in the case was the compatibility of the Children Act 1989 with the Human Rights Act, specifically the right to private and family life (article 8).<sup>lvii</sup> The courts in trying to deal with the practical problem of care plans that are not progressed had suggested that in order for the Children Act to comply, it was necessary to develop a concept of “starred milestones”. This would set out a timetable for progress through the child’s care plan; it would also be necessary for a judge to be able to grant interim care orders if the care plan was unclear. The House of Lords overturned these rulings, and made it clear that the Children Act expressly did not allow the courts to interfere in such an intrusive way into the manner in which a local authority decided to provide care for a child. However the House of Lords suggested that Parliament should, without delay, consider the issues that these cases raised, and specifically whether children in public care could find their care improved by a greater degree of court supervision. The government has introduced an amendment to the Children Act, passing through the House of Lords at the time of writing, to address this issue.<sup>lviii</sup>

#### **Z AND OTHERS V UK**

Four children received significant emotional abuse and neglect at the hands of their mother. They sued the local authority (Bedfordshire County Council) through the Official Solicitor, and the case

was eventually heard by the European Court of Human Rights. The court found that the neglect and abuse suffered by the children reached the threshold of inhuman and degrading treatment, and that the state had failed in its positive obligations under article 3 to provide the children with adequate protection. The local authority had taken four and a half years to seek emergency protection orders and put in train care proceedings. The court also found that the children had – at the time – no effective remedy in English law, though it noted that the Human Rights Act would now provide this in future cases.<sup>lix</sup>

## **DISABILITY RIGHTS**

Some interviewees referred to particular cases, or highlighted areas where case law gave them opportunities for further work. The most significant domestic cases mentioned are outlined below for the purpose of context. Most of them relate to mental health law which often poses some of the most challenging questions involving the balancing of the rights of individuals and the rights of the community.

### **R (H) v MENTAL HEALTH REVIEW TRIBUNAL, NORTH AND EAST LONDON REGION**

This was a landmark case leading to a declaration of incompatibility: a finding that the Mental Health Act 1983 was in part incompatible with the European Convention of Human Rights. The relevant sections of the Mental Health Act placed the burden of proof upon the patient to show that detention was no longer justified. The Mental Health Act 1983 (Remedial) Order 2001 amended these provisions to shift the burden of proof to the Mental Health Review Tribunal: the Tribunal now has to be satisfied that the patient's detention is justified if they are to refuse release. This makes the legislation compliant with article 6, the right to a fair trial.<sup>lx</sup>

### **R (C) v LONDON SOUTH AND WEST REGION MENTAL HEALTH REVIEW TRIBUNAL**

In this case the court found that delays in hearings before the Mental Health Review Tribunal breached the Article 5 rights of patients to a speedy hearing. Article 5 protects the right to liberty. The delays were not isolated, but rather systemic, and symptomatic of inadequacies and inefficiencies within the tribunal system. The court recommended that the listing of each case should be considered on its own merits, rather than just waiting its turn regardless of the individual circumstances of the person appealing.<sup>lxi</sup>

## **R (WILKINSON) v RMO BROADMOOR HOSPITAL**

This case involved judicial review proceedings by a detained mental health patient previously convicted of rape against a decision for compulsory treatment. The court found that following the Human Rights Act it must draw its own conclusions as to whether a patient was capable of consenting or refusing treatment, and go on to consider whether forcible treatment could violate Article 2 (the right to life) or article 3 (the right to be free from torture, inhuman or degrading treatment), or whether it was justifiable as necessary and proportionate under Article 8 (the right to privacy). It could not simply consider whether the treatment was lawful. In order for the court to properly consider these issues, it must hear the doctor's evidence, and be able to cross examine them if necessary. All the doctors were ordered to attend the judicial review hearing for cross examination. This would satisfy W's Article 6 rights (the right to a fair trial).<sup>lxii</sup>

