

Advocating for Human Rights

Participation

Accountability

Non-discrimination

Empowerment

Legality



SHRC

Scottish
Human Rights
Commission

“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 (1958 speech delivered on the tenth anniversary of the Universal Declaration of Human Rights)

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Introduction

Why we have produced this guide

This guide is the result of a collaboration between the Scottish Human Rights Commission and the Scottish Independent Advocacy Alliance with the aim of raising awareness about human rights and equipping advocates to effectively support people to secure their rights.

What is independent advocacy?

Independent advocacy is about standing up to injustice experienced by an individual or group. This may be because the individual or group are marginalised or discriminated against because of their diagnosis, gender, ethnicity, age etc.

In one-to-one advocacy an independent advocate works to ensure that the person understands their rights, has as much information as they need, is clear about their options and is supported to make informed decisions.

In collective or group advocacy, a group of people with a shared agenda will come together to lobby, campaign and influence legislation, policy, practice and services.

Who are we?

The Scottish Independent Advocacy Alliance (SIAA)

The SIAA is a membership organisation responsible for promoting, supporting and defending independent advocacy in Scotland. It has the overall aim of ensuring that independent advocacy is available to any person in Scotland.

The SIAA provides information and support, gathers and distributes information, represents advocacy organisations at various levels and raises awareness and understanding of independent advocacy across Scotland. The SIAA works to influence legislation, policy and practice in relation to advocacy. More information about the work of the SIAA is available on our website www.siaa.org.uk.

The Scottish Human Rights Commission

The Scottish Human Rights Commission is an independent public body, accountable to the people of Scotland through the Scottish Parliament.

The Commission has a general duty to promote awareness, understanding and respect for all human rights – economic, social, cultural, civil and political – to everyone, everywhere in Scotland, and to encourage best practice in relation to human rights.

Our full duties and powers are set out in the Scottish Commission for Human Rights Act 2006.

The Commission is accredited as an 'A Status' National Human Rights Institution (NHRI) within the United Nations (UN) system. This means we can report directly to the UN on human rights issues. We are the only Scottish organisation that can make direct contributions to the UN Human Rights Council.

The Commission has powers to recommend changes to law, policy and practice; promote human rights through education, training and publishing research; and to conduct inquiries into the policies and practices of Scottish public authorities.

More information about the work of the Commission is available on our website www.scottishhumanrights.com

What are human rights?

The founding statement of human rights law is the Universal Declaration of Human Rights. Its famous preamble states that:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”

Everyone, everywhere, has basic rights and freedoms which we need to live together with dignity based on our common humanity. These human rights are secured in law.

The law applies to everyone equally and provides an important means of protection for the most vulnerable in our communities, including those who use advocacy services, by setting out the duties owed by those responsible for upholding human rights and the outcomes people are entitled to expect as a matter of right.

Human rights include civil and political rights, such as:

- ▶ The right to freedom of expression
- ▶ The right to freedom of religion or conscience
- ▶ The right to property
- ▶ The right to freedom of assembly
- ▶ The right to privacy
- ▶ The right to life
- ▶ The right to be free from inhuman or degrading treatment or punishment
- ▶ The right to vote.

Human rights also cover economic and social rights, such as:

- ▶ The right to an adequate standard of living
- ▶ The right to adequate food, housing, water and sanitation
- ▶ The rights you have at work
- ▶ The right to health
- ▶ The right to education.

Some of the key rights which might be relevant to you are further examined later in this section of the materials.

Human rights create both rights and duties. States (national governments) accept duties under international law to respect, to protect and to fulfil human rights. This can be remembered using the traffic lights below:



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The duty to respect means that states must not act to interfere with the enjoyment of human rights.
.....



.....
The duty to protect requires states to ensure that others do not infringe or block access to human rights.
.....



.....
The duty to fulfil means that states must take positive action to facilitate the better enjoyment of human rights.
.....

At the individual level, while we are each entitled to our human rights, we should also respect the human rights of others.

Human rights apply regardless of nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status, and they cannot be taken away except in specific, pre-determined situations and according to law.

Also, human rights relate to and depend on each other. For example, it would be hard to exercise your right to freedom of expression without the right to health being fulfilled, and where the right to information is denied this undermines the right to participate in decisions.

Wider context

Throughout this guidance we will be using examples and case studies based on real life scenarios to illustrate the impact of advocacy in a human rights context. We will also try to reference different legislation that advocates might commonly come across in their work, for example the Mental Health (Care & Treatment)(Scotland) Act 2003.

What is a Human Rights Based Approach?

A human rights based approach is about *empowering* people to know and claim their rights and increasing the *ability* and *accountability* of individuals and institutions who are responsible for respecting, protecting and fulfilling rights.

This means giving people a greater opportunity to participate in shaping the decisions that impact on their human rights. It also means increasing the ability of those with responsibility for fulfilling rights to recognise and respect those rights and making sure they can be held to account.

A human rights based approach is about ensuring that both the standards and the principles of human rights are integrated into policymaking as well as the day to day running of organisations.

The PANEL principles

There are some underlying principles which are of fundamental importance in applying a human rights based approach in practice. These are:

Participation

Accountability

Non-discrimination and equality

Empowerment and

Legality

These are known as the PANEL principles.

Participation

Everyone has the right to participate in decisions which affect their human rights. Participation must be active, free, meaningful and give attention to issues of accessibility, including access to information in a form and a language which can be understood.

What does this mean for us?

The provision of advocacy services is fundamentally about helping those who may require help in speaking for themselves to participate in decisions that affect them, whether they be about healthcare, social activities or legal processes.

Accountability

Accountability requires effective monitoring of human rights standards as well as effective remedies for human rights breaches.

For accountability to be effective there must be appropriate laws, policies, institutions, administrative procedures and mechanisms of redress in order to secure human rights.

What does this mean for us?

Advocacy workers help their clients to access a wide range of accountability mechanisms such as complaints processes, courts and tribunals.

Non-discrimination and equality

A human rights based approach means that all forms of discrimination in the realisation of rights must be prohibited, prevented and eliminated. It also requires the prioritisation of those in the most marginalised situations who face the biggest barriers to realising their rights.

What does this mean for us?

There are times when those in need of advocacy support can be amongst some of the most vulnerable and marginalised people in our society – a human rights based approach means we must pay particular attention to the protection and realisation of their rights. Sometimes, because of their support needs, advocacy clients are discriminated against in access to services or in opportunities to express their views. Clients also have different identities based on their gender, ethnicity, religion and many other grounds. Each of these identities should be respected when receiving any services, including advocacy.

Empowerment of rights holders

A human rights based approach means that individuals and communities should know their rights. It also means that they should be fully supported to participate in the development of policy and practices which affect their lives and to claim rights where necessary.

What does this mean for us?

Advocacy workers play an essential role in helping their clients to know and understand their rights, particularly during legal processes such as detention in hospital or the appointment of a guardian to make decisions on a client's behalf. They do not make decisions on behalf of their clients but rather seek to assist their clients to form their own views and have those views heard.

Legality of Rights

A human rights based approach requires the recognition of rights as legally enforceable entitlements and is linked in with national and international human rights law.

What does this mean for us?

All public bodies in Scotland must be sure that their practices and procedures are grounded in human rights thinking. Under the law they must not breach the human rights of anyone. The situations which advocacy workers deal with on behalf of their clients are grounded in legally enforceable human rights, such as the right to private and family life, the right to liberty and the right to a fair trial. They are also grounded in non-legally enforceable, but internationally agreed human rights such as the right to health, the right to education and the right to an adequate standard of living. Making the explicit connection to human rights helps back up representations made on behalf of clients.

The Principles and Standards of Independent Advocacy

The PANEL principles have much in common with the Principles and Standards of Independent Advocacy, which you will find in Appendix 1. A human rights based approach grounds these principles in human rights standards and principles. It requires consideration of how human rights laws apply in each circumstance and how this can inform your work. In this way, a human rights based approach helps reinforce and strengthen the Advocacy Principles.

Types of Advocacy

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There are two types of advocacy – individual and collective

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One to one or individual advocacy

This includes professional or issue-based advocacy. It can be provided by both paid and unpaid advocates. An advocate supports an individual to represent his/her own interests or represents the views of an individual if the person is unable to do so. Advocates provide support on specific issues and provide information, but not advice. This support can be short or long term.

