



dca

Department for  
Constitutional Affairs  
Justice, rights and democracy

# Human rights: human lives

A handbook for  
public authorities



# Foreword



This guide is designed to assist officials in public authorities to implement the Human Rights Act 1998.

It aims:

- To raise your awareness of the different rights and freedoms protected by the Human Rights Act, and
- To show you, through actual examples, how to consider the potential human rights impact of your work, whether you are delivering services directly to the public or devising new policies and procedures.

This guide is deliberately expressed in general terms in order to be as useful and relevant as possible to all types of public authority. Some will find that it meets their requirements as it stands. Others may wish to use it as a point of departure and reference tool for the development of guidance tailored to their own particular needs.

**We welcome feedback on the usefulness of the Handbook, and any suggestions to improve it. You can contact us:**

- **By writing to:** Human Rights Division, Constitution Directorate, Department for Constitutional Affairs, 6th Floor Selborne House, 54/50 Victoria Street, London SW1E 6QW
- **By telephone:** 020 7210 1437
- **By e-mail:** [HumanRights@dca.gsi.gov.uk](mailto:HumanRights@dca.gsi.gov.uk)



## Why we wrote this Handbook

All those who work in public authorities, whether devising policy or procedures or delivering services directly to the public, must act in a way that's compatible with the Human Rights Act 1998.

The Act is all about treating individuals fairly, with dignity and respect – while still safeguarding the rights of the wider community. But the Human Rights Act has had a lot of bad press recently – most of it undeserved.

A review of the Act commissioned by the Prime Minister was published in July 2006 and concluded that, whilst the Act has been beneficial, there are misconceptions about it; there is a general lack of understanding of it; and there isn't enough guidance to help in applying the Act. This Handbook is designed to fill that gap.

## What you will find in this Handbook

- Information relevant to people working at all levels within any public authority
- The background on where the Human Rights Act originated and what rights it enshrines (Part 1)
- Explanations of each of the rights and how they may be relevant to different public authorities (Part 2)
- Real-life examples and case studies that show how human rights work in practice (Part 2)
- A jargon-buster and answers to frequently asked questions (Part 3)
- Details on where to find further information and useful contacts (Part 3)

## What you will not find in this Handbook:

- A substitute for proper legal advice or an exhaustive explanation of human rights law: always take proper legal advice if you have a specific issue to deal with
- Detailed sector-specific information. This guide is deliberately generic to make it as relevant as possible to a broad range of public authorities
- Lots of legal jargon!



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# Part 1: Background



## Basics

### Who should use this handbook and why

If you work in a public authority this handbook can help you to understand how the Human Rights Act relates to what you do and how you do it. The handbook is designed to give you information on how human rights are relevant to your role and what obligations public authorities have under the Human Rights Act. After reading this we hope you feel confident in dealing with human rights issues in your day to day work, whether you are in central or local government, the police or armed forces, schools or public hospitals, or any other public authority.

### What is the European Convention on Human Rights?

The European Convention on Human Rights was drafted after World War II by the Council of Europe. The Council of Europe was set up as a group of like-minded nations, pledged to defend human rights, parliamentary democracy and the rule of law, and to make sure that the atrocities and cruelties committed during the war would never be repeated. The UK had a major role in the design and drafting of the European Convention on Human Rights, and ratified the Convention in March 1951. The Convention came into force in September 1953.

The Convention is made up of a series of Articles. Each Article is a short statement defining a right or freedom, together with any permitted exceptions. For example: “Article 3 – Prohibition of torture. No one shall be subjected to torture or to inhuman or degrading treatment or punishment”. The rights in the Convention apply to everyone in the States that have signed the Convention. Anyone who believes that a State has breached their human rights should first take every possible step to have their case resolved in the domestic courts of that State. If they are unhappy with the result they can then take their case to the European Court of Human Rights, set up by the European Convention on Human Rights and based in Strasbourg, France.

### What is the Human Rights Act?

The Human Rights Act came into effect in the UK in October 2000. The Act enabled people in the UK to take cases about their human rights to a UK court. Previously they had to take complaints about their human rights to the European Court of Human Rights in Strasbourg.

### What are human rights?

There are sixteen basic rights in the Human Rights Act, all taken from the European Convention on Human Rights. They don't only affect matters of life and death like freedom from torture and killing; they also affect people's rights in everyday life: what they can say and do, their beliefs, their right to a fair trial and many other similar basic entitlements (a more detailed explanation of the types of rights is at page 55).

*(Article 1 is introductory and is not included in the Human Rights Act)*

### **Article 2: Right to life**

Everyone's right to life must be protected by law. There are only very limited circumstances where it is acceptable for the State to use force against a person that results in their death, e.g. a police officer can use reasonable force in self-defence.

### **Article 3: Prohibition of torture**

Everyone has the absolute right not to be tortured or subjected to treatment or punishment which is inhuman or degrading.

### **Article 4: Prohibition of slavery and forced labour**

Everyone has the absolute right not to be treated as a slave or required to perform forced or compulsory labour.

### **Article 5: Right to liberty and security**

Everyone has the right not to be deprived of their liberty – 'arrested or detained' – except in limited cases specified in the Article (e.g. where they are suspected or convicted of committing a crime) and provided there is a proper legal basis in UK law for the arrest or detention.

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

Everyone has the right to a fair and public hearing within a reasonable period of time. This applies both to criminal charges brought against a person, and in cases concerning their civil rights and obligations. Hearings must be before an independent and impartial court or tribunal established by law. It is possible to exclude the public from the hearing (though not the judgement) if that is necessary to protect things like national security or public order. A person who is charged with a criminal offence is presumed innocent until proven guilty according to law and must also be guaranteed certain minimum rights in relation to the conduct of the criminal investigation and trial.

### **Article 7: No punishment without law**

Everyone has the right not to be found guilty of an offence arising out of actions which, at the time they were committed, were not criminal. People are also protected against later increases in the maximum possible sentence for an offence.

*Apart from the right to hold particular beliefs, the following rights in Article 8 to 11 may be limited where that is necessary to achieve an important objective. The precise objectives for which limitations are permitted are set out in each Article – they include things like protecting public health or safety, preventing crime, and protecting the rights of others.*

### **Article 8: Right to respect for private and family life**

Everyone has the right to respect for their private and family life, their home and their correspondence. This right can be restricted only in specified circumstances.

### **Article 9: Freedom of thought, conscience and religion**

Everyone is free to hold a broad range of views, beliefs and thoughts, as well as religious faith. The right to manifest those beliefs may be limited only in specified circumstances.

### **Article 10: Freedom of expression**

Everyone has the right to hold opinions and express their views on their own or in a group. This applies even if these views are unpopular or disturbing. This right can be restricted only in specified circumstances.

### **Article 11: Freedom of assembly and association**

Everyone has the right to assemble with other people in a peaceful way. They also have the right to associate with other people, which includes the right to form a trade union. These rights may be restricted only in specified circumstances.

### **Article 12: Right to marry and found a family**

Men and women have the right to marry and start a family. The national law will still govern how and at what age this can take place.

*(Article 13 is not included in the Human Rights Act)*

### **Article 14: Prohibition of discrimination**

In the application of the other Convention rights, people have the right not to be treated differently because of their race, religion, sex, political views or any other personal status, unless there is an “objective justification” for the difference in treatment. Everyone must have equal access to the Convention rights, whatever their status.

### **Article 1 of Protocol 1: Protection of property**

*(a ‘protocol’ is a later addition to the Convention)*

Everyone has the right to the peaceful enjoyment of their possessions. Public authorities cannot usually interfere with a person’s property or possessions or the way that they use them except in specified limited circumstances.



## Article 2 of Protocol 1: Right to education

Everyone has the right not to be denied access to the educational system.

## Article 3 of Protocol 1: Right to free elections

Elections for members of the legislative body (e.g. Parliament) must be free and fair and take place by secret ballot. Some qualifications may be imposed on those that are eligible to vote (e.g. a minimum age).

## Article 1 of Protocol 13: Abolition of the death penalty

These provisions prohibit the use of the death penalty.

*Part 2 covers each of these rights, and how they are relevant to public authorities, in more detail.*

## What impact does the Human Rights Act have on public authorities?

- Public authorities have an obligation to treat people in accordance with their Convention rights (see pages 10-46 for a more detailed explanation). Anyone who feels their rights have been infringed by a public authority can take their complaint to a UK court or tribunal.
- Wherever possible existing legislation must be applied in a way that is compatible with the rights set out in the Act. This means that legislation under which public officials operate may have to be interpreted and applied in a different way than before the Act came into force.

## How does the Human Rights Act affect me?

- Public authorities have an obligation to act in accordance with the Convention rights, and therefore public officials must understand human rights and take them into account in their day to day work. That is the case whether officials are delivering a service directly to the public or devising new policies or procedures. Understanding human rights can help in making the right decisions.
- When it comes to decision making, the rights of one person often have to be balanced against the rights of others or against the needs of the broader community (there is more detail on this in Part 3). But if you have to restrict somebody's rights, you must make sure that you are not using a sledgehammer to crack a nut. Any restriction must be no greater than is needed to achieve the objective. This is called 'proportionality'.
- And always bear in mind that some Convention rights are absolute and can never be interfered with (e.g. the right not to be subjected to torture or inhumane or degrading treatment or punishment).

“Where after all, do universal human rights begin? In small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm or office where he works... unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.”

*Eleanor Roosevelt, Chairman of the United Nations  
Human Rights Commission, 1948*



## Part 2: The Convention rights in more detail

### Article 2 – Right to life

#### What does this right mean?

- “The right to life” means that the State has an obligation to protect life. This means, generally, that the State must not take the lives of its citizens.
- However, there are three very limited circumstances when taking life may not contravene Article 2:
  - When **defending** oneself or someone else from unlawful violence;
  - When lawfully **arresting** someone or preventing the escape of someone lawfully detained;
  - When acting lawfully to stop a **riot or insurrection**.

**Nevertheless, even if the action taken by the public authority falls into one of these three categories, any force used must be no more than absolutely necessary, which means that it must be strictly proportionate to the situation.**

- Article 2 also requires the State to take certain positive steps to protect the lives of people within its jurisdiction. For example, the taking of life must be illegal under a State’s law.
- Article 2 can also create a more active obligation to protect life, for example, where a public authority is aware of a real and imminent threat to someone’s life, or where a person is under the care of a public authority.
- Protection of the right to life may in certain circumstances also require an official investigation into deaths.

#### Public safety

The fact that a policy/decision restricts a Convention right does not necessarily mean that it will be incompatible with the Convention. It is a fundamental responsibility of the State – arising from Article 2 of the Convention itself – to take appropriate steps to protect the safety of its citizens. So whilst some rights conferred by the Convention are absolute (for example the right not to be subjected to torture or inhuman or degrading treatment or punishment), in general the rights of one person cannot be used to ‘trump’ the right of the general public to be kept safe from a real risk of serious injury or loss of life. In particular the rights in Articles 8 to 11 can be restricted where it is necessary and proportionate to do so in order to protect public safety.