## **R (L) v BOURNEWOOD COMMUNITY AND MENTAL HEALTH NHS TRUST**

In this case, the court agreed that the detention of an informal patient without mental capacity is justified under the common law doctrine of necessity. The effect of this judgement is that voluntary patients (those who have not been sectioned under the Mental Health Act) that are considered to lack capacity can be detained despite the fact that they do not have the protection of the procedures and safeguards set out in the Mental Health Act that they would have if they had been sectioned. This case is often referred to as the "Bournewood gap". It is subject to an appeal at the European Court of Human Rights and many lawyers suspect that it will be found to be in breach of Article 5 (the right to liberty).<sup>lxiii</sup>

In addition the following case, which is significant because of its finding of degrading treatment despite the fact that there was no *intention* to humiliate the applicant, was heard at the European Court of Human Rights. It relates to events that occurred in 1996.

## **ADELE URSULA PRICE v UK (2001)**

The applicant was a disabled woman described by the court as "four-limb deficient as a result of phocomelia due to Thalidomide." She also suffers from kidney problems. She was taken to a civil court because she had unpaid debt and refused to answer questions about her financial position. As a result of this she was committed to prison for seven days for contempt of court following a civil case. Because it was not possible to take her to prison until the next day, she spent the night at Lincoln Police Station. The cell in which she was held was not adapted for use by a disabled person. She had to sleep in her wheelchair since she could not use the bed for risk of sores, she could not reach any light switches or emergency buttons, and she was unable to use the toilet. In addition she was freezing cold. During the course of the night she was seen by a doctor who noted that the facilities were not suitable for disabled people. The court found that the treatment she had received was of a sufficiently high threshold to violate Article 3 of the European Convention on Human Rights by constituting degrading treatment and Ms Price received £4,500 damages, and £4,000 for her legal costs.<sup>lxiv</sup>

## Older people

Interviewees referred to case law relating to the closure of care homes from time to time. The relevant cases, and some additional guidance that provides useful context for the interviews, is summarised below.

### **R (BODIMEADE) V CAMDEN LBC**

This was a successful judicial review application against the closure of a local authority residential home for older people. The 28 residents had a clear expectation of a home for life, a statement that was clearly set out in the council's literature in relation to the home, and in the resident's handbook. The court decided in favour of the residents on the basis of the National Health Service and Community Care Act 1990 which required care assessments to be carried out in such circumstances, as well as finding that the Council's social services committee did not have all necessary information before it when it decided to close the home. Although the residents submitted article 8 arguments (the right to respect for a person's home and private life) in their favour, the court found it unnecessary to consider these.<sup>lxv</sup>

### **R (HEATHER) V LEONARD CHESHIRE**

This landmark case involved a decision by the Leonard Cheshire Foundation, a charity, to close a residential home for disabled people. Most of the residents of the home were found their places by, and funded by, social services or health authorities. The case was important because of its definition of what constituted a public authority for the purposes of the Human Rights Act. The court found that although the residents had contractual rights against Leonard Cheshire the provider was **not** a public authority for the purposes of the Human Rights Act, despite the fact that the residents' places were publicly funded. The courts stated that in future, a local authority should consider entering into a contract with a provider that would fully protect a resident's article 8 rights (the right to respect for their home and private life).<sup>lxvi</sup>

### **R (MADDEN) V BURY METROPOLITAN BOROUGH COUNCIL**

This case forced Bury to restart a process of consultation over the closure of two care homes for older people. The claimants made a case in court that the consultation process was inadequate. The judge made a number of comments about the adequacy of the consultation process, which he found was inadequate. Significantly he also found that there was no evidence that the Article 8 rights of residents had been addressed. Article 8 ensures respect for a person's private and family life, home and correspondence. Whilst the judge recognised that, even if their rights had been considered, the decision to close the homes may still have gone ahead, the significant factor was that the council failed to consider this point at all. This failure to consider Article 8 rights in turn led to "a failure to reach a proper assessment that the admitted interference with the rights of residents under Article 8 was justified." This was an additional and independent reason for finding the decision to close the care homes to be unlawful. This case judgment was released after most of the interviews had been conducted.<sup>lxvii</sup>