Another model of one to one advocacy is citizen advocacy. Citizen advocacy occurs when an ordinary citizen is encouraged to become involved with a person who might need support in the community. The citizen advocate is not paid. The relationship between the citizen advocate and the advocacy partner is on a one-to-one, long term basis. It is based on trust between the partner and the advocate and is supported, but not influenced, by the advocacy organisation. The advocate supports the advocacy partner through natural skills and talents rather than being trained in the role.

Peer advocacy is also a type of individual advocacy. A peer advocate shares significant life experiences with the advocacy partner. The peer advocate and their advocacy partner may share age, gender, ethnicity, diagnosis or issues. Peer advocates use their own experiences to understand and have empathy with their advocacy partners. Peer advocacy works to increase self-awareness, confidence and assertiveness so that the individual can speak out for themselves, lessening the imbalance of power between the advocate and their advocacy partner.

Non instructed advocacy

Sometimes non-instructed advocacy is referred to as another type of advocacy. It is in fact a form of one-to-one advocacy where a person has limited capacity perhaps due to dementia or has limited communication due to a physical disability.

“Non-instructed advocacy is... taking affirmative action with or on behalf of a person who is unable to give a clear indication of their views or wishes in a specific situation. The non-instructed advocate seeks to uphold the person’s rights; ensure fair and equal treatment and access to services; and make certain that decisions are taken with due consideration for their unique preferences and perspectives.” (Henderson, 2006)

For more information about non-instructed advocacy see the SIAA’s guidance http://www.siaa.org.uk/wp-content/uploads/2014/02/SIAA_Non_Instructed_Advocacy.pdf

Group or collective advocacy

Collective advocacy enables a peer group of people, as well as a wider community with shared interests, to represent their views, preferences and experiences. A collective voice can help reduce an individual's sense of isolation when raising a difficult issue.

A collective voice can be stronger than that of individuals when campaigning and can help policy makers, strategic planners and service providers know what is working well, where gaps are and how best to target resources. Being part of a collective advocacy group can help to reduce an individual's sense of isolation when raising a difficult issue. Groups can benefit with the support of resources and skilled help from an independent advocacy organisation.

The aim of all models of advocacy is to help individuals gain increased confidence and assertiveness so that, where possible, they will feel able to self-advocate when the need arises.



How are my human rights protected in law?

In Scotland, your human rights are protected by the UK **Human Rights Act**, the **Scotland Act** and the **European Convention on Human Rights** ('the Convention'). Your rights are also protected by a range of international human rights laws which, although they can't be enforced directly in Scottish courts, are monitored internationally.

The Human Rights Act

The Human Rights Act 1998 ('the Act') brings most of the fundamental rights and freedoms contained in the European Convention on Human Rights directly into UK law.

The rights included in the Act not only impact upon matters of life and death, but also affect the rights you have in your everyday life: what you can say and do, your beliefs, your right to a fair trial and other similar basic entitlements. Most rights have limits to ensure that they do not unfairly damage other people's rights. However, certain rights, such as the right not to be tortured, can never be limited by a court or anybody else.

Cases based on the rights and freedoms in the Act can be argued in a UK court or tribunal. The Act also requires all public authorities, such as hospitals, schools, local authorities, courts, and some care homes to comply with those human rights. According to the Act, all other legislation should also be interpreted and applied in a way that is consistent with the rights included in the Act.

The Scotland Act

The Scotland Act 1998 established the Scottish Parliament and the Scottish Government. It ensures that neither the Scottish Parliament nor the Scottish Government can pass any law that is incompatible with the human rights contained in the Human Rights Act or the European Convention on Human Rights. This means that human rights must be respected and realised at all levels of governance in Scotland.

The European Convention on Human Rights

The Convention was drafted by all the states of the Council of Europe, including the UK, and came into force in 1953. The Council of Europe was formed in response to the atrocities and cruelties of the Second World War and is a regional membership organisation for countries in Europe.

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. The rights in the Convention apply to everyone in the UK.

Independent advocacy

Scots law provides a right to independent advocacy in certain circumstances. This legislative right has direct connections to human rights requirements. For example, the right to private and family life under the European Convention on Human Rights protects the right to autonomy, to make one's own decisions, and the support required to do so. The provision of rights to independent advocacy, as they have been set out in legislation in Scotland, is a realisation of that human rights requirement. Independent advocacy is also a means of accessing other rights. For example, the assistance of an independent advocate is important in ensuring that those who require support are able to access justice or to maintain their family relationships. For details of where the right to advocacy has been set out in legislation and policy, please refer to Appendix 2.



The United Nations system

The United Nations was established in the aftermath of the Second World War. One of its key purposes is the promotion and protection of human rights and one of its earliest actions was to adopt the Universal Declaration of Human Rights (UDHR) in 1948. The UDHR expresses the rights to which all human beings are entitled by virtue of being human. It consists of 30 articles which have been elaborated in subsequent legally binding international treaties, regional human rights instruments, national constitutions and laws.

This quote from Eleanor Roosevelt, Chairperson of the United Nations Human Rights Commission that drafted the UDHR, shows that it was always envisaged that human rights should become important in everyday life such as in our homes and in care settings:

“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 (1958 speech delivered on the tenth anniversary of the Universal Declaration of Human Rights)

International treaties and conventions are the agreements made between states. The agreements contain legal obligations for states and rights for individuals within that state.

The UK has signed up to, and ratified, many of these agreements (treaties) on international human rights law, including:

- ▶ The International Convention on Civil and Political Rights
- ▶ The International Convention on Economic, Social and Cultural Rights
- ▶ The Convention on the Elimination of Discrimination Against Women
- ▶ The Convention on the Elimination of Racial Discrimination
- ▶ The Convention Against Torture
- ▶ The Convention on the Rights of the Child
- ▶ The Convention on the Rights of Persons with Disabilities.

Each of these treaties is monitored by a committee of independent experts from around the world. The UK must report to each of these committees every four or five years on its compliance with the treaty. Others, such as civil society groups and national human rights institutions like the Scottish Human Rights Commission, can give the committees alternative reports on their assessment of the rights in the treaty.

The UK has also agreed to allow individuals or groups to submit petitions directly to the relevant treaty committees with regard to alleged human rights abuses under two of these treaties – the Convention on the Elimination of Discrimination Against Women and the Convention on the Rights of Persons with Disabilities. Anyone who wished to submit a petition under either of these treaties would first have to have taken their complaint through all available legal remedies in Scotland.

In the following section we describe some of the key human rights and what they mean in practice in the types of situations advocacy workers deal with.



The UN Convention on the Rights of Persons with Disabilities

The UN Convention on the Rights of Persons with Disabilities is an example of one of the important international treaties that the UK, including Scotland, has signed up to which has relevance to those likely to be using advocacy services.

The Convention spells out what should be done to break down the barriers which people with long term physical, mental, intellectual or sensory impairments may face in realising their human rights. As such the Convention is relevant to people who, for example, have a visual or hearing impairment, or those who have a mental illness.

The Convention makes absolutely clear that people with disabilities have the same rights as everyone else and it sets out in some detail what is required to respect, protect and fulfil those rights in reality.

The Convention includes human rights across all areas of disabled people's lives, including all of the rights which are set out in the following pages.

In addition, the Convention provides, for example, that:

- ▶ people with disabilities have the right to make their own decisions in all areas of life, on the same basis as other people and there are duties to provide the support people need to exercise that capacity. This is an area which continues to develop, with the Committee who monitors the Convention calling for a fundamental move away from decisions being made on behalf of a person whose decision-making ability may be impaired (substituted decision-making) towards greater respect for their will and preference, and more emphasis on supporting them to make decisions, even in tough cases.
- ▶ people with disabilities should have real and effective access to justice (as participants in the justice system as victims of crime or human rights abuses, witnesses, on juries etc);
- ▶ people with disabilities have the right to live independently and be included in the community (for example the right to choose where they live and who they live with and not to be unlawfully forced into a particular living arrangement);
- ▶ barriers to accessibility for disabled people must be removed. This includes access to information, transport, buildings, facilities and services. Accessibility is at the core of all of the rights within the Convention, in order to ensure that disabled people can participate in all aspects of society on an equal basis with others. For example, ensuring physical access to theatres and parks is necessary to achieve the right to participate in cultural life, recreation, leisure and sport.

Although the Convention does not form part of domestic law, it can help us understand and interpret the rights in the Human Rights Act with respect to people with disabilities.

In Scotland, the Equality and Human Rights Commission and the Scottish Human Rights Commission have been given a special role as independent bodies to promote, protect and monitor the Convention.

Key Rights Explained

There are many important human rights contained in the international treaties discussed in the previous section.