### Is Article 2 relevant to my work?

Article 2 will be relevant particularly if you are involved in any of the following:

- policy decisions that may affect someone's right to life
- care for other people or protecting them from danger
- investigation of deaths
- you have the power of arrest
- you are a police officer, prison officer or parole officer
- you suspect that someone's life is at risk

### What must a public authority do?

Article 2 impacts on the work of public authorities in many different ways. For example:

- If a public authority knows of the existence of a real and immediate risk to someone's life from the criminal acts of another individual, then it should take appropriate preventative operational measures to protect that person.
- If a public authority undertakes care of a person, for example by putting them in prison or placing them in a home, then it must take appropriate steps to ensure that the person is safe.
- The protection of the right to life also means that there should be an effective official investigation into deaths resulting from the use of force by a public authority. This duty to investigate may also be triggered in other situations where there has been a suspicious or unlawful killing.
- If a public authority is planning an operation which may result in a risk to life, the control and organisation of the operation must be such as to ensure that only the minimum necessary force is used.
- Where the work of a public authority concerns persons known to be dangerous, there is an obligation to take appropriate steps to safeguard the public from such persons. For example this will be relevant to the parole and probation services, the police and social services.

## Article 2 in practice

### Case Studies

#### *Pretty v. United Kingdom (2002)*

A woman suffering from an incurable degenerative disease wanted to control when and how she died. In order to avoid an undignified death through respiratory failure she wanted her husband to help her commit suicide and sought an assurance that he would not be prosecuted for any involvement in her death. The European Court of Human Rights found that Article 2 does not create an entitlement to choose death rather than life. Accordingly, there was no right to die at the hands of a third person or with the assistance of a public authority.

#### *Osman v. United Kingdom (1998)*

A teacher had developed an unhealthy interest in one of his pupils which included following him home, locking him in a classroom, vandalising his home and victimising his school friend. The teacher's behaviour was reported to the headmaster and to the police. The teacher subsequently shot the pupil and his father, injuring the pupil and killing his father. The European Court of Human Rights found that the police had not failed in their duty under Article 2 to safeguard the father's right to life. There was insufficient proof that the teacher posed a real and immediate threat to life which the police knew about or ought to know about. The positive obligation to safeguard life must not impose an impossible or disproportionate burden on public authorities.

#### *Best Practice Example*

A social worker from the domestic violence team at a local authority used human rights arguments to secure new accommodation for a woman and her family at risk of serious harm from a violent ex-partner. She had received training on the 'positive obligations' placed on the local authority to protect the right to life (under Article 2) and the right to be free from inhuman and degrading treatment (under Article 3). (Example provided by the British Institute of Human Rights).

## Article 3 – Prohibition of torture and of inhuman and degrading treatment

### What does this right mean?

- It is absolutely forbidden to subject any person to torture or to any treatment or punishment that is inhuman or degrading.

## Key words and meanings

Conduct that amounts to any one of these forms of ill treatment will be in breach of Article 3.

**Torture** – deliberate infliction of severe pain or suffering, whether to punish or intimidate, or obtain information.

**Inhuman treatment** – treatment which is less severe than torture but still causes serious physical and/or mental pain or suffering.

**Degrading treatment** – treatment arousing feelings of fear, anguish and inferiority capable of humiliating and debasing the victim.

### Is Article 3 relevant to my work?

Article 3 will be relevant particularly if your job involves any of the following:

- caring for other people
- detaining people or looking after those in detention
- removing, extraditing or deporting people from the UK
- working in a place where someone may be inadvertently placed in a humiliating position, for example in nursing homes or hospitals

## What must a public authority do?

- There is a negative obligation to refrain from subjecting people to torture or to inhuman or degrading treatment or punishment. But in some cases this may necessitate the application of extra resources in order to prevent inhuman or degrading treatment.
- There is a positive obligation on public authorities to intervene to stop torture, inhuman or degrading treatment or punishment as soon as they become aware of it, even if a private individual is carrying it out.
- There is an obligation not to expose a person to torture or inhuman or degrading treatment or punishment, which means that a person must not be removed, extradited or deported to a country in which there is a real risk that they will be treated in such a way.
- There is a positive obligation on states to investigate any allegations of torture or of inhuman or degrading treatment or punishment.

## Article 3 in practice

### Case Studies

#### *Z v UK (2001)*

A local authority failed to separate four children from their mother even though it was clear that the children were being subjected to an unacceptable level of abuse and neglect over a four-year period. The Court found that the authority had a positive obligation to remove the children as soon as they became aware of abuse that might amount to inhuman or degrading treatment.

#### *McGlinchey and others v UK (2003)*

A woman who had a heroin addiction and suffered from asthma was sentenced to four months in prison. While there, she suffered severe heroin withdrawal symptoms including vomiting and weight loss. A doctor who visited her when she arrived advised the nursing staff to monitor her symptoms. Her condition deteriorated over a weekend, but the nursing staff did not call out a doctor, nor did they transfer her to a hospital. On the Monday morning, she collapsed and was immediately admitted to hospital, where she died. The European Court of Human Rights held that the Prison Service had breached Article 3 because it had failed to take appropriate steps to treat the prisoner's condition and relieve her suffering, and had failed to act sufficiently quickly to prevent the worsening of her condition.

A disabled man stopped attending his scheduled medical appointments at the local hospital because he felt humiliated by the hospital's practice of examining him in front of a large group of people including students. Following training he learnt that Article 3 (prohibition of inhuman or degrading treatment) protected his dignity and felt empowered to use these human rights standards to question the practice and ask to be seen only by his doctor. (Example provided by the British Institute of Human Rights).

## Article 4 – Prohibition of slavery and forced labour

### Best Practice Example

A health trust has used the Human Rights Act to strengthen its harassment and bullying policies. (Example taken from the Audit Commission, Human Rights – Improving Public Service Delivery (2003).

### What does this right mean?

- Everyone has an absolute right not to be held in slavery or servitude or be required to perform forced or compulsory labour.

- The Article states that there are four types of work which are not to be considered as forced or compulsory labour:
  - Work done during legitimate detention or on conditional release from detention (i.e. prison work or community service);
  - Compulsory military service or civilian service as a conscientious objector;
  - Community service in a public emergency;
  - Any work which forms part of a normal civic obligation (e.g. compulsory fire service, or maintaining a building if you are a landlord).

### Key words and meanings

- **Slavery and servitude** – are closely connected, but slavery involves being owned by another person – like a possession – whilst servitude usually involves a requirement to live on another’s property and with no possibility of changing the situation.
- **Forced or compulsory labour** – arises when a person is made to work or perform a service against their will, and where the requirement to do the work is unjust or oppressive, or the work itself involves avoidable hardship. It can cover all kinds of work and services.

#### Is Article 4 relevant to my work?

Article 4 will be relevant particularly if you:

- suspect that someone is being forced to work without suitable recompense
- have powers to make people work in an emergency

### What must a public authority do?

- Ensure all staff are properly recompensed for the work they do.
- There is a positive obligation on public authorities to intervene to stop slavery, servitude or forced or compulsory labour as soon as they become aware of it.

### Case Study

#### *Siliadin v France (2005)*

A 15-year old-girl was brought into France from Togo by ‘Mrs D’, who paid for her journey but then confiscated her passport. It was agreed that the girl would work for Mrs D until she had paid back her airfare, but after a few months she was ‘lent’ to ‘Mr and Mrs B’ who forced her to work for 15 hours a day, 7 days a week with no pay, no holidays, no identity documents and without her immigration status being



regularised. The girl wore second-hand clothes and did not have her own room. The authorities intervened once they were alerted to the situation. However, at the time, slavery and servitude were not specifically criminalised in France. The European Court of Human Rights held that the girl had been held in servitude and that France had breached its positive obligations under Article 4, because French law had not afforded the girl specific and effective protection.

## Article 5 – Right to liberty and security

### What does this right mean?

- Everyone has the right to liberty and security of person. This amounts to a right not to be “arrested” or “detained” even for a short period. This right is subject to exceptions where the detention has a proper legal basis in UK law and falls within one of the following categories of detention permitted by Article 5:
  1. Following conviction by a criminal court.
  2. For a failure to obey a court order or legal obligation (e.g. not paying a criminal fine).
  3. To ensure that a person attends a court, if there is a reasonable suspicion that they have committed a crime, or if it is reasonably necessary to prevent them committing a crime or escaping after they have done so.
  4. To ensure that a minor receives educational supervision or attends court.
  5. In relation to a person who is shown to be of unsound mind, an alcoholic, a drug addict or a vagrant, or who may spread an infectious disease if not detained.
  6. To prevent unauthorised entry into the country or in relation to a person against whom steps are being taken with a view to deportation or extradition.

### Other rights under Article 5

Article 5 also concerns the procedures that must be followed by those who have power to arrest or detain others. It gives the detained person the right:

- to be told promptly of the reasons for their arrest and of any charge against them, in a language which they can understand. The information must be given in simple, non-technical terms. This applies to any detention (e.g. detention of mental patients), and is not limited to arrests of criminal suspects.
- to be brought “promptly” before a judge or judicial officer. This applies only to criminal offences.
- to be tried for a criminal offence within a “reasonable time”.

- to challenge the lawfulness of their detention before an independent judicial body which will give a speedy decision and order their release if the detention is found to be unlawful.
- to obtain compensation if he or she is arrested or detained in breach of Article 5.

In cases considering Article 5, the European Court of Human Rights has set out principles to be applied in a range of areas such as mental health detention, or bail in criminal cases. In the case of the latter, national law must generally allow bail pending a criminal trial, unless:

- there is a danger that the accused will not attend the trial, and the court cannot identify any bail conditions that would ensure his attendance,
- there is a danger that the accused will destroy evidence, warn other possible suspects, co-ordinate his story with them, or influence witnesses,
- there are good reasons to believe that the accused will commit further offences whilst on bail, or
- the seriousness of the crime and the public reaction to it are such that release would cause a public disturbance.

#### **Is Article 5 relevant to my work?**

Article 5 will be relevant particularly if you are involved in any of the following:

- arresting or detaining people
- limiting or curtailing people's liberty
- reviewing the detention of mental health patients
- military discipline procedures

#### **What must a public authority do?**

- Ensure that any arrest or detention is lawful and is covered by one of the specified exceptions to the right to liberty (which are listed above).
- Ensure that any arrest or detention is not excessive in the particular circumstances that you are dealing with.
- Take all reasonable steps to bring a detained criminal suspect promptly before a judge.
- Take all reasonable steps to facilitate the detained person's right to challenge the lawfulness of his detention before a court.

- Obtain reliable evidence from an objective medical expert for detention on mental health grounds.
- Tell the person detained in a simple, clear, non-technical way – and without delay – why they are being deprived of their liberty. If they do not speak English, then get an interpreter to translate into a language that they can understand.

## Article 5 in practice

### CASE STUDY

#### *Austin v Metropolitan Police Commissioner (2005)*

On May Day in 2001, thousands of people took part in a political demonstration in Oxford Circus, London, halting traffic and ordinary business. The police had been given no prior warning of the protest and the demonstrators were generally uncooperative. The police cordoned-off an area that held some of the demonstrators and non-participants. The cordon was maintained for over seven hours, and physical conditions within the cordon became unacceptable. One demonstrator and one bystander caught up in the action brought their cases to the courts. The High Court held that the cordoning off action implemented by the police had resulted in the deprivation of liberty of all those held, but was justified as falling within one of the specified exceptions to the right to liberty because the police had taken the action to prevent crimes of violence.

#### *Best Practice Example*

A hospital psychiatric department held a number of mental health detainees who spoke little or no English. Members of a user-led mental health-befriending scheme were concerned about the fact that the services of an interpreter were not available when detaining these patients. They used human rights arguments based on the right to liberty (under Article 5) and the right not to be discriminated against on the basis of language (under Article 14) to argue successfully for a change in the hospital's practice of failing to provide an interpreter. (Example provided by British Institute of Human Rights).