## ***FAIR ACCESS TO CARE SERVICES GUIDANCE***

This guidance covers the eligibility criteria for adult social care, and is issued under the Local Authority Social Services Act 1970. It consists of a range of criteria which should be considered when deciding whether to provide services. It reminds local authorities that the practice of including a “domiciliary ceiling” so that the cost of care at home is capped at the average cost of residential or nursing home care is the reverse of the government’s stated policy of promoting autonomy and independent living. Care provision should be based on an assessment of the needs of the individual. The guidance also states that when drawing up eligibility criteria, councils should be mindful of the Human Rights Act. Community care lawyers have suggested that the imposition of a blanket cost ceiling and the lack of consideration of individual needs may be incompatible with article 8 rights which should ensure respect for a person’s private and family life.<sup>lxviii</sup>

## **Refugees and asylum seekers**

Interviewees referred to some domestic case law during the course of the research. Those cases that provide a necessary context are briefly summarised below.

### **R (SAADI) V SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Four Kurdish asylum seekers challenged the legality of their detention at Oakington Reception Centre. Asylum claimants are detained for the length of the “fast track” process which determined their claims; the process would normally last between 7 and 10 days. The Home Secretary won this case on appeal following a ruling that detention was unlawful and a violation of the claimants’ article 5 rights (which protect the right to liberty). The court of appeal overturned this ruling. The courts found that a short period of detention was “not an unreasonable price to pay” to ensure swift resolution of asylum claims, and since Immigration Officers already had the power to detain people under the 1971 Immigration Act, the detention was not unlawful in domestic law.<sup>lxix</sup>

### **R (T AND S) V SECRETARY OF STATE FOR HEALTH AND SECRETARY OF STATE FOR THE HOME DEPARTMENT**

An HIV positive mother who is seeking asylum in the UK sought to challenge the lack of provision for milk tokens within the package of assistance currently provided, and sought as a remedy to be given an additional £7 per week to allow her to buy milk.<sup>lxx</sup> As she is HIV positive, she should not breast feed her child for risk of passing on infection. The court rejected all the human rights arguments presented. It found the connection between free milk tokens and the mother and child’s article 8 rights to respect for their family life “too remote for it to be held within the ambit of this Article” and in relation to article 2 (the right to life) was “not persuaded that the claimants have made out the fact as to impecuniosity which is a condition precedent to the obligation of the state to make such a provision [a positive obligation to provide milk tokens]”. However the judge said that if the government department did believe that the mother had insufficient money to buy formula milk then article 2 would be engaged and “the executive will obviously need to take appropriate action.”<sup>lxxi</sup>

## **R (AHMADI) v SECRETARY OF STATE FOR THE HOME DEPARTMENT**

The Ahmadi family applied for judicial review of the Home Secretary's decision to remove them to Germany, the country where they had first claimed asylum on fleeing Afghanistan. The family alleged that there was medical evidence concerning both the children and the mother that showed that removing them to Germany would affect their mental state so much that it would interfere with their article 8 rights to respect for their private and family life. The courts found that the process by which the family had been removed did not give adequate opportunity for this medical evidence to be considered before it was rejected as "manifestly unfounded" and therefore their case should be heard by an independent adjudicator. The family did not need to return to the UK, since their case could be heard by means of video evidence.<sup>lxxii</sup>

## **APPENDIX 4: JOINT COMMITTEE ON HUMAN RIGHTS**

### **COMMITTEE MEMBERS**

Jean Corston, (Chairman)  
Vera Baird,  
Norman Baker,  
Kevin McNamara,  
Richard Shepherd,  
Shaun Woodward,  
Lord Campbell of Alloway  
Lord Lester of Herne Hill,  
Lord Parekh,  
Baroness Perry of Southwark,  
Baroness Prashar,  
Baroness Whitaker,

### **TERMS OF REFERENCE**

To consider:

- (a) matters relating to human rights in the United Kingdom (but excluding consideration of individual cases);
  - (b) proposals for remedial orders, draft remedial orders and remedial orders made under section 10 of and laid under Schedule 2 to the Human Rights Act 1998; and
  - (c) in respect of draft remedial orders and remedial orders, whether the special attention of the House should be drawn to them on any of the grounds specified in Standing Order 73 (Joint Committee on Statutory Instruments).
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## REFERENCES

- <sup>i</sup> House of Lords Hansard (3 November 1997) 1228, 1308, statements made by the Lord Chancellor: “a culture of awareness of human rights will develop.”
- <sup>ii</sup> The principle of proportionality lies at the heart of a human rights framework. Proportionality ensures that the restriction on a person’s rights goes only as far as is necessary to achieve a particular objective. The saying “not taking a sledgehammer to crack a nut” is a more colloquial summary of what this principle aims to achieve.
- <sup>iii</sup> For more about the Human Rights Act as a set of values or principles see Francesca Klug, *Values for a godless age*, Penguin, 2000.
- <sup>iv</sup> Five duties have been identified that can be imposed on authorities: 1) a duty to put in place a legal framework which provides effective protection for Convention rights; 2) a duty to prevent breaches of Convention rights; 3) a duty to provide information and advice relevant to the breach of Convention rights; 4) a duty to respond to breaches of Convention rights; 5) a duty to provide resources to individuals to prevent breaches of their Convention rights. In Keir Starmer *European Human Rights Law*, LAG, 1999, p196. They may be particularly relevant in relation to fundamental rights (Articles 2, 3) or intimate interests (Article 8).
- <sup>v</sup> *The case for a Human Rights Commission: interim report*, HL Paper 160/HC1142, p6
- <sup>vi</sup> [2001] EWHC Admin 657
- <sup>vii</sup> This speech was made to the Labour Party Conference in Blackpool on 1 October 2002.
- <sup>viii</sup> *The case for a human rights commission*, Joint Committee on Human Rights, HL Paper 160, Evidence 7, paragraph 29
- <sup>ix</sup> *Community Care*, 8-14 August, p44
- <sup>x</sup> See *Auditing for Rights* by Jonathan Cooper and Rosin Pillay, published by JUSTICE, December 2001, for more information about Strasbourg-proofing and the current system of human rights scrutiny.
- <sup>xi</sup> Alternative dispute resolution is gaining importance within the legal profession too. Lord Woolf, in his judgement on Cowl referred to its importance in public law. Mediation forms one part of the tools which can be used for ADR.
- <sup>xii</sup> *Equality and diversity: the way ahead* covers the implementation of the directive which prohibits discrimination on the grounds of age, religion or belief and sexual orientation. *Equality and diversity: making it happen* covers the proposal for a single equality body. Both are available from [www.womenandequalityunit.gov.uk](http://www.womenandequalityunit.gov.uk)
- <sup>xiii</sup> More recently an advisory group has been established within the Lord Chancellor’s Department to advise Yvette Cooper MP, the Minister with responsibility for the Human Rights Act. It contains many of the same individuals and organisations that sat on the original Task Force.
- <sup>xiv</sup> The summary leaflets are available in Arabic, Bengali, Chinese, English, Greek, Gujarati, Hindi, Punjabi, Somali, Turkish, Urdu, Vietnamese and Welsh.
- <sup>xv</sup> Submissions were received from: Welsh Women’s Aid – Cymorth I Fenywod, MIND, Scope, RNIB, Children’s Society, The Children’s Rights Alliance for England, Stonewall, Rights of Women, Refugee Council, and Council of Ethnic Minority Voluntary Sector Organisation
- <sup>xvi</sup> The Employment and Race Directives are colloquially known as the “Article 13”, from Article 13 of the Amsterdam Treaty, signed in 1997 which amended the Treaty of European Union.
- <sup>xvii</sup> HL paper 160/HC 1142, *The Case for a Human Rights Commission: Interim Report*, evidence 38
- <sup>xviii</sup> *Ibid*
- <sup>xix</sup> For a copy of the consultation document see [www.womenandequalityunit.gov.uk](http://www.womenandequalityunit.gov.uk), where you can also find a response form to participate in the consultation exercise.
- <sup>xx</sup> *Equality and diversity: making it happen*, Cabinet Office consultation document, 23 October 2002, p 28.
- <sup>xxi</sup> *The case for a Human Rights Commission: interim report*, HL Paper 160/HC1142, p7
- <sup>xxii</sup> For an example of in-depth reporting into the Victoria Climbié case see [www.bbc.co.uk/news](http://www.bbc.co.uk/news). The in-depth section for 2002 has a detailed section on this inquiry. Two people were found guilty of the murder of Aileen Walker on 20 September 2002: it took the judge two hours to read a complete list of the injuries she received before she was killed. The case was widely reported in all the major national media outlets and the BBC ran a chat-room discussion on the case. See [www.bbc.co.uk](http://www.bbc.co.uk).
- <sup>xxiii</sup> CRAE, March 2002
- <sup>xxiv</sup> Sir David Ramsbotham, Her Majesty’s Chief Inspector of Prisons June 2001, *Follow up to 1997 thematic review “Women in prison”*.