We are now going to look in more detail at some of the human rights contained in the European Convention on Human Rights. Those rights are part of our law in Scotland through the Human Rights Act and the Scotland Act. We will then explain some of the other human rights which are not contained in our national laws, but which are guaranteed internationally and are central to securing human dignity for everyone. We have used both examples of real life human rights **cases** and **story** examples of potential situations, to illustrate the rights. It is important to bear in mind that many of the story examples discussed are unlikely to reach a threshold of being classified as a human rights violation in the legal sense. Nevertheless, looking at them through a human rights lens can help to resolve issues in a way which respects the dignity, autonomy and rights of the individuals involved.

First of all it is important to understand that there are different types of rights in the Convention. In particular there are **Absolute Rights** and **Qualified Rights** (there are other categories too but we'll focus on these for now).

Absolute Rights

Some rights are known as absolute rights which mean they can never be restricted under any circumstances. These rights are the "red lines" which must not be crossed. The threshold for a violation of these rights will only be met in the most serious of circumstances.

Absolute rights include:

- ▶ **The right to life**
- ▶ **The right not to be subjected to inhuman or degrading treatment**

Qualified Rights

Some human rights are qualified, which means they can be interfered with in some circumstances and within limits.

These rights are written so that the first part of the Article sets out the right that is to be protected, while the second part establishes whether a public authority can legitimately interfere with that right in order to protect the wider public interest.

Qualified rights include:

- ▶ **The right to respect for private and family life, home and correspondence**
- ▶ **Freedom to manifest one's religion**
- ▶ **Freedom of expression**
- ▶ **Freedom of assembly and association**
- ▶ **The right to property.**

To consider whether a restriction of a qualified right is justified, you need to think through the following important questions:

- ▶ **LEGALITY – is there a legal basis for the restriction of the right?**
- ▶ **If so, is there a *legitimate aim* – does the restriction have a legitimate aim (such as the protection of public health or the protection of other people's human rights)?**
- ▶ **If so, is the action *proportionate* – is it the minimum necessary interference with the right?**

Proportionality explained

The principle of proportionality is at the heart of many human rights claims.

Proportionality can be most easily explained by the expression:

“Don't use a sledgehammer to crack a nut.”

When thinking about decisions that affect any of the qualified rights, it is important that the right is interfered with as little as possible, only going as far as is necessary to achieve the legitimate aim.

The following questions might help you to determine whether a restrictive act is proportionate or not:

- ▶ **What is the problem being addressed by the restriction upon someone's rights?**
- ▶ **Will the restriction lead to a reduction in the problem?**
- ▶ **Does a less restrictive alternative exist and has it been tried?**
- ▶ **Does that restriction involve a blanket policy or does it allow for different individual 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 destroy the ideas behind the human rights at issue?**

Key Rights Explained

Right to life

ARTICLE 2 – Right to life

Everyone's right to life shall be protected by law.

What does this right mean?

The right to life is an absolute right which means that there is a duty not to take away anyone's life and a duty to take reasonable steps to protect life.

When could this right be relevant?

- ▶ Deaths through negligence
- ▶ Severe malnutrition
- ▶ Decisions about life saving healthcare treatment
- ▶ End of life issues
- ▶ Suicide.

Case Example of Article 2 issue

Savage v South Essex Partnership NHS Foundation Trust (2008)

A woman suffering from paranoid schizophrenia absconded from hospital and committed suicide. An inquest found that the precautions taken by the trust to prevent the woman from absconding were inadequate. The hospital had a duty to employ competent staff and to adopt systems of work which would protect patients' lives. Staff also had a duty to do all that could be reasonably expected to prevent the patient committing suicide, if they knew, or should have known, that a particular patient presented a real and immediate risk of suicide.

Right not be subjected to torture or to inhuman or degrading treatment or punishment

ARTICLE 3 – Right not be subjected to torture or to inhuman or degrading treatment or punishment

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

What does this right mean?

Inhuman treatment is prohibited under this article which means that treatment which causes severe mental or physical harm must never occur. Degrading treatment means treatment that is grossly humiliating and undignified. Whether treatment reaches this threshold depends on various factors including the age, physical and mental health of the person who experiences harm and the power relationship involved. Duties under this right not only include refraining from an action or an omission which results in inhuman or degrading treatment, but also taking reasonable positive steps to prevent ill-treatment, to protect those at immediate risk of ill-treatment and to provide effective remedies where ill-treatment occurs.

When could this right be relevant?

- ▶ Abuse or neglect
- ▶ Lack of respect for privacy
- ▶ Denial of essential medication or aids
- ▶ Inappropriate use of force or restraint
- ▶ Inadequate personal care.

Case example of Article 3 issue

ZH v Commissioner of Police of the Metropolis (2013)

Z was a 16 year old with severe autism and epilepsy. He was with his carers at the local swimming pool when he became fixated by the water at the poolside and would not move. After about 30 minutes, the pool manager called the police. Z's carers knew that he did not like to be touched. The police arrived and one of the carers told the officers that Z was autistic. One of the officers approached Z and touched him gently on his back. Z jumped into the pool and was lifted out, struggling, by the police officers. He was placed on his back and restrained. Handcuffs and leg restraints were placed on him. After about 15 minutes, Z was taken to a police van where he was placed alone in a cage. After about 25 minutes, the restraints were removed and Z was permitted to leave with his carers. As a result of the incident Z suffered post-traumatic stress disorder, which lasted more than two years, and his epilepsy worsened. The police were found to have subjected Z to inhuman and degrading treatment. They were responsible for Z entering the water. They had also failed to take the ample opportunity to seek the advice of the carers as to the best way of removing him safely. In addition, no attempt had been made to calm Z down before he was restrained.

Right to liberty and security

ARTICLE 5 – Right to liberty and security

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law...

What does this right mean?

Unless identified in one of a range of narrow exceptions, such as preventing harm to yourself or others, no one should be unnecessarily detained against their will. Where a person is deprived of their liberty, there must be certain procedural steps put in place. A person is entitled to:

- ▶ be given information about the reason for their detention,
- ▶ have a trial within a reasonable time or be released pending trial (criminal cases)
- ▶ have a court or tribunal decide on the lawfulness of their detention
- ▶ compensation if their deprivation of liberty is unlawful.

When could this be relevant?

- ▶ Restrictions on people's movements in care homes such as locked doors or excessive restraint with bed guards for long periods
- ▶ Informal detention of patients who do not have the capacity to decide whether they would like to be admitted into hospital, for example those with learning disabilities or dementia
- ▶ A combination of measures used in a domestic home environment – use of physical or medical restraint, 'time out', intrusive observation, using electronic devices, restricting freedom to interact with people outside the home – which amount to a deprivation of liberty
- ▶ Restricting access to independent living aids.

Story example of Article 5 issue

Frances has dementia and has a habit of wandering around her care home in the evenings. She has never attempted to leave the grounds and her wandering has posed no significant problem to any other individuals in the home. Lately the home has been forced to make a quarter of staff redundant and as a result there are not enough staff to properly supervise all of the residents all of the time. As a result Frances has been locked in her room while she is asleep so that she cannot wake up, wander around and potentially injure herself. She finds being locked in her room extremely distressing and does not understand why the new rule has been imposed.

Right to a fair trial

ARTICLE 6 – Right to a fair trial

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

What does this right mean?

This right is about a fair hearing and due process. It applies not only to criminal processes but importantly also to processes which determine civil rights – such as employment, Children’s Hearings, Mental Health Tribunals.

When could this be relevant?

- ▶ Having the opportunity to participate effectively in hearings, including having interpretation facilities
- ▶ Having access to documents referred to in a hearing
- ▶ Ensuring a fair process for dealing with any complaints
- ▶ Having an opportunity to be heard before any decision is made in an employment or disciplinary process
- ▶ Being informed about the outcome of a decision made about you.



Story example of Article 6 issue

Daniel is a Chinese national who is detained in hospital while visiting the UK. He understands only a little English. Daniel receives notice of a Mental Health Tribunal to consider an application to detain him in hospital under a Compulsory Treatment Order. He is provided with an interpreter to discuss the application with his advocacy worker. However, when he attends the tribunal hearing, there has been a lapse in communication and no interpreter has been arranged. The tribunal members discuss adjourning the hearing but, as the Mental Health Officer is not available on any alternative dates, they decide to proceed. Daniel does not follow the proceedings and only understands at the end that he is to remain in hospital. He is upset at this outcome.