## Article 6 – Right to a fair trial

### What does this right mean?

Everyone has the right to a fair trial in cases where:

- (a) there is a dispute about someone's "civil rights or obligations"; or
- (b) a criminal charge is brought against someone.

The right includes:

- the right to a *fair* hearing
- the right to a *public* hearing (although there are circumstances where it is permissible to exclude the public and press, e.g. to protect a child or national security interests)
- the right to a hearing before an *independent and impartial tribunal*
- the right to a hearing *within a reasonable time*.

### What kinds of cases are covered by Article 6?

The terms “criminal charge” and “civil rights and obligations” have very specific meanings under Article 6. It is important to know which type you are dealing with because the protection afforded by Article 6 is more extensive if there is a “criminal charge” at stake. It is not always easy to determine whether a penalty is a ‘criminal charge’ or whether a dispute involves a ‘civil right or obligation’ under Article 6. Some disputes will fall outside the scope of Article 6 altogether. This is an area which has generated a lot of cases through the courts. So if you are dealing with a penalty of some kind and you are not sure whether Article 6 applies, or whether the penalty is criminal or civil under the Article, then you should obtain further advice.

#### What is a ‘criminal charge’?

Anything that amounts to a criminal charge in UK law will always be criminal under Article 6. But that is not the end of the matter. There are also certain other penalties that are not called ‘criminal charges’ in UK law (and do not result in a criminal conviction or criminal record), but which are considered to be ‘criminal’ under Article 6. This is because the classification of a penalty under UK law is not conclusive of a ‘criminal charge’ under Article 6. What matters is whether the nature of the ‘offence’ for which the penalty is imposed, and the seriousness of the possible punishment, make it very similar to a criminal charge. For example, a penalty that involves detaining a person in custody, perhaps in a military discipline case, or following a contempt of court, is likely to be regarded as ‘criminal’ for the purposes of Article 6. In the same way, a fine that is imposed to punish and deter people from doing certain things (such as evading tax, or transporting illegal immigrants into the UK) may also be regarded as criminal for Article 6 purposes, even though it is not part of the criminal law in the UK.

#### What is a ‘civil right or obligation’?

Civil rights and obligations include rights and obligations that are recognised in UK law, for example, contractual rights, property rights etc. Again, UK law is not conclusive of the matter because ‘civil rights and obligations’ has its own special

meaning under Article 6. Essentially this term describes cases involving disputes about private rights or the use of administrative powers which affect private rights, for example: contracts, planning decisions, property disputes, family law or employment law.

### **What sort of cases fall outside Article 6?**

Article 6 does not always cover disputes under immigration legislation, or concerning extradition, tax, or voting rights. These will often fall outside the scope of Article 6 altogether.

### **What about appeals?**

Article 6 does not guarantee a right of appeal but the general guarantees of Article 6 apply to the first level of proceedings, as well as to any appeal which is available. However, some of the more specific rights, such as the right to an oral hearing or to a public hearing, may not apply in full to an appeal.

If a case is decided by a non-judicial body, such as an administrative authority rather than a court, the proceedings may not always meet the full standard in Article 6. However, this need not matter (particularly if you are dealing with a 'civil right or obligation') if there is an appeal from the decision of that authority to a court or tribunal that does meet the Article 6 standard for fair trials and can deal with all aspects of the case. There need not be a full re-hearing of the facts of the case, for example where the earlier hearing took place in public.

### **The right of access to a court**

As well as ensuring that the proceedings are conducted fairly, Article 6 gives you the right to bring a civil case to court. The legal system must be set up in such a way that people are not excluded from the court process. The right of access to court is not, however, unlimited and the European Court of Human Rights has accepted that the following people can be restricted from bringing cases:

- litigants who keep bringing cases without merit
- bankrupts
- minors
- people who are not within a time-limit or limitation period for bringing a case
- other people where there is a legitimate interest in restricting their rights of access to a court, provided that the limitation is not more restrictive than necessary.

### **The right to reasons**

Article 6 generally includes a right to a reasoned decision, so that people know the basis for the decision sufficiently clearly to decide whether they can challenge it further.

### **What about legal aid?**

Article 6 does not give a general right to legal aid in every civil case involving a person who cannot afford to bring proceedings (for legal aid in criminal cases, see page 23). However, legal aid may be required by Article 6 in some civil cases, for example, in cases or proceedings that are very complex, or in circumstances where a person is required to have a lawyer representing him.

### **What does the right to a fair hearing mean?**

This means, in essence, a person's right to present their case and evidence to the court (or the administrative authority who makes the decision) under conditions which do not place them at a substantial disadvantage when compared with the other party in the case. This includes a right to have access to material held by the other side, and – if there is a hearing – the ability to cross-examine witnesses on terms that are equal with the other side's. Witnesses and victims also have Convention rights. Where they are young or vulnerable the court must do what it can to protect them and acknowledge their rights.

### **What does the right to a public hearing mean?**

In principle, this right means that both the public at large and the press have access to any hearing under Article 6. But a failure to provide a public hearing at the first level of proceedings is not necessarily a breach of Article 6. For example, where the initial decision-maker in a civil case is an administrative authority, then it may be sufficient to provide a public hearing at the appeal stage (see below). In any case, the right to a public hearing can be subject to certain restrictions in the interests of morals, public order or national security or where the interests of those under 18 or the privacy of the parties require an exclusion of the public and the press. However any exclusion of the public must only go as far as is necessary to protect those interests. Even where the public has been excluded from the hearing, the outcome of the case must be publicly available, whether it is read out by the court or available in written form.

### **What does the right to an independent and impartial tribunal mean?**

The court or other body that decides a case must be independent of the parties in that case. The way in which members of the court or body are appointed or the way they conduct a particular case can affect their independence.

Similarly, members of the court or decision-making body must be impartial, and not show prejudice or bias or give any other grounds for legitimately doubting whether they are being impartial. Sometimes a judge or an administrative decision-maker will have had some earlier involvement with the case before deciding the case. Or he or she may have links with either party, or very strong views. Generally speaking,

however, prior involvement will not necessarily mean that the judge or the administrative decision-maker is not impartial. If there is no evidence of *actual* bias, then the test is whether there is an appearance of bias. For example, a judge or an administrative decision-maker who decides a case should not later be involved in the appeal against their own decision in the very same case because that would give the appearance of bias.

### **Do administrative decision-makers have to comply with these standards?**

Decisions that are taken by administrative authorities, in cases affecting a 'civil right or obligation', do not necessarily have to comply with the full requirements of Article 6 (such as the right to a public hearing), provided that there is a right of appeal to a court or tribunal that does comply with those requirements.

However, in some cases the decision-maker may have a duty to act quasi-judicially, for example, by holding a public hearing in a case where the facts are in dispute between the parties. There are also some types of decision which should not be made by an administrative authority (even at the very first level), but which should be allocated to a court. For example, a criminal charge should normally be tried by a court. Whether or not the decision-maker in a particular case is a fair and impartial tribunal for the purposes of Article 6 is therefore a developing and complex area, about which you might need specialist advice.

### **What does the right to a trial within a reasonable time mean?**

People are entitled to have their case heard without excessive procedural delays. Whether a delay is excessive will very much depend on the circumstances of the case, including:

- the type and complexity of the case (for example, criminal cases and family cases involving children usually have a strict timescale)
- the conduct and diligence in the case of both sides
- the conduct and diligence of the court

Inadequacy of resources (e.g. social workers or judges) is not an excuse for excessive delay.

### **Additional rights in a criminal trial**

These include:

- the right of the defendant, as a general principle, to be in court during his trial. If the defendant is in custody it is the responsibility of the prison authorities to ensure he is at court. The defendant can waive his right to attend court, but he must do so freely and clearly. However, if the defendant deliberately chooses to be absent from Court when his trial is heard, the Court may continue with the case and will not necessarily have breached Article 6 in doing so.

- the right of the accused not to say anything that may incriminate him or herself, often called the “right to silence”. However, if the accused exercises the right to silence, the court may be allowed to draw conclusions about why he chose to remain silent. So, there is no absolute right to silence.
- the right to be presumed innocent until proven guilty, which means that it is usually for the prosecution to prove that the defendant is guilty of the offence.
- the right of the accused to be informed promptly of the details of the accusation made against him and in a language he can understand.
- the right to adequate time and facilities to prepare a defence case, including the provision of legal aid where justice requires this, and the right to communicate with a lawyer in good time for the trial.
- the right of the defendant to question prosecution witnesses and to call and examine defence witnesses under the same conditions.
- the right of the defendant to defend himself or the right to effective legal assistance (which must be funded by legal aid if the defendant cannot afford it and it is in the interests of justice for him or her to have assistance).
- the right to a free interpreter where the accused cannot understand the language used.

### Is Article 6 relevant to my work?

Article 6 will be relevant particularly if you are involved in:

- processing benefits, awards, permits, or licences or if you deal with appeals and decisions
- decision-making procedures in the public sector, for example, planning, child care, confiscation of property
- the work of courts and tribunals

### What must a public authority do?

- Build in the necessary procedures to any process of awards, appeals or decisions to ensure that it meets the Article 6 standard.
- Ensure that any person who is subject to a decision-making process has access to an interpreter if needed.
- If the original decision-making process does not comply with the necessary standard of fairness (perhaps because there was no public hearing) then ensure that there is an appeals process in place which complies with the Article 6 standard.



- Ensure that any appeal process is readily available, fair and easily understood.
- Ensure that adequate time and facilities are given to prepare a defence or an appeal.

### **Case Study**

#### *H v. United Kingdom (1987)*

A mother who suffered with mental health problems had her child taken into care after a safety order was made to protect the child. Shortly after this she married and her mental health improved and she made applications to the court for staying access and then for care and control, both of which were refused. The court then terminated the mother's access to the child with a view to putting the child up for adoption. Over a period of two years and seven months, the child's mother and her husband persistently but unsuccessfully approached the council seeking to re-establish contact. The council delayed considerably and failed to notify them that the child had already been placed with an adoptive family. An adoption order was subsequently made, which ended all connections between the child and the natural parents. Procedural delays had meant that by the time of the adoption hearing, the child had been with her adoptive parents for 19 months and that the mother had not had access to the child for over three years. The court found that the delay by the council was in breach of Article 6, particularly given the importance of what was at stake and the 'irreversibility' of adoption.

### **Best Practice Example**

A local education authority has produced a 'good practice guide to decision-making' drawing on principles of good decision-making drawn from a range of sources including the Human Rights Act. The guide, which is designed for decision-makers at all levels within the authority, contains a user-friendly checklist of issues to consider and procedures to follow whilst decisions are being made.

A number of planning departments have allowed public participation at planning committees and changes to licensing procedures. (Example taken from the Audit Commission. Human Rights – Improving Public Service Delivery (2003)).

A borough council has improved its procedures for appeals by appointing an independent chair. (Example taken from the Audit Commission, Human Rights – Improving Public Service Delivery (2003)).

## Article 7 – No punishment without law

### What does this right mean?

- A person has the right not to be found guilty of a criminal offence for an action they carried out at a time when such an action was not criminal. Also, a person cannot be given a punishment which is greater than the maximum penalty which was available at the time they committed the offence.
- If, at the time the act or omission was committed, that act was contrary to the general law of civilised nations, then prosecution and punishment for that act may be allowed. This exception allowed for the punishment of war crimes, treason and collaboration with the enemy following the World War II.