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<sup>xxv</sup> Howard League for Penal Reform, 2001, *Children in prison: provision and practice and Lancaster Farms* and Howard League for Penal Reform, 2001, *Children in prison: provision and practice at Castington*.

<sup>xxvi</sup> 25% of children and young people with severe mental illness are being inappropriately placed in either adult psychiatric wards or paediatric wards – putting either other children, or themselves, at risk. *Community Care* 1-7 August p 30. *Community Care* magazine is currently running a campaign for better mental health services for children and young people.

<sup>xxvii</sup> The prizes were awarded for the winners of the competition on 2 October 2000, the day the Human Rights Act came into force.

<sup>xxviii</sup> The Bill was prevented from becoming law in May 1994 by the use of Parliamentary procedure: the Bill was talked out.

<sup>xxix</sup> For an explanation of *R (L) v Bournewood Community and Mental Health NHS Trust* please see Appendix 3.

<sup>xxx</sup> A summary of the case referred to here as Price is included in Appendix 3.

<sup>xxxi</sup> This situation has already been held to be a violation of Article 8 rights by the European Court of Human Rights in *JT v UK*. The Mental Health White Paper at the time of writing took no account of this decision.

<sup>xxxii</sup> *Community Care* magazine reports that uptake of direct payments among people with learning disabilities also remains low (19-25 September, pp 30-31).

<sup>xxxiii</sup> *Polls Apart 3*, published by Scope and the Disability Rights Commission, July 2001.

<sup>xxxiv</sup> The British Deaf Association's statistics show that there are more speakers of BSL who speak no English than there are speakers of Welsh that speak no English.

<sup>xxxv</sup> This is reinforced by the Disability Rights Commission. Jill Stewart from the DRC told the interviewer during the course of this research that DNR notices are still a grave matter of concern to disabled people with cases continuing to be reported despite recent Government guidance and monitoring by the Commission on Health Improvement. The DRC held a seminar to discuss this area in November 2002.

<sup>xxxvi</sup> Reported in *The Guardian*, 9 October 2002, and *Community Care*, 10-16 October 2002.

<sup>xxxvii</sup> Diane Pretty, who had motor neurone disease, challenged the UK government because it would not give her husband immunity from prosecution if he helped her to commit suicide claiming this breached her article 3 rights. Her case finally reached the European Court of Human Rights at Strasbourg where she was unsuccessful. Diane Pretty died on May 11 2002.

<sup>xxxviii</sup> From *Langborger v Sweden* summarised in Keir Starmer, *European Human Rights Law*, Legal Action Group, 1999, p368.

<sup>xxxix</sup> The national minimum standards published following the Care Standards Act, although drawing heavily on well-established human rights thinking, contain no mention of the Human Rights Act. *Care homes for older people*, national minimum standards, and *Care homes for younger adults and adult placements* national minimum standards, both Stationery Office, 2001.