Right to private and family life

ARTICLE 8 – Right to private and family life

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

What does this right mean?

This right is very broad in scope and covers many different situations.

Article 8 relates to the following main interests:

- ▶ **Privacy** – this is defined broadly and relates to all aspects of privacy both in and outside of an individual's private home
- ▶ **Family life** – this covers all close and personal ties of a family kind – not only those of a blood or formalised nature
- ▶ **Physical, psychological and moral well-being** – this covers the right to well-being through retaining autonomy, choice and dignity. It requires that there be access to information and participation in decisions that affect an individual's life
- ▶ **Home** – this is not about a right to a house but rather a right to respect for the home life of an individual
- ▶ **Correspondence** – this covers all forms of communication with others such as phone calls, letters, emails etc.

When could this right be relevant?

- ▶ Involving people in decisions made about their treatment and care, including the use of Advance Statements
- ▶ Respecting people's right to privacy in their own home, in a care home, in a hospital setting or elsewhere in the community
- ▶ Restrictions placed on a person in a psychiatric hospital such as room searches, monitoring telephone calls and letters.
- ▶ Remaining with a partner either at home or in a care setting
- ▶ Maintaining socialisation and recreational activities and/or support to access such activities
- ▶ Maintaining personal relationships with family members and others



- ▶ Parent-child relationships
- ▶ Use of personal information
- ▶ Poor quality of care not amounting to inhuman or degrading treatment
- ▶ Consent to medical treatment and forms of restraint
- ▶ Effects of care home closures.



Case example of Article 8 issue

R. (on the application of Tracey) v Cambridge University Hospitals NHS Foundation Trust (2014)

A woman with terminal lung cancer was admitted to hospital following a road traffic accident. The hospital placed a Do Not Attempt Cardio-Pulmonary Resuscitation (DNACPR) notice on her medical file without consulting the patient or her family. When her family expressed concern, they were consulted and a second notice was placed on the woman's file. Despite retaining capacity to make decisions about medical treatment, the patient herself was not involved in the decisions to place DNACPR notices on her file as her doctors thought it would distress her. The court found that there should be a presumption that the patient should be involved in such an important decision. There need to be convincing reasons not to involve the patient, such as if the doctor thought that doing so would cause them physical or psychological harm, not just distress.

Story example of Article 8 issue

Susan has a mild learning disability. Four years ago, she had a son, who was adopted at birth due to concerns about Susan's relationship with the father, who had a record of violent behaviour. Susan has since entered a new relationship and is due to give birth to a daughter soon. She has a support worker who she sees regularly and input from her local community learning disability team. Susan's social worker has informed her that the local authority intends to seek to have her daughter fostered at birth as they do not believe that she will be able to look after her adequately. Susan is very upset and feels that she would now be able to look after her daughter with some initial support to learn parenting skills.

SIAA has made an animation, 'Opening Doors' which aims to raise awareness about the power of advocacy for families in difficult circumstances who are at risk of having their children taken into care. You can view the film here:

<http://www.siaa.org.uk/publications-category/openingdoors/>

Right to freedom of thought, conscience and religion

ARTICLE 9 – Freedom of thought, conscience and religion

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

What does this right mean?

Everyone is free to hold a broad range of views, beliefs and thoughts and to follow a religious faith. The right to manifest – to practice through e.g. prayer or diet, or to show e.g. through dress or adornments – those beliefs may be limited only in special circumstances.

When could this be relevant?

- ▶ Respect for cultural and religious requirements
- ▶ Opportunities for prayer or to wear religious clothing
- ▶ Providing support to enable people to participate in their normal religious practices such as dietary requirements at meal times and in care and support plans.

Case example of Article 9 issue

Eweida and others v United Kingdom (2013)

Several applicants complained that their rights under Article 9 to manifest their Christian religion had been unjustifiably interfered with.

One was an employee at an airline who had been forbidden from wearing a visible cross on a necklace when in a role dealing face to face with customers. It was inconsistent with the employer's uniform policy.

Another was employed as a nurse, and was prevented from wearing a necklace with a cross because of the risk of it becoming tangled in the course of work.

Another was a psycho-sexual therapist who worked for a charity offering relationship counselling. He was dismissed from employment as his employer did not believe he would be willing to counsel same-sex partners because of his professed religious objections to same sex relationships.

The court held that the interference with the rights of the airline employee was unjustified, but that the interference with the rights of the nurse and therapist were proportionate.

The court thought the interest of the airline business in its corporate image, with a common uniform, was not significantly affected by allowing its employee wearing a discrete cross. Other employees had worn items of religious clothing such as turbans or hijabs without affecting the employer's image. By contrast, the prohibition on the nurse wearing a cross was to further health and safety in the workplace, which was a purpose of greater importance. Similarly, the relationship charity had been pursuing the important purpose of ensuring equality of provision of its services to heterosexual and same sex couples. The importance of this purpose outweighed the importance of respecting their employee's rights to manifest his beliefs.

Right to freedom of expression

ARTICLE 10 – Freedom of expression

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

What does this right mean?

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.

When could this be relevant?

- ▶ Having access to appropriate communication aids
- ▶ Speaking up at a patients' participation meeting in a hospital
- ▶ Being supported rather than prohibited from individually and collectively expressing views
- ▶ Whistleblowing.

Story example of Article 10 issue

Some of the residents of a care home are very active in the community and have weekly excursions to local places of interest. They often go to the local community centre where they are entertained by scout group performances or have a monthly painting session. Unfortunately, due to a lack of funding the community centre is earmarked for closure. In one of the residents weekly meetings it is suggested that the residents jointly launch a protest, starting with writing to their local MSP. They also come up with the idea to send out protest letters to houses in the area and finally by talking to the local newspaper about the effect the closure will have on the community. The care home manager tells the resident group that the home will not facilitate the residents' protests as it is bad for the reputation of the home to have residents making a fuss.

Right to freedom of assembly and association

ARTICLE 11 – Freedom of assembly and association

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

What does this right mean?

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.

When could this be relevant?

- ▶ Advocacy staff and other workers may join a workers' union
- ▶ Everyone, including people receiving care services and their families may protest about the quality of care or any other issue.

Story example of Article 11 issue

David lives at home and is supported by care workers on a daily basis. David uses a wheelchair and is unable to leave his flat without someone accompanying him. David and a friend decide to attend an anti-austerity protest march. Once they get to the march they find the route has been diverted so as to avoid clashing with a different demonstration in the city. The new route has lots of shallow steps, cobbles and steep hills and is inaccessible to David and so he has to go home and miss the protest.

Right not to be discriminated against

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

What does this right mean?

A person cannot be discriminated against in respect of the other Convention rights.

When could this be relevant?

- ▶ Discriminatory access to services on grounds of any grounds including socioeconomic status
- ▶ Commitment to improving mental health services for people from black and minority ethnic groups
- ▶ Ensuring that people are not denied treatment solely on the basis of their age
- ▶ Non-English speakers being presented with health options without the use of an interpreter.

Story example of Article 14 issue

Tracy lives in a care home. She was born male but identifies as female and has lived as a woman for the last 20 years although she has not undergone any gender reassignment surgery. Although she is much happier living life as a woman she is still very self-conscious and wary of being discriminated against. Recently some of the individuals receiving care services have begun to object to Tracy using the women's toilet in the common area of the home. The manager has asked Tracy to only use the facilities in her own room as he does not want to create a fuss. She feels this infringes not only her right to privacy and autonomy but also that she is being discriminated against.

Other International Human Rights of Importance

Economic Social and Cultural Rights

Economic, social and cultural rights cover a broad range of human rights. They are guaranteed in international human rights treaties to which the United Kingdom is legally bound, and include rights relating to the workplace, social security, adequate housing, food, water, health care and education.

Under its international commitments to economic, social and cultural rights, the UK, and Scotland, should show progress over time towards the full realisation of these rights by everyone. This means taking steps, according to the maximum of available resources, to progressively achieve their full realisation.

Even where resources are scarce there should still be every effort made to improve the enjoyment of these rights. For example, regardless of the resources available to it, a country should as a matter of priority seek to ensure that everyone has access to, at the very least, minimum essential levels of all of these rights, and that targeted programmes exist to protect the rights of people in poverty or otherwise marginalised and disadvantaged.

While these rights can only be fully realised over time, they also contain immediate obligations to ensure (as a priority) minimum essential levels of these rights for everyone, non-discrimination and that any retrogression (roll-back) on rights can be justified with reference to the full range of human rights. This does not mean that the government must provide all of these things, such as healthcare, water, education, food and other goods and services but that it must ensure that those services are adequate and equally accessible to all.