#### Is Article 7 relevant to my work?

Article 7 will be relevant particularly if you are involved in:

- creating or amending criminal law
- prosecution of criminal offences
- disciplinary action that leads to punishment, where the offence falls within the Convention concept of a criminal offence (see Article 6 above)

### What must a public authority do?

- Take account of Article 7 when creating/amending criminal legislation.
- Ensure that offences are clearly defined in law.
- Ensure that criminal laws and punishments are not applied retrospectively.

## Article 7 in practice

### Case Study

#### *R v Secretary of State for the Home Department, ex parte Uttley (2004)*

In 1995 a man was convicted of various sexual offences, including rape. He was sentenced to 12 years' imprisonment. He was released after serving two-thirds of his sentence, subject to licence conditions until three-quarters of the way through the sentence. However had he been convicted and sentenced at the time the offences took place, the legal provisions then in force would have entitled him to be released on remission without conditions. He argued that the imposition of licence conditions rendered him subject to a heavier penalty than that which was applicable at the time

the criminal offence was committed, and that this was a breach of Article 7. The House of Lords disagreed. They held that Article 7 would only be infringed if a sentence imposed on a defendant exceeded the maximum penalty which could have been imposed under the law in force at the time the offence was committed. That was not the case here because, even at the date of the offences, the maximum sentence for rape was life imprisonment. Article 7 was not intended to ensure that the offender was punished in the exact same way as would have been the case at the time of the offence, merely that he was not punished more heavily than the maximum applicable at the time of the offence. In any event the imposition of licence conditions did not render the sentence heavier than it would have been under the earlier regime.

## Qualified Rights: Articles 8 to 11

### Article 8 – Right to private and family life

#### What does this right include?

- Everyone has the right to respect for their private and family life, their home and their correspondence.
- This right may be restricted provided such interference has a proper legal basis, is necessary in a democratic society and pursues one of the following recognised **legitimate aims**:
  - national security
  - public safety
  - the economic well-being of the country
  - the prevention of disorder or crime
  - the protection of health or morals
  - the protection of the rights and freedoms of others.

But the interference must be necessary (not just reasonable) and it should not do more than is needed to achieve the aim desired.

#### Key words and meanings

**Private life** The concept of “private life” is broad. In general, the right to a private life means that a person has the right to live his own life with such personal privacy as is reasonable in a democratic society, taking into account the rights and freedoms of others. Any interference with a person’s body or the way the person lives their life is likely to affect their right to respect for their private life under Article 8. Article 8 rights include matters of self-determination that may include, for example:

- freedom to choose one's own sexual identity
- freedom to choose how one looks and dresses
- freedom from intrusion by the media.

The right to private life can also include the right to have personal information, such as a person's official records, photographs, letters, diaries and medical information, kept private and confidential. Any disclosure of personal information about someone, to another person or body, is likely to affect a person's right to their private life under Article 8. Unless there is a very good reason, public authorities should not collect or use information like this; if they do, they need to make sure the information is accurate. Of course they must also comply with data protection legislation.

Article 8 places limits on the extent to which a public authority can do things which invade a person's privacy about their body without their permission. This can include activities such as taking blood samples and performing body searches

In some circumstances, the State must take positive steps to prevent intrusions into a person's private life by other people. For example, the State may be required to take action to protect people from serious pollution where it is seriously affecting their lives.

**Family life** – The right to respect for family life includes the right to have family relationships recognised by the law. It also includes the right for a family to live together and enjoy each other's company. The concept of "family life" under Article 8 is broader than the nuclear family. So, it can include the relationship between unmarried couples, an adopted child and the adoptive parent, or a foster parent and fostered child.

**Home** – Everyone has the right to enjoy living in their home without public authorities intruding or preventing them from entering it or living in it. People also have the right to enjoy their homes peacefully. This may mean, for example, that the State has to take positive action so that a person can peacefully enjoy their home, for example, to reduce aircraft noise or to prevent serious environmental pollution. A person's "home" may include their place of business. A person does not have to own their home to enjoy these rights.

**Correspondence** – Again, the definition of "correspondence" is broad, and can include communication by letter, telephone, fax or e-mail.

### Is Article 8 relevant to my work?

Article 8 will be relevant particularly if you are involved in any of the following:

- accessing, handling or disclosing personal information
- entry to properties (including businesses)
- providing or managing housing
- surveillance or investigation
- dealing with families, or children
- immigration and asylum
- handling environmental issues, such as waste management or pollution
- provision of medical treatment or social care

### What must a public authority do?

- Always be alert to policies or actions that might interfere with a person's right to respect for their private and family life, their home and their correspondence.
- Where possible, a public authority should try to ensure that its policies or decisions do not interfere with someone's right to respect for private and family life, their home and their correspondence.
- If a public authority does decide that it is necessary to interfere with someone's Article 8 rights, they will need to make sure that the policy or action is necessary, pursues one of the recognised legitimate aims and is proportionate to that aim. A public authority may be asked to produce reasons for its decisions.

### Article 8 in practice

**BALANCING** – Article 8 is one of the Convention rights that may require you to strike a balance between a person's private rights and the needs of other people or society as a whole (see "Balancing one person's rights against those of the community" on page 54).

The right to respect for a person's private and family life, their home and their correspondence under Article 8 also raises issues in areas such as:

- searches of homes and the use of covert surveillance, such as listening devices
- family law disputes or asylum cases where there is a risk that a family will be separated

- the rights of homosexuals (there have also been recent developments in domestic law in this area, such as the Employment Equality (Sexual Orientation) Regulations 2003)
- the rights of transsexual people (which are given effect in domestic law by the Gender Recognition Act 2004)
- certain aspects of the rights of prisoners
- employees' rights to privacy, including the monitoring of e-mails and telephone calls
- the imposition of unreasonable mandatory dress codes or drug testing at work
- the use of CCTV and exchange of data obtained from it
- the right to refuse medical treatment
- the rights of egg and sperm donors, and children born as a result of artificial insemination
- the ability of the media to report details of the private lives of famous people.

### **Case Studies**

#### ***Peck v. UK (2003)***

A man suffering from depression attempted suicide by cutting his wrists on the street. CCTV cameras filmed him walking down the street with the knife. The footage was then published as film and as photographs without his consent and without any attempt to conceal his identity. The European Court of Human Rights held that, although the filming and recording of the incident did not necessarily interfere with the man's Article 8 rights, the disclosure of the CCTV footage by the local authority constituted a serious interference with Article 8. In this case there were insufficient reasons to justify disclosure of the footage without the man's consent and without masking his identity. Accordingly, disclosure of the material was a disproportionate interference with his private life.

#### ***Connors v. UK (2004)***

A family had been settled for about thirteen years on a site provided by the council for people with a nomadic lifestyle. The council then evicted them for causing a nuisance, using the summary eviction procedure. The family challenged the council's decision on the basis that their eviction from the site was an unjustifiable breach of their Article 8 rights. The European Court of Human Rights held that there had been a breach of the right to respect for the home under Article 8. The court found that the legal framework applying to the occupation of pitches on local authority gypsy sites did not provide the family with sufficient procedural protection of their

rights. Special consideration should be given to their needs and their nomadic lifestyle because of the vulnerable position of gypsies in society. An interference that would render them homeless could not be justifiable unless the public interest grounds were considerably weighty. The Court found that there were no such grounds and as such the decision infringed Article 8.

#### ***Best Practice Example***

A physical disabilities team at a local authority decided to provide support workers to facilitate social activities. Residents were taken to a number of social events including pubs and clubs. One service user who was gay asked for a support worker to accompany him to a gay pub but the manager of the scheme refused on the basis that none of his staff were prepared to attend a gay venue. Following training by BIHR an advocate working on behalf of the service user realised that human rights arguments based on the right to respect for private life (Article 8) could be used to challenge practices of this sort. (Example provided by the British Institute of Human Rights).

## **Article 9 – Freedom of thought, conscience and religion**

### **What does this right mean?**

Article 9 protects people's rights in relation to a broad range of views, beliefs, thoughts and positions of conscience as well as to their faith in a particular religion.

- The State is never permitted to interfere with a person's right to hold a particular belief. It can only restrict their right to manifest a belief (for example, worshipping, teaching, practising and observing their faith either in public or in private).
- However the State would have to show that such interference has a proper legal basis, is necessary in a democratic society and pursues one of the following recognised legitimate aims:
  - Public safety
  - The protection of public order, health or morals
  - The protection of the rights and freedoms of others

But the interference must be necessary (not just reasonable) and it should not do more than is needed to achieve the aim desired.

### Is Article 9 relevant to my work?

Article 9 will be relevant particularly if you are involved in any of the following:

- Taking decisions that may conflict with someone's religious beliefs e.g. time-tabling an examination on a religious holiday
- Detaining or accommodating a person. You must take care to ensure that any interference with their freedom to manifest religious beliefs is proportionate
- Decisions that may come into conflict with religious beliefs
- Situations where religious organisations provide a service to others

### What must a public authority do?

- Always be alert to policies or actions that might interfere with a person's right to manifest their religion or belief.
- Where possible, a public authority should try to ensure that its policies or decisions do not interfere with someone's right to manifest their religion or belief.
- If a public authority does decide that it is necessary to interfere with someone's right to manifest their religion or belief, they will need to make sure that policy or action is necessary, pursues one of the recognised legitimate aims and is proportionate to that aim. A public authority may be asked to produce reasons for its decisions.

### Article 9 in practice

Article 9 is one of the Convention rights that may require you (in relation to the manifestation of beliefs) to strike a balance between a person's private rights and the needs of other individuals or society as a whole.

Under the Human Rights Act the right to freedom of belief under Article 9 may be relevant to areas such as:

- the actions of employers and schools to accommodate the Article 9 rights of their employees and pupils, which may include issues relating to time off for religious holidays, uniforms etc



- the arrangements made to ensure prisoners can practise their religion
- how far people can go in trying to encourage others to convert to their religion.

### **Case Studies**

#### ***R (Williamson and others) v Secretary of State for Education and Employment and others (2005)***

Article 9 was invoked in an attempt to overturn the ban on corporal punishment of children by teachers. It was claimed that part of the duty of education in the Christian context was that teachers should be able to stand in the place of parents and administer physical punishment to children who were guilty of indiscipline. The House of Lords found that the statutory ban pursued a legitimate aim and was proportionate. Children were vulnerable and the aim of the legislation was to protect them and promote their well being. Corporal punishment involved deliberately inflicting physical violence. The legislation was intended to protect children against the distress, pain and other harmful effects this infliction of physical violence might cause.

#### ***Pendragon v. United Kingdom (1998)***

A national heritage site traditionally used by druids during the summer solstice was lawfully closed by the authorities. A druid claimed that the authorities had unlawfully interfered with her Article 9 rights. The court disagreed. It found firstly, that the authorities had acted in accordance with the law, because they had power to close the site under an Act of Parliament. And secondly, the reason for closing the site was that they were unable to guarantee the safety of those celebrating the summer solstice. They were therefore acting in the interests of public safety, and the interference was justified.

#### ***Best Practice Example***

The Strasbourg Court has found that there is also a right not to be compelled to manifest views associated with a particular religion. So, for instance care should be taken when devising procedures for the swearing of oaths. A requirement to swear an oath on the Bible would be contrary to Article 9, as would a requirement to swear on any other religious text or in a religious form. Best practice requires the provision of a form of an alternative form of solemn affirmation binding on the conscience of the individual without reliance on religious forms.