<sup>xl</sup> *Care homes for younger adults and adult placements*, Stationery Office, 2001, p89.

<sup>xli</sup> *Ibid.* p108.

<sup>xlii</sup> Set out by the European Court of Human Rights in *Ireland v UK*, in Keir Starmer, *European Human Rights Law*, Legal Action Group, 1999, p91.

<sup>xliii</sup> *Showing Restraint: challenging the use of restraint in care homes*, Alison Clarke & Les Bright, Counsel and Care, January 2002.

<sup>xliv</sup> *Friday is Pay Day*, Lorna Easterbrook, Help the Aged, December 2001, p6.

<sup>xlv</sup> *Residents taking risks* and *Sex and relationships*, both Counsel and Care, 2002.

<sup>xlvi</sup> *A case for change* is a joint project between the Children's Society, the Refugee Council and Save the Children.

<sup>xlvii</sup> *Mothers in exile*, Jenny McLeish, Maternity Alliance 2002.

<sup>xlviii</sup> *Ibid* p48.

<sup>xlix</sup> The journalist and photographer eventually succeeded. The article appeared in the *Guardian* magazine on 14 September 2002: the author was Melanie MacFadyean.

<sup>i</sup> A report by the Refugee Council and the Joseph Rowntree Foundation, *Disabled People in Refugee and Asylum Seeking Communities* found that many staff across social services, voluntary sector and other local authority departments did not know that local authorities retain responsibility for addressing the needs of all disabled people, regardless of their immigration status.

<sup>ii</sup> Speakers included Jane Kennedy MP, Minister of State at the Lord Chancellor's Department, Cherie Booth QC, Keir Starmer QC, and representatives of a wide range of organisations involved in human rights work in the UK.

<sup>iii</sup> I was allowed to read a small selection of NACAB's case files. The cases I read show that issues dealt with by their advisers clearly have a Human Rights Act dimension, even if the Bureaux do not use the Act as a way of dealing with individual cases.

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<sup>liii</sup> In fact information is available in Arabic, Bengali, Chinese, Greek, Gujarati, Hindi, Punjabi, Somali, Turkish, Urdu, Vietnamese and Welsh. Refugee organisations would welcome it also in French, Spanish and a range of east European languages.

<sup>liv</sup> Liberty runs an advice line specifically for legal advisers on 0808 808 4546. It is staffed by lawyers from Liberty and the Public Law Project.

<sup>lv</sup> Jenny Watson and Mitchell Woolf, *The Human Rights Act Toolkit*, Legal Action Group forthcoming 2003. The Toolkit is designed as a framework for managers in public authorities and charities to allow them to understand more fully the implications of the Human Rights Act 1998 on their work.

<sup>lvi</sup> [2001] 1 WLR

<sup>lvii</sup> Care orders have a great impact upon children's lives. In many cases children are forgotten as social workers move on to the next pressing case, so children can be left for many years with short-term foster parents without progress being made on their long term adoption or fostering care.

<sup>lviii</sup> [2002] UKHL 10

<sup>lix</sup> [2001] Fam Law 583, ECtHR

<sup>lx</sup> [2002] QB1 CA

<sup>lxi</sup> [2002] 1WLR 176 CA

<sup>lxii</sup> [2002] 1WLR 419, CA

<sup>lxiii</sup> [1998] 3 WLR 107, HL

<sup>lxiv</sup> [2001] 10 July (No 33394/96)

<sup>lxv</sup> [2002] 63 BMLR 154

<sup>lxvi</sup> [2002] EWCA Civ 366

<sup>lxvii</sup> [2002] EWHC 1882 Admin

<sup>lxviii</sup> *Community care law update*, in *Legal Action*, pp 11-16, September 2002.

<sup>lxix</sup> [2002] UKHL 41

<sup>lxx</sup> One HIV specialist midwife reported to Maternity Alliance that 85% of her caseload of HIV positive women were asylum seekers.

<sup>lxxi</sup> [2002] EWHC 1887 Admin

<sup>lxxii</sup> [2002] EWHC 1897 Admin