Some of the most relevant economic and social rights people who may use advocacy services are outlined briefly below.



Right to the highest attainable standard of physical and mental health

What does this mean?

The right to health is not a right to be healthy – genetic traits and our varied lifestyles make this impossible! It is a right to a range of goods, services and information which are needed for health. It includes both a right to healthy conditions and a right to adequate health care. It covers a wide range including mental health, sexual and reproductive health, environmental health, workplace health and safety, prevention, treatment and control of diseases as well as broader public health strategies.

The right to healthy conditions includes:

- ▶ Safe drinking water and adequate sanitation
- ▶ Safe food
- ▶ Adequate nutrition and housing
- ▶ Healthy working and environmental conditions
- ▶ Health-related education and information
- ▶ Gender equality.

The right to health care includes:

- ▶ **Availability** – sufficient health care information, services, goods and facilities, including trained health workers
- ▶ **Accessibility** – health care information, services, goods and facilities should be physically and economically accessible without discrimination
- ▶ **Acceptability** – health care should be acceptable in terms of medical ethics as well as culturally acceptable to persons belonging to minorities
- ▶ **Quality** – health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, among other things, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe water and adequate sanitation.

When could this be relevant?

- ▶ Access to essential medicines
- ▶ Access to information about health
- ▶ Non-discrimination against a group of people in accessing health services.

Right to adequate housing

What does this mean?

The right to adequate housing is relevant to the places where people actually live, whether they are owned or rented accommodation, or residential institutions such as care homes. It contains the following important elements:



- ▶ **Security of tenure** – this means people should have a degree of security and legal protection against forced eviction, harassment and other threats
- ▶ **Availability of facilities and infrastructure** – this means an adequate house must contain the things essential for health, security, comfort and nutrition such safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services etc
- ▶ **Affordability** – this means that household or financial costs must not be so high that other basic needs like food are under threat. Tenants should be protected by appropriate means against unreasonable rent levels or rent increases
- ▶ **Habitability** – this means adequate housing must have adequate space and protect you from cold, damp, heat, rain, wind or other threats to health
- ▶ **Accessibility** – this means housing must be accessible to those entitled to it and disadvantaged groups such as older people, children, people with disabilities etc should be ensured some degree of priority consideration
- ▶ **Location** – this means adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. Also, housing should not be built on polluted sites or nearby to pollution sources that threaten the right to health of the inhabitants
- ▶ **Cultural adequacy** – this means that the way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.

When could this be relevant?

- ▶ Residents in care homes being threatened with eviction
- ▶ Damp in people's houses causing health problems
- ▶ Accessing doctors surgeries
- ▶ Housing requiring adaptation to meet the needs of older or disabled people.

Right to adequate food

What does this mean?

The right to adequate food means the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances and acceptable within a given culture. It also means the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights.

- ▶ **Dietary needs** – means the diet as a whole should contain a mix of nutrients for physical and mental growth, development and maintenance, and physical activity according to human physiological needs at all stages throughout the life cycle
- ▶ **Free from adverse substances** – sets requirements for food safety and for a range of protective measures to prevent contamination of foodstuffs and bad environmental hygiene or inappropriate handling of food
- ▶ **Cultural or consumer acceptability** – means other cultural issues should be taken into account, such as the provision of kosher or halal diets
- ▶ **Availability** – refers to the possibilities either for growing your own food or through accessing food by other means
- ▶ **Accessibility** – means food must be both affordable and physically accessible particularly for physically vulnerable individuals.

When could this be relevant?

- ▶ People living at home being able to get to shops to buy food, or are given support to do so if they require help
- ▶ Quality of nutrition and hydration for people with particular needs
- ▶ Ensuring staff numbers in care homes are sufficient to encourage and help residents to eat well and drink regularly
- ▶ Ensuring menus are properly planned for people who have diabetes, unplanned weight loss or difficulty swallowing and chewing.

Right to independent living

What does this mean?

People with disabilities have the right to live independently and be included in the community. In Scotland, the Scottish Government, the Convention of Scottish Local Authorities (on behalf of local authorities), the disabled people's Scottish Independent Living Coalition, and the National Health Service Scotland have articulated this as meaning "disabled people of all ages having the same **freedom, choice, dignity** and control as other citizens at home, at work, and in the community. It does not mean living by yourself, or fending for yourself. It means rights to practical assistance and support to participate in society and live an ordinary life."

This includes the following elements:

- ▶ **Living arrangements** – the opportunity to choose their place of residence, where and with whom they live. It also includes not being obliged to live in a particular living arrangement
- ▶ **Access to support** – access to a range of support services, at home, in residential and other community support services. This includes personal assistance to support living and inclusion in the community and to prevent isolation
- ▶ **Equal access to community services** – community services and facilities must be equally available to disabled people and be able to respond to their needs.

When could this be relevant?

- ▶ People being required to move away from their families into a group living situation to receive care
- ▶ Lack of respite care to allow people to maintain a care package in a family care arrangement
- ▶ Policies which limit the care packages available to older people in their own home in favour of moving into a care home
- ▶ Lack of provision of support to attend local groups, work opportunities, or to participate in the community.



The *FAIR* model – Putting a human rights based approach into practice

These materials will help you apply a human rights based approach in practice.

The Scottish Human Rights Commission has developed what we call the 'FAIR' approach to help you do this. The basic steps of the FAIR approach are:

- ▶ **Facts:** What is the experience of the individuals and what are the important facts to understand?
- ▶ **Analyse Rights:** Developing an analysis of the human rights at stake
- ▶ **Identify Responsibilities:** Identify what needs to be done and who will be responsible for doing it
- ▶ **Review Actions:** Make recommendations for action and later recall and evaluate what has happened as a result.

The flow chart on page 38 outlines these steps in more detail and you can use the case studies accompanying this guide to familiarise yourself with putting the steps into practice.

Not every unfair, or unjust, situation will be an abuse of human rights law. However, often a human rights based approach, using the FAIR approach can be a means of reaching a fair and just solution in those situations.

The role of a human rights based approach is to ensure that the dignity of the individual is at the centre of policy and decision making. Where it is applied everyone affected will have an opportunity to help think through how everyone's human rights can best be realised in the delivery of services.

Thinking it through FAIR flowchart

This flowchart will help you to apply a human rights based approach.

For the case studies we would recommend that you read each in turn, discuss with others where you can, and follow the steps in the flowchart to think through a human rights based approach to the scenario.

Facts

What is the experience of the individual? Is the individual being heard and if not, do they require support to do so?

What are the important facts to understand?

Analysis of right(s) at stake

What are the human rights or issues at stake? (refer to Key Rights Explained for help)

Is the right to life or the right not to be subjected to inhuman or degrading treatment at stake? If so, these rights are absolute and cannot be restricted.

Can the right be restricted? What is the justification for restricting the right?

Is the restriction on the right 'proportionate'? i.e. is it the minimum necessary restriction to meet the aim or is a "sledgehammer being used to crack a nut"?

Identification of shared responsibilities

What changes are necessary?

Who has responsibilities for helping to make the necessary changes?

Review actions

Have the actions taken been recorded and reviewed and has the individual affected been involved?

Case Studies

There are a series of case studies accompanying this guide. We would recommend that you read each in turn, discuss with others where you can, and follow the steps in the flowchart to think through a human rights based approach to the scenario.

There is a worked example of how to do this below.