## Article 10 – Freedom of expression

### What does this right mean?

Everyone has the right to hold opinions, and to receive opinions and information without interference by a public authority and regardless of frontiers. The right also includes the freedom and to express views. However, the Article does not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

The right may be subject to formalities, conditions, restrictions or penalties, but these must have a proper legal basis. Furthermore, the interference must be necessary in a democratic society and pursue one of the following recognised legitimate aims:

- In the interests of public safety, national security or territorial integrity.
- To prevent disorder or crime.
- To protect health or morals.
- To protect the reputations or rights of others.
- To prevent the disclosure of information received in confidence.
- To maintain the authority and impartiality of the judiciary.

But the interference must be **necessary** (not just reasonable) and it should not do more than is needed to achieve the aim desired.

### Key words and meanings

**Expression** – “Expression” can cover holding views or opinions, speaking out loud, publishing articles or books or leaflets, television or radio broadcasting, producing works of art, communication through the internet, some forms of commercial information and many other activities. It can also cover the right to receive information from others, so you possess expression rights as a speaker and as a member of an audience. You can express yourself in ways that other people will not like, or may even find offensive or shocking. However, offensive language insulting to particular racial or ethnic groups would be an example of where a lawful restriction on expression might be imposed.

### Does Article 10 affect me?

Article 10 will be relevant particularly if you are involved in any of the following:

- broadcasting, media and press work
- regulation of communications or the internet
- writing speeches or speaking in public
- decisions in relation to provision of information, for example to people in detention
- regulation or policing of political demonstrations

### What must a public authority do?

- Always be alert to policies or actions that might interfere with a person's right to freedom of expression.
- Where possible, a public authority should try to ensure that its policies or decisions do not interfere with freedom of expression.
- If a public authority does decide that it is necessary to interfere with someone's Article 10 rights, they will need to make sure that the policy or action is necessary, pursues one of the recognised legitimate aims and is proportionate to that aim. A public authority may be asked to produce reasons for its decisions.

### Article 10 in practice

The right to free expression under Article 10 may be relevant to areas such as political demonstration, industrial action and "whistle-blowing" employees. It has also been very important for the media. The press's rights under Article 10 have come into conflict with celebrities' rights to privacy under Article 8 in several high profile cases. In addition, the interaction between Article 10 and the criminal law has been tested in several cases.

#### Case Study

##### *Observer and the Guardian v. United Kingdom (1991)*

The Guardian and the Observer published some excerpts from Peter Wright's book, *Spycatcher*, which contained material alleging that MI5 had conducted unlawful activities. The Government succeeded in obtaining an injunction preventing further publication until proceedings relating to a breach of confidence had been concluded. Subsequently the book was published in other countries and then in the UK. The

Guardian complained that the continuation of the injunction infringed Article 10.

The European Court of Human Rights held that although the injunction was lawful, as it was in the interests of national security, once the book had been published, there was insufficient reason for continuing the publication ban. The injunction should have been discharged once the information was no longer confidential.

## Article 11 – Freedom of peaceful assembly and association

### What does this right mean?

- Everyone has the right to assemble with other people in a peaceful way, and the right to associate with other people, including the right to form a trade union. Everyone also has the right not to take part in an assembly or join an association if that is their choice.
- This right may be restricted provided such interference has a proper legal basis, is necessary in a democratic society and pursues one of the following recognised **legitimate aims**:
  - national security
  - public safety
  - the prevention of disorder or crime
  - the protection of health or morals
  - the protection of the rights and freedoms of others

But the interference must be *necessary* (not just reasonable) and it should not do more than is needed to achieve the aim desired.

### Key words and meanings

**Freedom of assembly** – applies to static meetings, marches, public processions and demonstrations. The right must be exercised peacefully, without violence or the threat of violence, and in accordance with the law.

**Freedom of association** – A person's right to freedom of association includes: the right to form a political party (or other non-political association such as a trade union or other voluntary group); the right not to join and not be a member of such an association or other voluntary group. This means that no one can be compelled to join an association or trade union, for example. Any such compulsion may infringe Article 11.

### Is Article 11 relevant to my work?

Article 11 will be relevant particularly if you are involved in any of the following:

- making decisions regarding public protests, demonstrations or marches
- industrial relations
- policy making

### What must a public authority do?

- Always be alert to policies or actions that might interfere with a person's right to freedom of assembly and association.
- Where possible, a public authority should try to ensure that its policies or decisions do not interfere with someone's freedom of peaceful assembly and association.
- If a public authority does decide that it is necessary to interfere with someone's Article 11 rights, they will need to make sure that the policy or action is necessary, pursues one of the recognised legitimate aims and is proportionate to that aim. A public authority may be asked to produce reasons for its decisions.

### Article 11 in practice

**RESTRICTIONS** – The State is allowed to limit the Article 11 rights of members of the armed forces, police, and civil service, provided these limitations can be justified. This is based on the idea that it is a legitimate aim of democratic society for these people to be politically neutral, and thus restricted from being closely associated with a particular political cause.

#### Case Study

A group of young men used a shopping centre in Wellingborough as a meeting and 'hanging out' point. The numerous complaints from shoppers and shop-owners about the nuisance caused by them sometimes led to police involvement. The local council wrote to the young men telling them they were banned from the shopping centre. A lawyer of the young men took the case to court arguing that they had the

right to gather where they chose. The court disagreed, saying that if the young men had been organising a demonstration, or other kind of peaceful assembly, they could rely on Article 11. As they were simply hanging out in the shopping centre, Article 11 did not apply.

(Case illustration from Watson, J., and Woolf, M., *Human Rights Act: Toolkit*. London: LAG, 2003)

## Article 12 – The right to marry and found a family

### What does this right mean?

- Men and women have the right to marry and found a family provided they are of a marriageable age, and marriage between two individuals is permitted in national law. This final requirement gives authorities flexibility when placing limitations on marriage. However the state must not impose limitations which impair the very essence of the right.

#### Is Article 12 relevant to my work?

Article 12 will be relevant particularly if you are involved in any of the following:

- registering marriages
- making decisions on fertility treatment

### What must a public authority do?

- If a public authority takes a decision that has the effect of interfering with someone's right to marry or found a family, then it must be particularly careful to ensure that the decision is in accordance with the relevant national law.

### Article 12 in practice

**TRANSSEXUAL PEOPLE** – In the case of *Goodwin v UK*, the European Court of Human Rights interpreted Article 12 as providing post-operative transsexual people with the right to marry in their acquired gender. The Gender Recognition Act now allows transsexual people to obtain legal recognition in their new gender, and once they have obtained such recognition they can marry a person of the opposite gender.

## **Case Study**

### ***B & L v the United Kingdom (2005)***

English law prohibited a parent-in-law from marrying their child-in-law unless both have reached age 21 and both their respective spouses have died. B was L's father-in-law, and they wished to marry. L's son treated his grandfather, B, as "Dad".

The Court accepted the Government's argument that the legislation had the legitimate aim of protecting the family and any children of the couple. However, it nonetheless considered that there had been a violation of the right to marry under Article 12. The prohibition was based primarily on tradition. There was no legal prohibition on a couple in this situation engaging in an extra-marital relationship. Moreover on several occasions couples had obtained exemptions from the prohibition by personal Acts of Parliament. This showed that the objections to such marriages were not absolute.

## **Article 14 – Prohibition of discrimination**

### **What does this right mean?**

Discrimination means treating people differently, without an objective and reasonable justification, on certain prohibited grounds (this is known as direct discrimination). It can also cover situations where the same rule applies to everyone but in practice has greater impact on one particular group (this is known as indirect discrimination). Article 14 of the European Convention on Human Rights gives people the right to protection from discrimination in relation to all the other rights guaranteed under the Convention. It means that everyone is entitled to equal access to those rights. People cannot be denied equal access to them on grounds of their personal "status".

### ***How does article 14 work?***

Article 14 only works to protect people from different treatment in exercising their other Convention rights. It does not give people a general right to protection from different treatment in all areas of their life. The structure of Article 14 means that a person needs to be able to identify another Convention right in order to make use of the non-discrimination protection. However, that person does not need to identify an actual breach of the right to claim that he or she has been discriminated against with respect to their enjoyment of it. They simply need to show that the subject matter of the Convention right is activated.

### ***On what grounds is discrimination prohibited?***

Article 14 gives the following as examples of the grounds of discrimination that the Article does not allow:

- sex
- race
- colour
- language
- religion
- political or other opinion
- national or social origin
- association with a national minority
- property
- birth

Importantly, though, Article 14 protects people from discrimination on the grounds of “any other status” too. This means that the categories are not closed. The “other status” ground could therefore be used to protect people from discrimination on the grounds of, for example:

- sexual orientation
- whether you were born inside or outside a marriage
- disability
- marital status
- age

### ***Is differential treatment ever acceptable?***

Differential treatment may be acceptable in some circumstances. It is legitimate to treat people differently based on differences which have nothing to do with their personal status – for example it is lawful to impose a punishment only on people who have been found guilty of a criminal or disciplinary offence, because committing an offence is not one of the protected grounds: it is not a personal status but a historical fact. A public authority is also entitled to treat people differently if there is a relevant difference in their situation, other than a prohibited ground. For example it may be legitimate to pay a man more than a woman if he has been employed longer



or works in a more skilled or senior position. The difference of treatment here is not on the grounds of sex (which would be a prohibited ground), but on the grounds of skill or seniority (which is not).

Where the only difference between people is one of the prohibited grounds, a public authority can still treat them differently in a way which is connected with their Convention rights if it can show that it is pursuing a legitimate aim and that the discriminatory treatment is proportionate to the aim. Only good reasons will suffice, especially where the difference in treatment is on grounds of sex or race. This is known as justification.

There will be many ways in which Article 14, taken together with another Convention right, can apply to potentially discriminatory situations.

For example:

- It might not be a breach of a person's right to education if the State does not provide a particular kind of teaching. But if the State provides it for boys but not for girls, or for people who speak only a particular language, but not another, this could be discrimination in relation to the right to education. If this were the case, the people affected would rely on their rights under Article 14 (non-discrimination) taken with Protocol 1, Article 2 (education).
- It is unlikely to be a breach of the right to respect for your property for the state to impose a particular kind of tax – Article 1, Protocol 1 specifically preserves the State's right to assess and collect tax. But if the State taxes some people but not others in the same situation, then it might be a breach of Article 14 in relation to the right to respect for property. If this were the case, the people affected would rely on their rights under Article 14 (non-discrimination) taken with Protocol 1, Article 1 (property).

Article 14 has been successfully invoked under the Human Rights Act on behalf of a gay couple who wished to be treated in the same way as a heterosexual couple for the purposes of one partner succeeding to another under a tenancy.

### **Is Article 14 relevant to my work?**

Article 14 will be relevant wherever any of the other Convention rights is in play – even if there is no breach of the other Convention right, particularly in any circumstances where different groups are treated in different ways.

### **What must a public authority do?**

- Where possible, a public authority should try to ensure policies or decisions do not involve any form of discrimination on any ground.

- If it is necessary to treat some people more favourably than others, there must be an objective and reasonable justification for the discrimination.
- A public authority may be asked to produce reasons for its decisions.

### Article 14 in practice

**POSITIVE DISCRIMINATION** – occurs when a disadvantaged group is treated more favourably in order to assist them in redressing an existing situation of inequality. Such treatment will still amount to a breach of Article 14, unless a legitimate aim can be demonstrated.

**INDIRECT DISCRIMINATION** – occurs when a rule that applies equally to everyone results in a disproportionate disadvantage to a particular group e.g. a requirement that a job holder must be over six feet tall would exclude more woman than men, even though it might be possible for someone below six feet to do the job perfectly well.