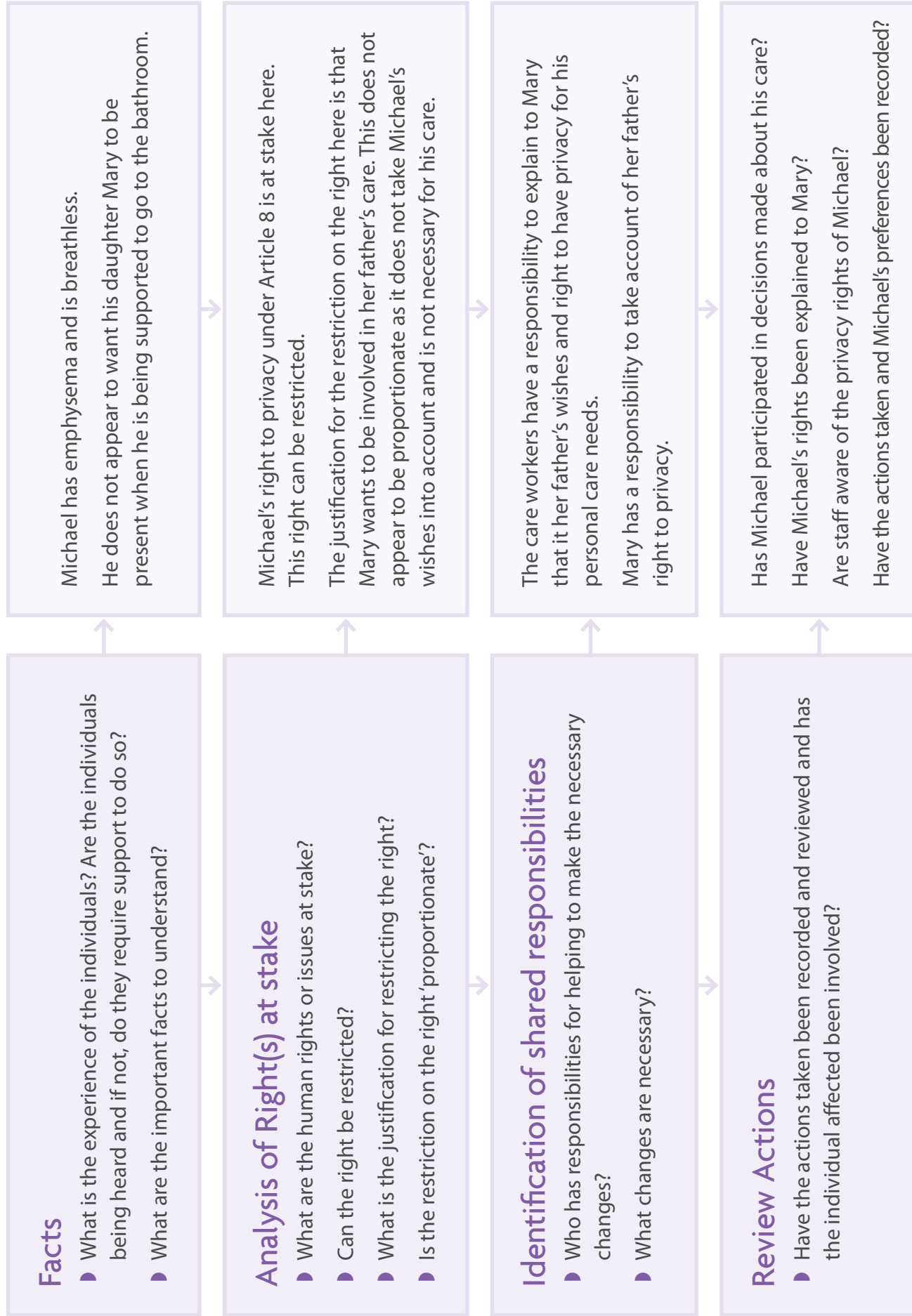
Example Case Study – Michael

Michael spent most of his life working down the mines in Lanarkshire. Well into his eighties he is now in a care home on the edge of the mining village he was brought up in. As a result Michael is well known not just to the other residents in the home but by many of the staff whose parents and grandparents he knew. Michael is in poor health and as a result of his work suffers from emphysema and is breathless.

Michael has a daughter, Mary, who moved away from home when she was eighteen, qualified to be a nurse but has now returned back to the village after her retirement. She is a strong character and frequently takes over the tasks of the care staff and constantly inspects their work and support.

One day Michael asks to be supported to go to the toilet which the duty staff begin to respond to. Michael's daughter, Mary, then begins to insist that she would take her dad to the toilet. Michael begins to get upset and starts to breathe more heavily and to get agitated. The staff ask the daughter to leave but she refuses saying that as a professional nurse and as a daughter she has the right to stay and make sure that they are looking after her father properly.

Using the flowchart for example case study – Michael



How Human Rights fit with what you already know and do

How human rights fit with other legislation

All legislation in Scotland must take into account human rights and must be read through lens of human rights under sections 2 and 3 of the Human Rights Act 1998 and sections 101 of the Scotland Act 1998.

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

The table on the following pages shows how some key pieces of legislation fit with human rights. It illustrates how often the legislation strongly reflects the underlying principles and legal tests of the human rights framework.

Key legislation – principles and provisions	The fit with Human Rights
<p style="text-align: center;">Adult Support and Protection (Scotland) Act 2007</p>	
<p>The Adult Support and Protection (Scotland) Act 2007 provides for measures to identify, support and protect adults who may be at risk of harm or neglect whether this is physical or psychological harm, neglect, sexual abuse or financial exploitation.</p> <p>The fundamental overarching principle of the Act is that:</p> <p>“any intervention in an individual’s affairs should provide benefit to the individual and should be the <i>least restrictive option of those that are available.</i>”</p> <p>The following guiding principles must be taken into account when any parts of the Act are put into place. These are:</p> <ul style="list-style-type: none"> ▶ The wishes and feelings of the adult at risk (past and present) ▶ The views of other significant individuals, such as the adult’s nearest relative; their primary carer, guardian, or attorney; or any other person with an interest in the adult’s well-being or property ▶ The importance of the adult taking an active part in the performance of the function under the Act 	<p>Which key articles of the Convention?</p> <p>ARTICLE 3 – prohibition of torture and inhuman or degrading treatment. This is understood to include a duty to act to prevent, prohibit and remedy ill treatment. Some of the types of “harm” covered by the Act correspond with types of ill treatment covered by Article 3.</p> <p>ARTICLE 8 – right to respect for private and family life, home and correspondence. This includes the right to free and informed consent to any intervention in one’s affairs and to physical and mental integrity – including forms of harm covered by the Act which do not reach the threshold of Article 3 – ill-treatment. Any interference with this right must be according to the law, in pursuit of a legitimate aim (such as the protection of the health of an adult at risk of harm) and be the least intervention necessary to achieve the aim, and must therefore be proportionate.</p> <p>ARTICLE 1 Protocol 1 – the right to peaceful enjoyment of possessions. Any interference in the financial affairs of an adult must pass the tests of legality, necessity and proportionality.</p>

- Providing the adult with the relevant information and support to enable them to *participate* as fully as possible; the importance of ensuring that the adult is not treated less favourably than another adult in a comparable situation
- The adult's abilities, background and characteristics (including their age, sex, sexual orientation, religious persuasion, philosophical belief, racial origin, ethnic group and cultural and linguistic heritage).

Which underlying principles?

The principle of *participation* in particular is reflected in that decisions being made under the Act require the adult to receive the relevant information and support to enable them to participate as fully as possible.

The principle of proportionality outlined above in relation to Article 8 corresponds with the overarching principle of the Act which says that "any intervention in an individual's affairs should provide benefit to the individual and should be the *least restrictive option of those that are available*."

Key legislation – principles and provisions

Adults with Incapacity (Scotland) Act 2000

The Adults with Incapacity (Scotland) Act 2000 introduced a system for safeguarding the welfare and managing the finances and property of any person over 16 years who lacks the legal capacity to do so themselves because of mental disorder or inability to communicate. It explains what is meant by incapacity and sets out the circumstances and the safeguards whereby a local authority social worker or other party such as relative, friend or a carer may obtain powers to enable them to make decisions on behalf of these adults. The Act aims to ensure that solutions focus on the needs of the individual so that decisions are only made on their behalf to the extent that is necessary.

The law sets out the roles and responsibilities of anyone authorised to make decisions on behalf of someone with impaired capacity. According to the Act any decisions made by a guardian:

- must be of benefit to the person concerned
- will only be taken when really needed
- must take into account the past and present wishes of the person
- should *restrict that person's freedom* as little as possible
- should only be taken when the person could not make a decision themselves
- should *take into account* the views of carers, relatives and people who work closely with the person.

The fit with Human Rights

Which key articles of the Convention?

ARTICLE 5 – the right to liberty and security of person. This Act provides for the necessary “procedure prescribed by law” under which a person can be detained. Welfare guardians may decide where the adult shall live and/or consent to certain forms of restraint. These powers may only be granted by a court.

NB: The legal procedures which provide authority to deprive individuals of their liberty are currently under review, following the Supreme Court decision of *Cheshire West*. The ruling states that deprivation of liberty is a matter of fact and does not depend on the purpose of the intervention or the nature of the person’s individual circumstances. The majority of the judges agreed that the fundamental characteristics of deprivation of liberty are being ‘under continuous supervision and control’ and lack of freedom to leave. New or revised procedures may emerge. These would also form a “procedure prescribed by law”.

ARTICLE 8 – the right to respect for private and family life, home and correspondence. This Act provides for interferences with this right to privacy and autonomy and complies with the European Court of Human Rights approach to legal capacity in decision making which is functional – “can this individual make this decision at this time?” rather than status based – which would find someone incapable if they have a certain disorder. As with the Convention, the Act requires a presumption in favour of capacity and the provision of support to exercise capacity where needed.

Any interference with this right must be justified by pursuing a legitimate aim, be based on the law and be the least form of intervention necessary to achieve the aim and therefore be proportionate. This area continues to develop, with the UN Convention on the Rights of Persons with Disabilities calling for a fundamental move away from decisions being made on behalf of a person whose decision-making ability may be impaired (substituted decision-making) towards greater respect for their will and preference, and more emphasis on supporting them to make decisions, even in tough cases.

ARTICLE 6 – the right to a fair hearing. The Act provides a process for the making and continuation of guardianship and intervention orders. Such orders impact on the ability of an individual to manage their own affairs. As such they should comply with the right to a fair hearing, including the right to be heard.

Which underlying principles?

The principle of *participation* in particular is reflected in the Act's presumption of capacity as well as involvement of carers, relatives and people who work closely with the person.

The principle of *proportionality* outlined above in relation to Article 8 corresponds with the principle that any decisions made by the guardian must only be taken when really needed and should restrict that person's freedom as little as possible.

Key legislation – principles and provisions	The fit with Human Rights
<p data-bbox="268 1144 320 2085" style="text-align: center;">Mental Health (Care and Treatment) (Scotland) Act 2003</p> <p data-bbox="363 1144 783 2085">The Mental Health (Care and Treatment) (Scotland) Act 2003 places a range of duties and gives a range of powers to organisations involved in the provision of mental health services and defines clear procedures for compulsory treatment and/or the detention of persons with a mental disorder. It introduced new mechanisms such as the possibility of “advance statements” which enable people to set out how they wish to be treated for a mental disorder when they are unable to make decisions. It also introduced the right of every person with a mental disorder to access independent advocacy.</p> <p data-bbox="810 1144 927 2085">The Act sets out a series of principles which say that whenever a professional involved is making a care and treatment decision he or she should:</p> <ul data-bbox="954 1144 1294 2085" style="list-style-type: none"> ▶ take the past and present <i>wishes of the individual</i> into account ▶ make sure the person gets the information and support he or she needs to <i>take part in decisions</i> ▶ take the views of the person’s carer, named person, guardian or welfare attorney into account ▶ look at the full range of care and treatment options that a person may need 	<p data-bbox="363 203 400 1144">Which key articles of the Convention?</p> <p data-bbox="419 203 536 1144">ARTICLE 5 – the right to liberty and security of person. This Act provides for the necessary “procedure prescribed by law” under which a person can be detained.</p> <p data-bbox="563 203 855 1144">ARTICLE 8 – the right to respect for private and family life, home and correspondence. The compulsory treatment of an individual will automatically engage aspects of an individual’s physical and psychological integrity and autonomy that are protected by Article 8. Advance statements and advocacy are both measures to facilitate participation in decision-making and, by doing so, to uphold autonomy.</p> <p data-bbox="882 203 999 1144">ARTICLE 3 – prohibition of torture and inhuman or degrading treatment. Without the necessary safeguards afforded by the Act detention or treatment could amount to ill treatment.</p> <p data-bbox="1026 203 1142 1144">ARTICLE 9 – the right to freedom of thought, conscience and religion. Any care and treatment decision must take account of the person’s background, beliefs and abilities.</p> <p data-bbox="1169 203 1326 1144">ARTICLE 14 – the right to non-discrimination. Any care and treatment decision must make sure that individuals receiving care and treatment under the Act are not treated less favourably than other people.</p>

- ▶ give treatment that provides maximum benefit to the individual
- ▶ take account of the person's background, beliefs and abilities
- ▶ make sure that *any restrictions on an individual's freedom should be the minimum necessary in the circumstances*
- ▶ make sure that individuals receiving care and treatment under the Act are *not treated less favourably than other people*
- ▶ take the needs of carers into account and ensure that carers get the information and support they need
- ▶ take special care of your welfare if you are under 18 years of age when receiving care and treatment
- ▶ ensure safeguards are in place to protect that person's rights.

Which underlying principles?

The *PANEL* principles of **Participation, Accountability, Non-discrimination and equality, Empowerment and Legality** are broadly reflected in the Act.

The principle of proportionality which applies to Article 8 of the Convention corresponds with the principle of the Act that any restrictions on an individual's freedom should be the minimum necessary in the circumstances.

Key legislation – principles and provisions	The fit with Human Rights
<h3>Equality Act 2010</h3>	
<p>This Act brings together a number of pieces of equality legislation into one single Act simplifying the law and strengthening it to help tackle discrimination and inequality.</p> <p>The Act applies to all organisations that provide a service to the public, or a section of the public (service providers) and to organisations that provide public functions. It also applies to anyone who sells goods or provides facilities.</p> <p>The Act protects people from discrimination on the basis of nine ‘protected characteristics’. The relevant characteristics for services and public functions are:</p> <ul style="list-style-type: none"> ● age ● disability ● gender reassignment ● marriage and civil partnership ● pregnancy and maternity ● race – this includes ethnic or national origins, colour and nationality ● religion or belief ● sex, and ● sexual orientation. 	<p>Which key articles of the Convention?</p> <p>The Equality Act supports the realisation of all the Convention rights for individuals with “protected characteristics.”</p> <p>The advancement of equality and the prohibition and elimination of discrimination, on any ground, are fundamental to human rights and a central element of human rights law.</p> <p>ARTICLE 14 – In particular the Equality Act gives further effect to the principles of <i>Article 14</i> of the Convention and the right not to be discriminated against in the enjoyment of Convention rights.</p> <p>An important additional aspect to Article 14 however is that the protection from direct and indirect discrimination afforded by Article 14 is on <i>any ground</i> in relation to Convention rights beyond the “protected characteristic” in the Act.</p> <p>Which underlying principles?</p> <p>The principle of non-discrimination and equality are core to the aims of the Act.</p> <p>The principle of <i>proportionality</i> which is key to the human rights framework is reflected in the tests that apply to indirect discrimination, namely that indirect discrimination can be justified if it can be shown that the rule, policy or practice is intended to meet a legitimate objective in a fair, balanced and reasonable way. Furthermore any positive action under the Act must be proportionate.</p>

Under the Act *direct discrimination* in services and public functions happens when someone is treated less favourably than another person because of a protected characteristic.

Indirect discrimination happens when there is a rule, a policy or even a practice that applies to everyone but which particularly disadvantages people who share a particular protected characteristic. Indirect discrimination can be *justified if it can be shown that the rule, policy or practice is intended to meet a legitimate objective in a fair, balanced and reasonable way*. If this can be shown it will be lawful.

There are also 2 types of discrimination that protect disabled people in particular. Discrimination arising from disability happens when a disabled person is treated unfavourably for a reason connected with their disability – they don't have to compare themselves to anyone else for this to apply.

Also, disabled people also have the right to have reasonable adjustments made for them when they receive functions or services.

Victimisation occurs when someone is treated badly because they have done something in relation to the Act, such as making or supporting a complaint or raising a grievance about discrimination, or because it is suspected that they have done or may do these things.

The positive action provisions in the Act enable public sector organisations to take proportionate steps to help people overcome their disadvantages or to meet their needs.

What to do next

We want everybody to understand what human rights are and how we can work together to make sure that human rights are protected and respected in Scotland. That is why the Scottish Independent Advocacy Alliance and the Scottish Human Rights Commission have produced these materials for you to use in your advocacy work.

Government officials and public authorities are primarily accountable for ensuring that people's human rights are respected. However, we all share some responsibility in helping to make sure that all of our rights are respected.

We believe that human rights based thinking and arguments should be applied at every level, from individual communication and decision-making to advocacy and complaints processes. In this way many issues may be resolved for individuals and a human rights culture adopted by decision-makers and service providers.

A note on using the law to uphold human rights

Most human rights issues do not need specialist legal advice and can be resolved by communication, advocacy and non-judicial complaints mechanisms: talking to those involved, and using existing complaints processes where necessary.