### Case Study

#### *Lindsay v. UK (1986)*

A married couple, in which the wife was the sole earner, complained that the UK income tax regime had the effect of taxing comparable couples in a discriminatory way on grounds of sex, marital status and religion. First, married couples in which the husband was the sole earner were taxed more heavily than married couples in which the wife was the sole earner. Second, married couples were taxed more heavily than co-habiting couples who were not married. The Commission found that the tax measures which gave extra advantages to a wife who was the earner in the family had an objective and reasonable justification in positively encouraging married women to work. The court did not accept that married couples were in a similar position to co-habiting couples for the purposes of taxation and Article 14 only protects people from discrimination who are less favourably treated compared to others in a similar position. Accordingly there was no violation of Article 14.

#### *Best Practice Example*

A local authority has combined human rights training with discrimination training, as both promote respect and dignity equally for all persons. Taking a human rights approach in potential discrimination cases will encourage thinking about the desired outcome from the individual's point of view rather than just simply ensuring equality of treatment. This should help staff to avoid indirect discrimination. It is sometimes the case that everybody has been treated equally but a small group of individuals suffers a distinct disadvantage.

A housing department has taken advice on issues such as discrimination against non-spouses and same sex partners in succession, housing allocation policies, nuisance neighbours and racial harassment. (Example taken from the Audit Commission, Human Rights – Improving Public Service Delivery (2003)).

A local council revised its policy for adult social care services working with asylum seekers to ensure that asylum seekers with special needs are treated fairly and without discrimination. (Example taken from the Audit Commission, Human Rights – Improving Public Service Delivery (2003)).

## Protocol 1, Article 1 – Protection of property

### What does this right mean?

The protection of property under Protocol 1 Article 1 has three elements to it:

- A person has the right to the peaceful enjoyment of their property.
- A public authority cannot take away what someone owns.
- A public authority cannot impose restrictions on a person's use of their property.

However, a public authority will not breach this right if a law says that it can interfere with, deprive, or restrict the use of a person's possessions, and it is necessary for it to do so in the public interest. There is a public interest in the government raising finance, and in punishing crimes, so a person's rights under Protocol 1, Article 1 are not violated by having to pay taxes or fines. The Article requires public authorities to strike a fair balance between the general interest and the rights of individual property owners.

The protection extends to businesses as well as to individuals.

### *When can the State interfere with the use of, or take away, a person's property?*

A person has the right to use, develop, sell, destroy or deal with their property in any way they please. The right to protection of property means that public authorities cannot interfere with the way that a person uses their property unless there is a proper legal basis for this interference and such interference is justified.

For example, if a public authority plans to build a road over someone's land, it must have laws in place to let it do this. It must also have a procedure to check that a fair balance has been struck between the public interest in building the road, and the individual's right to his land. It will not normally be fair to deprive a person of his land unless the person can get proper compensation for it. An interference with a person's peaceful enjoyment of property may be necessary in the public interest – for example, a compulsory purchase of a person's property may be necessary or a certain amount of noise from road traffic may intrude upon a person's home.

## Key words and meanings

**Possessions and property** – this has a wide meaning, it includes land, houses, leases, money and personal property. It also covers intangible things such as shares, goodwill in a business, patents and some forms of licences including those which allow people to exercise a trade or profession. Entitlements to social security benefits are also generally classified as property.

### Is Protocol 1, Article 1 relevant to my work?

Protocol 1 Article 1 will be relevant, particularly if you are involved in:

- work in any area that can deprive people of their possessions or property
- taking decisions about planning, licensing or allowing people to exercise a trade or profession
- compulsory purchase

## What must a public authority do?

- Where possible, a public authority should try to ensure policies or decisions do not interfere with peaceful enjoyment of possessions, restrict the use of possessions or take away possessions.
- Where this is unavoidable, then the interference must be lawful and necessary in the public interest.
- If it does decide that it is necessary to interfere with someone's possessions, there must be an objective and reasonable justification for that.
- A public authority may be asked to produce reasons for its decisions.
- Public authorities should take action to secure the right to property, as well as refraining from interfering with it.

## Protocol 1, Article 2 – Right to education

### What does this right mean?

- A person has a right not to be denied access to the existing educational system.
- Parents have a right to make sure that their religious or philosophical beliefs are respected when public authorities provide education or teaching to their children.

### **LIMITS ON THE RIGHT TO EDUCATION**

- The general right to education is not an absolute right for a person to learn whatever they want, wherever they want. The Government has made a special reservation to the Convention in this area so that education provided by the state is limited to the extent that this is compatible with the need to provide an efficient education and the need to avoid unreasonable public expenditure. This means that a person may not have a right to the most expensive form of education if there are cheaper alternatives available, but the Government or local education authority must balance the right not to be deprived of an education against the spending limits it imposes. Our Government has stressed that the cost of providing education is a relevant factor in making these decisions.
- Parents cannot stop schools teaching about things like sex education if they are reasonable things for the school to teach, so long as it is not trying to indoctrinate the children. However, parents can remove their children from sex education classes.
- In a recent case it was also held that the duty under Protocol 1, Article 2 is imposed on the State and not on any particular domestic institution. It does not create a right to be educated in a particular school or a particular manner, so that if an expelled pupil is able to have access to efficient education somewhere else, there would be no breach of his or her Convention right.

### **PUNISHMENTS IN SCHOOLS**

- The right to education does not prevent schools from imposing disciplinary measures on pupils, provided they do not breach any other Convention right (for example ill treatment contrary to Article 3). A school that imposes a penalty on a pupil will have to show that such a penalty pursued a legitimate aim (such as punishing cheating or ensuring compliance with school rules), and was proportionate.
- Penalties imposed may include suspension or exclusion, provided the pupil still has access to alternative state education conforming to the parents' religious and philosophical convictions.

### Is Protocol 1, Article 2 relevant to my work?

It may be relevant, especially if you are involved in any of the following:

- teaching or school administration
- providing non-school based education
- education policy
- provision of funding for schools or other forms of education

### What must a public authority do?

- Where possible, a public authority should try to ensure policies or decisions do not interfere with the right to education.
- A public authority may be asked to produce reasons for its decisions.
- Public authorities should take action to secure the right to education, as well as refraining from interfering with it.

## Protocol 1, Article 2 in practice

### Case Study

#### *Simpson v. United Kingdom (1989)*

Parents of children with special needs can argue that the needs of their child require special facilities that may have to be respected by the educational authorities.

However, this is not an absolute right, the authorities will have discretion as to how they allocate limited resources. Authorities can legitimately seek to integrate a child with special needs into mainstream school even if this is not what the parents want.

## Protocol 1, Article 3 – Right to free elections

### What does this right mean?

Free elections must be held at reasonable intervals and must be conducted by secret ballot. They must be held in conditions that ensure that people can freely express who they want to elect. The State can put some limits on the way in which elections are held. Also, it can decide what kind of electoral system to have, such as “first past the post” or proportional representation.

The right to fair elections under Protocol 1, Article 3 applies only to those eligible to vote under the domestic laws. In addition, Article 16 of the Convention provides that nothing in Articles 10, 11 or 14 is to be taken as preventing a state from imposing restrictions on the political activity of non-citizens.

### Is Protocol 1, Article 3 relevant to my work?

It may be relevant, particularly if you are involved in:

- exercising decision making powers about voting rights or the right to stand for election
- arranging elections.

### What must a public authority do?

- Respect the voting rights of individuals.
- Enable those with a right to vote to use their vote if they wish to do so.
- Ensure that elections are conducted freely and fairly.

### Protocol 1, Article 3 in practice

#### Case Study

#### *Hirst v United Kingdom (2005)*

The UK's absolute statutory bar on convicted prisoners voting in Parliamentary elections was found to be in breach of Article 3 of Protocol 1.

The Court noted that a prisoner by fact of his imprisonment did not lose the protection of the other guarantees under the Convention and that removal of the vote cut a prisoner off even further from the democratic society in which he lived. The blanket ban on all convicted prisoners sentenced to imprisonment was said to be arbitrary in its effects and indiscriminate in its application. However, the judgment left open the question whether a ban limited to imprisonable offences of a certain severity or imposed expressly by a trial judge on the facts of a case would be acceptable.

## Part 3: Guidance and Information



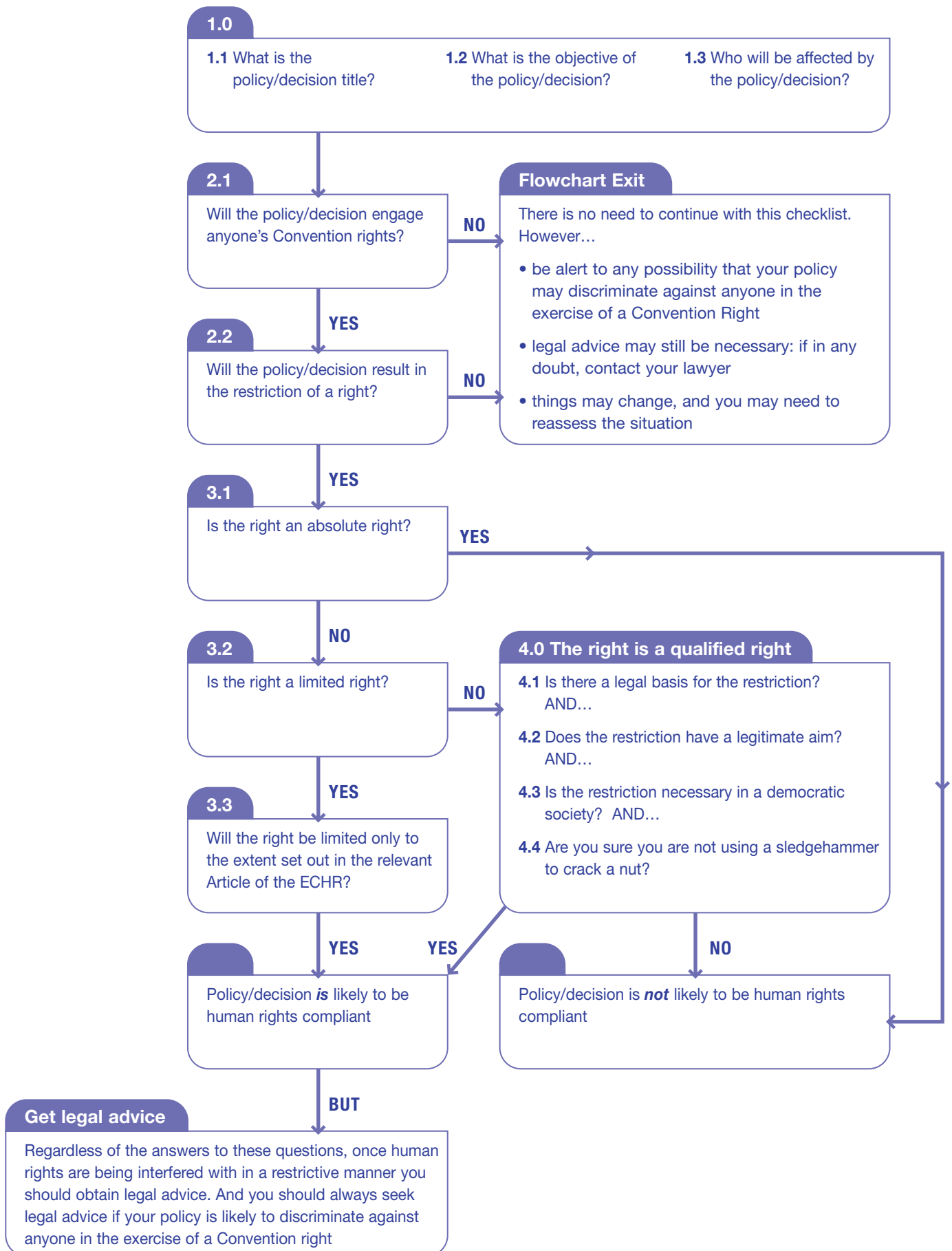
### Human Rights flowchart

The flowchart overleaf is designed to help in applying human rights in the workplace. It will be particularly relevant when you are restricting a right – either by balancing one right against another, or when you are balancing the rights of an individual against the interests of the public. It may also be useful when you are making decisions or policies that are previously untested.

More detail on the questions contained in the flowchart can be found in the succeeding pages. Once you have read those and understand the full meaning of the questions contained in the flowchart, it will be a useful prompt to refer back to when you need to make decisions involving human rights.



# Human Rights flowchart



## Human Rights Flowchart explained

### 1. The Policy/Operational decision

These questions cover the basics. They ensure that all the information about the new policy/decision is in one place if someone else in the organisation needs to know about it, perhaps to provide additional help or advice.

#### 1.1 What is the policy/decision title?

This is simply a question of labelling the policy/decision clearly so that it may be referred to without confusion.

#### 1.2 What is the objective of the policy/decision?

Here you should set out the basic aim of the policy/decision. What are you setting out to achieve? You could break this section down into three sections:

- why the policy/decision is being developed,
- why it is needed and,
- what is its purpose?

#### 1.3 Who will be affected by the policy/decision?

To answer this you should look back at the objective you are trying to achieve and think about what groups of people are most likely to be affected by it. Answering this question now is important because it will help you at the next stage when you will be asked to decide whether or not the policy/decision has anything to do with human rights. Knowing who is affected by the policy/decision will help you answer this question. For example, if you are dealing with families this might raise the question of whether the right to respect for private and family life, protected in Article 8, is involved.

## 2. Human Rights Impact

### 2.1 Will the policy/decision engage anyone's Convention rights?

Here we advise you to refer to Part 2 (page 10) of this guide to look through all the rights and consider whether or not your policy/decision falls into any of the areas that are covered by the Convention rights.

#### Flowchart Exit

If you decide that no Convention rights are engaged, there is no need to continue along the flowchart. However, there are three further points to note:

- First – be alert to any possibility that your policy may discriminate against someone in the exercise of a Convention right.
- Secondly – although this checklist is designed to help you identify any potential human rights impact, it may still be necessary to obtain legal advice. For example, the policy/decision may be particularly controversial or you may not be fully certain about whether or not certain human rights have been engaged.
- Thirdly, even if you decide that the policy/decision does not engage anyone's Convention rights, things may change and you may need to reassess the situation.

### 2.2 Will the policy/decision result in the restriction of a right?

If you decide that your policy/decision might engage a Convention right, the next step is to look at the nature of this engagement. Will the policy/decision restrict or limit any of the rights it engages? If so, you should log details of how the right is interfered with or limited.

You should remember that interference with a right may not always simply consist of an action that is not compatible with Convention rights; it may also be a failure to take action where a right places a positive obligation on public authorities to take action to preserve a right.

Once you have made your assessment, if you decide that although a right is engaged, the policy will not result in any restriction on that right, or that you are not under a positive obligation to act differently, then you may exit the flowchart, bearing in mind the points mentioned above in the Flowchart Exit box.

If however, you do decide that there is a danger of Convention rights being restricted, it will be necessary to proceed to the next section.

### 3. Types of Right

#### 3.1 Is the right an absolute right?

If the right you are proposing to restrict is absolute, it may not be restricted, and any attempt to do so will be incompatible with the Convention. The prohibition of torture and inhuman or degrading treatment or punishment (Article 3), slavery and forced labour (Article 4) and retroactive laws (Article 7) are all absolute rights and may not be limited in any way. So is the right to hold particular beliefs (the first part of Article 9) and the abolition of the death penalty (Protocol 13).

#### 3.2 Is the right a limited right?

If the right you are proposing to restrict is limited, it may be restricted within the terms set out in the Article. The terms will be different for different rights and they have been explained in relation to the individual rights in Part 2 of this guide. For example, there are six instances where the right to liberty and security set out in Article 5 may be lawfully restricted. These are set out in the section dealing with Article 5 in Part 2 of this guide (see page 16). One example is after conviction by a competent court. There are also some rights where there is no limitation mentioned in the text of the Convention, but where limitations have been read in through decisions of the European Court of Human Rights. For example the courts have read in some limitations on the right to vote and stand for office (Article 3 of Protocol 1).

#### 3.3 Will the right be limited only to the extent set out in the relevant Article of the Convention?

So, if you decide that you are trying to restrict either an absolute or limited right, you may exit the flowchart at this point. However, you should consider your policy/decision further because it will either not be compliant with the Convention (if it restricts an absolute right), or you will need to check that your restriction is provided for in the text of the article (if it restricts a limited right).

If you are restricting a qualified right, then you will need to continue using the flowchart.

## 4. Qualified Rights

In the case of qualified rights, the fact that a policy/decision restricts the right does not necessarily mean that it will be incompatible with the Convention. If a restriction has a legitimate aim, such as public safety, and the restriction itself does not go any further than absolutely necessary to protect this aim, then it is likely that it will be compatible with the Convention. The Convention recognises that there are situations where a State must be allowed to decide what is in the best interests of its citizens, and enables a State, or a public authority acting on behalf of the State, to restrict people's rights accordingly.

The following questions will help you to determine whether or not your policy/decision falls within this category of accepted restrictions.

### 4.1 Is there a legal basis for the restriction?

Any restriction must have a clear legal basis. The restriction must be set out in law, or in rules or guidance, and it must be communicated effectively to ensure that people to whom it applies can find out about it. This will allow them to prepare to change their behaviour in good time if they are required to do so. That might mean making guidance or other rules publicly available, perhaps via the internet, via other partner organisations, or through cross-agency working.

### 4.2 Does the restriction have a legitimate aim?

If you are restricting rights you will need to identify a legitimate aim that you are trying to achieve. A legitimate aim is one that is set out in the text of the articles themselves, such as public safety, the protection of public order, national security or protection of the rights or freedoms of others.

You will find legitimate aims for restricting rights listed in the sections relating to each article in Part 2 of this guide.

If the aim that you want to achieve does not fall within one of those listed in the text of the Article, it is likely that the restriction will not be legitimate. You should seek legal advice.

### 4.3 Is the restriction necessary in a democratic society?

For a restriction to be necessary in a democratic society there must be a rational connection between the legitimate aim to be achieved and the policy/decision that restricts a person's rights. It is not sufficient to put forward a legitimate aim if, in fact, the restriction will not make a real difference in achieving that aim.

#### 4.4 Are you sure you are *not* using a sledgehammer to crack a nut?

A policy/measure should be no more restrictive than it needs to be in order to achieve its objective. This is called “proportionality”. For example, a blanket application of a policy/measure to everyone concerned will often be considered disproportionate, as it does not take into account individual circumstances, and the individual rights of each person affected – it will have the effect of imposing restrictions in circumstances where they are not really needed.

Look at the objectives you identified, *and* at paragraph one of this section, and box one of the flowchart, and ask yourself whether the objectives can be achieved only by the policy/decision you are proposing. Ask yourself if there is any other less restrictive way of achieving the desired outcome.

If there is another less restrictive way of achieving the desired outcome, but you decide *not* to adopt it, you will need to be prepared to say why you have made that choice. Your reasons will have to be good ones.

#### Exiting the Flowchart

Even if you conclude that the policy/decision does not infringe one of the other Articles of the Convention, you will need to consider whether it discriminates against anyone in relation to the exercise of their Convention rights, contrary to Article 14. See page 37 for further details of the issues to be considered in relation to Article 14. You should think about the diversity of customers, staff and service users that your organisation works with. You must consider whether the restriction applies only to a particular group or class of person defined by one of the statuses discussed in relation to Article 14 (see page 38). Any differential impact should be noted, even if it is unintentional. Indirect impact also needs to be considered, for example where the restriction applies in principle to everyone but would have a particularly heavy impact on a particular group or class who would find it harder to comply.

If you decide that your restriction does apply unequally in the way a Convention right is enjoyed or protected you will need to decide whether or not the differential treatment is justified. The approach here is rather similar to that applied in relation to the qualified rights (above). It is necessary to consider:

- Whether the differential treatment is in pursuit of a legitimate aim?
- Whether the differential treatment is proportionate to that aim (i.e. there is no less discriminatory way of achieving the aim)?

If the answer to both these questions is “yes”, then it is likely that differential treatment will be justified.

The case studies in the relevant section of Part 2 will help you when working through this.

## Points to Remember

It will be useful to bear in mind the following points when reading this guide and also when applying human rights in the workplace:

- Whilst some rights conferred by the Convention are absolute (for example the right not to be subjected to torture or inhuman or degrading treatment or punishment), in general the rights of one person cannot be used to 'trump' the right of the general public to be kept safe from a real risk of serious injury or loss of life.
- More than one right may be relevant to a given situation.
- Always be aware of other existing guidance that may be relevant to the decision or policy that you are developing, and consider how it fits in.
- If you are unsure or a matter is particularly complex, consider seeking legal advice if necessary. You should always take legal advice if you are proposing to interfere with Convention rights in a way which is restrictive, or if you have any concern that complying with human rights is putting other important policy goals such as public safety at risk.

## Balancing one person's rights against those of the community

The fact that a policy/decision restricts a Convention right does not necessarily mean that it will be incompatible with the Convention. It is a fundamental responsibility of the State – arising from Article 2 of the Convention itself – to take appropriate steps to protect the safety of its citizens. The State also needs to take into account other general interests of the community. So whilst some rights conferred by the Convention are absolute (for example the right not to be subjected to torture or inhuman or degrading treatment or punishment), others are either limited or qualified in the way described in this guide. In particular the rights in Articles 8 to 11 can be restricted where it is necessary and proportionate to do so in order to achieve a legitimate aim. Provided a restriction of such a right has a legitimate aim, such as public safety, and the restriction itself does not go any further than necessary to protect this aim, then it is likely that it will be compatible with the Convention. In this way the Convention recognises that there are certain situations where a State is allowed to restrict individual rights in the best interests of the wider community.

## Three types of rights

Not all the Convention rights operate in the same way. Some are ‘absolute’ while others are ‘limited’ or ‘qualified’ in nature

**Absolute Rights:** States cannot opt out of these rights under any circumstances – not even during war or public emergency. There is no possible justification for interference with them and they cannot be balanced against any public interest. Examples are the prohibition of torture, inhuman or degrading treatment in Article 3, and the prohibition of slavery in Article 4(1).

**Limited Rights:** These are rights that are not balanced against the rights of others, but which are limited under explicit and finite circumstances. An example is the right to liberty and security in Article 5.

**Qualified Rights:** These are rights that can be interfered with in order to protect the rights of other people or the public interest.

An interference with qualified rights may only be justified where the State can show that the restriction:

- Is lawful – this means in accordance with the law, which must be established, accessible and sufficiently clear;
- Has a legitimate aim – the restriction must pursue a permissible aim as set out in the relevant article. Public authorities may only rely on the expressly stated legitimate aim when restricting the right in question. Some of the protected interests are: national security, the protection of health and morals, the prevention of crime, and the protection of the rights of others; and
- Is necessary in a democratic society – the restriction must fulfil a pressing social need and must be proportionate to that need.

## Proportionality

The principle of proportionality is at the heart of how the qualified rights are interpreted, although the word itself does not appear anywhere in the text of the Convention.

The principle can perhaps most easily be understood by the saying “Don’t use a sledgehammer to crack a nut”. When taking decisions that may affect any of the qualified rights, a public authority must interfere with the right as little as possible, only going as far as is necessary to achieve the desired aim.



It may prove useful to ask the following questions to determine whether a restrictive act is proportionate or not:

- What is the problem that is being addressed by the restriction?
- Will the restriction in fact lead to a reduction in that problem?
- Does a less restrictive alternative exist, and has it been tried?
- Does the restriction involve a blanket policy or does it allow for different cases to be treated differently?
- Has sufficient regard been paid to the rights and interests of those affected?
- Do safeguards exist against error or abuse?
- Does the restriction in question destroy the very essence of the Convention right at issue?

The following case study, based on the case of *R v. Secretary of State for the Home Department ex p Daly* (2001), illustrates these principles:

A blanket policy was established to allow prison officers to search the correspondence of all prisoners (without them being present) for security purposes. While the prisoners did not claim that legal correspondence should be immune from such examination, they argued that the search should take place in their presence. They feared that prison officers might do more than just briefly examine the legal documents and this might inhibit the willingness of prisoners to communicate freely with legal advisers. The prison service claimed that if the prisoners were present, they might intimidate staff or disrupt the search. The courts held that a blanket policy preventing prisoners from being present was disproportionate because a less restrictive, but equally effective alternative existed which would allow prisoners to be present unless there was a justification for excluding them.

### The margin of appreciation

The European Court of Human Rights has also accepted that there are areas in which national authorities are better placed than the Court to decide what is best for those within their jurisdiction, and so to apply the Convention rights in their own way. This is particularly so where circumstances require rights to be balanced against national security, or wider economic and social needs, for example. This is referred to as the margin of appreciation. Whether the Court allows a wide or narrow margin of appreciation depends on the nature of the right in question and the extent to which views on the issue diverge among the countries which have signed up to the Convention.

This in turn means that decisions of the Court may change over time to keep pace with changing conditions in the signatory States – for this reason the Convention is called a “living instrument”. It means that even where the European Court of Human Rights has ruled that a practice or policy is within a State’s margin of appreciation, this may change in the future if a new consensus evolves across a sufficient number of countries.

Although the margin of appreciation concerns the attitude of the European Court of Human Rights to decisions taken in individual States, courts in the UK have developed a similar approach when considering decisions made by public authorities in the UK. They will allow public authorities a degree of latitude in making decisions, particularly where the public authority is in a better position than the court to assess the issue (for example issues relating to social policy or allocation of resources). However the courts will be more willing to intervene on issues such as discrimination or fair procedures. This idea is sometimes known as “deference” but is better referred to as the concept of a “discretionary area of judgement”.

## Positive obligations

Most of the Convention is concerned with things that the State must not do, and puts States under an obligation to refrain from interfering with a right. However, the Court has decided that in order to make the Convention effective, a number of rights also place positive obligations on states. These require the State to take action to prevent the breach of a right. For example, Article 2 can create a positive obligation to take steps to protect members of the public, for example, where a public authority is aware of a real and imminent threat to someone’s life, or where a person is under the care of a public authority.

## Frequently asked questions

### **What does the Human Rights Act do?**

It makes the human rights contained in the European Convention on Human Rights enforceable in UK law. This means that it is unlawful for a public authority to act in a way that is incompatible with a Convention right. A person who feels that one or more of their rights has been breached by a public authority can raise that human rights issue in the appropriate court or tribunal. If the person is unhappy with the court’s decision and has pursued the matter as far as it can go in the UK, they may take their complaint to the European Court of Human Rights, an institution set up by the Convention and based in Strasbourg, France.

### **Do judges now have more power than elected politicians?**

The simple answer is no. Judges must interpret legislation as far as possible in a way that is compatible with the Convention rights. If this is not possible courts can strike down incompatible secondary legislation, or can make a declaration of incompatibility in relation to primary legislation. They cannot strike down primary legislation.

### **What difference does the Human Rights Act make?**

The principal effect of the HRA is to enable people to enforce their human rights in the domestic courts. The HRA should mean that people across society are treated with respect for their human rights, promoting values such as dignity, fairness, equality and respect.

### **Are human rights relevant to every decision I make?**

The short answer to this is no. Many everyday decisions taken in the work place are not affected by human rights. However, by understanding human rights properly you are more likely to know when human rights are relevant and when they are not. This should help you to make decisions more confidently, and ensure that your decisions are sound and fair.

### **What is a public authority?**

The Human Rights Act says that persons carrying out certain functions of a public nature will fall within the definition of public authority. The courts are still deciding exactly what this means. The following are definitely public authorities:

- Central Government
- Local government
- Local Authorities
- Police, prison and immigration service
- NHS Trusts
- Courts and tribunals
- Planning inspectorate
- Executive agencies
- Statutory regulatory bodies

This list is not exhaustive. If you are unsure whether or not you work in a public authority you should check with your line manager. However, if you are reading this document, it is likely that you do work for a public authority. In any event, following human rights standards, even in matters not strictly covered by the ambit of the Human Rights Act, will be good practice.

### **Do all new laws have to be compatible with the Human Rights Act?**

When a Minister introduces a Bill to Parliament they are required to confirm in writing that in their view, the Bill is compatible with Convention rights, or that they are unable to say that it is compatible but they wish to proceed with the Bill anyway. Therefore it is possible for new legislation to be incompatible.

### **Are all Convention rights guaranteed, whatever the circumstances?**

Not all Convention rights are formulated in the same way. While some rights are protected absolutely, such as the right to be free from torture, others are limited in certain defined situations, or qualified so as to take account of the rights of others or the interests of wider society. This is explained in greater detail in Part 3 of this guide.

### **Who can bring a case under the Human Rights Act?**

Any 'victim' can do so. It is not necessary to be a UK citizen. Anyone bringing proceedings must be directly affected by an act or omission of a public authority.

### **Is any other guidance on the Human Rights Act available?**

For further information about human rights and the act, we recommend:

- Guide on the Human Rights Act produced by the Department for Constitutional Affairs, available for download on our website;  
[www.dca.gov.uk/peoples-rights/human-rights/index.htm](http://www.dca.gov.uk/peoples-rights/human-rights/index.htm)
- You will find also Human Rights Guides in most bookshops. One such publication is the Human Rights Toolkit, by Jenny Watson and Mitchell Woolf, published by the Legal Action Group. This provides a more detailed practical guide to the human rights act and its impact on public authorities.
- At page 63 we have listed some useful contacts and organisations for further advice and guidance.

## Jargon buster

### **Human Rights Act:**

The Human Rights Act 1998. Came into force on 2nd October 2000. Makes certain rights contained in the European Convention on Human Rights enforceable in UK law. These rights are called “the Convention rights” and they are set out in Part 2 of this handbook.

### **The Convention:**

The European Convention on Human Rights and Fundamental Freedoms. Treaty of the Council of Europe that came into force 3rd September 1953. Signed by UK 4th November 1950. Ratified by the UK 8th March 1951.

### **Articles:**

The Convention is divided up into Articles. Article 1 is introductory whilst each of the Articles from 2 -12 and Article 14 detail a different human right or freedom. Most other Articles of the Convention deal with procedural issues. Each of the Protocols is also divided up into Articles.

### **Protocol:**

Additions or amendments to the original Convention. They may be signed and ratified by parties to the Convention and are effective as if they were part of the original Convention. The UK has not signed all of the Protocols.

### **Legitimate Aim:**

Any interference with a qualified right for the relevant purpose of safeguarding an interest set out in the Article.

### **Proportionality:**

Not using a sledgehammer to crack a nut. Any restriction must go no further than is necessary in a democratic society to achieve the legitimate aim.

### **Margin of Appreciation:**

The degree of discretion allowed to the State by the European Court of Human Rights when interpreting and applying Convention rights.

**Public Authority:**

This includes all government departments and other “core” public authorities such as:

- Central Government
- Local government
- Local Authorities
- Police, prison and immigration service
- NHS Trusts
- Courts and tribunals
- Planning inspectorate
- Executive agencies
- Statutory regulatory bodies

Outside this, private organisations whose functions are of a public nature are included in relation to those public functions.

**Ratify:**

Ratification is the process by which a member State adopts and agrees to be bound by an international treaty.

**Victim:**

A victim is someone who is or would be directly affected by an act or an omission of a public body.

## Guidance on procurement and contracting out services

Where a provider who is not a public authority provides a service to the public under contract to a public authority, that service must be provided in a way that takes account of the HRA and is compatible with the Convention rights. Where Human Rights are relevant to a contract for works, or a mixed contract for services and works, they should also be considered.

By defining a public authority functionally, the HRA tries to ensure that providers in this situation are subject to Human Rights duties. In other words, someone providing a public service will be deemed to be a public authority. However, the Courts have found that situations are not always clear cut. In some situations they have found that providers are not public authorities. The public authority has then sometimes been held responsible for breaches of Human Rights by the provider, and has had to pay damages to people whose rights have been breached.

To prevent this, a public authority should specify at contract specifications stage the public authority's requirements in relation to Human Rights. This specification can be enforced as part of the contract. It should include any activities required to be performed by the provider. A well-drawn up specification provides transparency as to how the public authority has sought to secure the discharge of its HRA obligations, and will help it in monitoring and enforcing those obligations.

The specification must be drawn up in line with procurement law and your public authority's procurement processes. Further guidance is available at <http://www.dca.gov.uk/peoples-rights/human-rights/pdf/contrguide.pdf>. You should also ensure that your legal advisors are content.

## Relevant organisations and contacts

Department for Constitutional Affairs  
Selborne House  
54-60 Victoria Street  
London SW1E 6QW  
Tel: 020 7210 1473  
Email: [humanrights@dca.gsi.gov.uk](mailto:humanrights@dca.gsi.gov.uk)

The British Institute of Human Rights  
The Law School  
King's College London  
26-29 Drury Lane  
London  
WC2B 5RL  
Tel: 020 7848 1818  
Email: [admin@bihr.org](mailto:admin@bihr.org)

The Northern Ireland Human Rights Commission  
Temple Court  
39 North St  
Belfast  
BT1 1NA  
Tel: 028 90 243987  
Email: [information@nihrc.org](mailto:information@nihrc.org)



## Useful Websites

[www.dca.gov.uk/peoples-rights/human-rights/index.htm](http://www.dca.gov.uk/peoples-rights/human-rights/index.htm)

The British Institute of Human Rights: <http://www.bihhr.org/>

European Court of Human Rights: <http://www.echr.coe.int/echr>. Here you can use HUDOC to search for case law of this court

Joint Committee on Human Rights (Houses of Parliament):  
[www.parliament.uk/parliamentary\\_committees/joint\\_committee\\_on\\_human\\_rights.cfm](http://www.parliament.uk/parliamentary_committees/joint_committee_on_human_rights.cfm)

Liberty: <http://www.liberty-human-rights.org.uk/>

Justice: [www.justice.org.uk](http://www.justice.org.uk)

See the Casesheets at the NHSLA site: <http://www.nhsla.com/Publications/>

Disability Rights Commission: <http://www.drc-gb.org/>

Commission for Racial Equality: <http://www.cre.gov.uk/>

Equal Opportunities Commission: <http://www.eoc.org.uk/>

United Nations Home Page: [www.un.org](http://www.un.org)

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