Taking a human rights case to court can often be costly, time consuming and stressful, but where other approaches do not provide satisfaction anyone who believes that their human rights have been breached should then seek legal advice. If a person decides to pursue their claim in the courts they should first take every possible step to have the case resolved in the domestic courts. For example, this might include the sheriff court, employment tribunal and eventually the highest courts in the country – the High Court of Justiciary for criminal cases and the Supreme Court for civil cases. All domestic courts in the UK are required by the Human Rights Act to uphold the human rights contained in the Convention.

Only if a person is still dissatisfied and believes their human rights have not been properly upheld by the domestic courts, they may then consider exercising their right to apply to the European Court of Human Rights in Strasbourg to hear their case.

What do I do if I am worried about my human rights or the human rights of my advocacy partner?

There are a number of things you can do if you're worried about human rights not being respected.

Please note that the Scottish Human Rights Commission cannot give any advice to individuals about their human rights, but we hope the information in this guide will help you to resolve the issues you may encounter.

Section 1 will give you a better understanding of human rights. You can use the flowchart on page 38 to think about whether there is a human rights issue and whether there might be ways of sensibly resolving the problem.

Thinking it through

First of all it will be helpful to think through the issues yourself or have somebody assist you to think through the issues. You can use the FAIR flowchart on page 38 to help you.

Following the steps of the flowchart you should consider:

- ▶ **Facts:** What is the experience of the individual? Is the individual being heard and if not, do they require support to do so? What are the important facts to understand?
- ▶ **Analyse Rights:** What are the human rights at stake? Is there any justification for restricting the rights and if so is it the minimum restriction?
- ▶ **Identify Responsibilities:** Who do you think is responsible to make the necessary changes? What changes do you think are required?
- ▶ **Review Actions:** Have the actions taken been recorded and reviewed and has the individual affected been involved?

In your day-to-day advocacy work, you will be familiar with the routes of complaints and redress available in relation to particular services and in your area. You can use the human rights points you have identified to support those processes. Applying human rights thinking to the issues you are dealing with can help frame them as a legal right. This can help resolve problems and lead to better recognition of people's human rights as part of the issues they face.

If you or someone you know is over 16 and at risk of physical, sexual, financial or psychological harm or neglect because of a disability, mental disorder, illness or physical or mental infirmity, you can contact the Adult Protection Unit or its equivalent in your local area.

A final resort – get legal help

If you or your advocacy partner are unable to resolve the matter and feel that the violation of their rights has been serious then you may need to seek legal advice or help your advocacy partner seek legal advice.

- ▶ For further details of organisations and services that may be able to help you if you have a human rights problem, you can refer to the Scottish Human Rights Commission's guide, 'Help with Human Rights' <http://www.scottishhumanrights.com/application/resources/documents/HelpHumanRightsFeb15.pdf>
- ▶ For further tips and tools, the British Institute of Human Rights has produced a guide, *Mental Health Advocacy and Human Rights: Your Guide*, available for download at <https://www.bih.org.uk/mental-health-advocacy-and-human-rights-your-guide>
- ▶ The Mental Welfare Commission has produced the 'Rights in Mind' pathway to help those involved in mental health services ensure that patients have their human rights respected at key points in their treatment. It highlights where human rights come into play throughout a person's journey in adult acute mental health care – in the community, when being admitted to hospital, on the ward and on discharge. The infographic takes you through the journey, step by step, highlighting relevant rights and the questions people might have.

Human Rights belong to us all. Sometimes there are no easy answers to dilemmas that arise but using a human rights based approach can help you to make sure that the decisions which affect us respect human rights and the services we receive are of a high standard.

Appendix 1

Principles & Standards for independent advocacy

Principle 1: Independent Advocacy puts the people who use it first

- ▶ Standard 1.1
 Independent Advocacy is directed by the needs, interests, views and wishes of the people who use it
- ▶ Standard 1.2
 Independent Advocacy helps people to have control over their lives and to be fully involved in decisions which affect them
- ▶ Standard 1.3
 Independent Advocacy tries to make sure that people's rights are protected
- ▶ Standard 1.4
 Independent Advocacy values the people who use it and always treats people with dignity and respect.

Principle 2: Independent Advocacy is accountable

- ▶ Standard 2.1
 Independent Advocacy is accountable to the people who use it
- ▶ Standard 2.2
 Independent Advocacy is accountable under the law
- ▶ Standard 2.3
 Independent Advocacy is effectively managed.

Principle 3: Independent Advocacy is as free as it can be from conflicts of interest

- ▶ Standard 3.1
 Independent Advocacy cannot be controlled by a service provider
- ▶ Standard 3.2
 Independent Advocacy and promoting independent advocacy are the only things that independent advocacy organisations do
- ▶ Standard 3.3
 Independent Advocacy looks out for and minimises conflicts of interest.

Principle 4: Independent Advocacy is accessible

- ▶ Standard 4.1
 Independent Advocacy reaches out to the widest possible range of people, regardless of ability or life circumstances.

Appendix 2

The right to access independent advocacy in legislation & policy

The Mental Health (Care & Treatment)(Scotland) Act 2003

The right to access independent advocacy was first enshrined in the Mental Health (Care & Treatment)(Scotland) Act 2003 (MHA) . It means that anyone with a mental disorder in Scotland can access independent advocacy. The Act places a duty on NHS Boards and LA to fund independent advocacy.

The Adults with Incapacity (Scotland) Act 2000

The Act gives the same right of access to independent advocacy to anyone with dementia, as the MHA.

- ▶ Mental Health (Care & Treatment)(Scotland) Act 2003
- ▶ Mental Health (Scotland) Act 2015
- ▶ Social Care (Self-directed Support) (Scotland) Act 2013
- ▶ Public Bodies (Joint Working) (Scotland) Act 2014
- ▶ Community Empowerment (Scotland) Act 2015

The following table provides an overview of the different legislation that either gives people a right to access independent advocacy or mentions advocacy as a way to involve people:

<p>The Adults with Incapacity (Scotland) Act 2000</p>	<p>Amended by the Adult Support and Protection (Scotland) Act 2007 which states:</p> <p>In determining an application or any other proceedings under this Act the sheriff shall ... take account of the wishes and feelings of the adult who is the subject of the application or proceedings so far as they are expressed by a person providing independent advocacy services.</p>	<p>http://www.legislation.gov.uk/asp/2000/4/contents</p>
<p>The Mental Health (Care & Treatment) (Scotland) Act 2003</p>	<p>Section 259 states that:</p> <p>Every person with a mental disorder shall have a right of access to independent advocacy; and accordingly it is the duty of</p> <ul style="list-style-type: none"> (a) each local authority, in collaboration with the (or each) relevant Health Board; and (b) each Health Board, in collaboration with the (or each) relevant local authority, to secure the availability, to persons in its area who have a mental disorder, of independent advocacy services and to take appropriate steps to ensure that those persons have the opportunity of making use of those services. 	<p>http://www.legislation.gov.uk/asp/2003/13/contents</p>

<p>Education (Additional Support for Learning) (Scotland) Act 2004</p>	<p>The Act states: Where, in connection with the exercise of an education authority's functions under this Act in relation to any child or young person, the relevant person wishes ... another person (referred to as an advocate) to;</p> <ul style="list-style-type: none"> (i) conduct such discussions or any part of them, or (ii) make representations to the authority, on the relevant person's behalf, the education authority must comply with the relevant person's wishes. 	<p>http://www.legislation.gov.uk/asp/2004/4/contents</p>
<p>Adult Support and Protection (Scotland) Act 2007</p>	<p>Amended The Adults with Incapacity (Scotland) Act 2000 and states: In determining an application or any other proceedings under this Act the sheriff shall ... take account of the wishes and feelings of the adult who is the subject of the application or proceedings so far as they are expressed by a person providing independent advocacy services.</p>	<p>http://www.legislation.gov.uk/asp/2007/10/contents</p>

<p>Education (Additional Support for Learning) (Scotland) Act 2009</p>	<p>The Education (Additional Support for Learning) (Scotland) Act 2009 adds to the Education (Additional Support for Learning) (Scotland) Act 2004, and states:</p> <p>14A Provision of advocacy service: Tribunal</p> <p>(1) The Scottish Ministers must, in respect of Tribunal proceedings, secure the provision of an advocacy service to be available on request and free of charge to the persons mentioned in subsection (2).</p> <p>(2) The persons are:</p> <ul style="list-style-type: none"> (a) in the case of a child, the child's parent, (b) in the case of a young person; <ul style="list-style-type: none"> (i) the young person, or (ii) where the young person lacks capacity to participate in discussions or make representations of the type referred to in subsection (3), the young person's parent. <p>(3) In subsection (1) advocacy service means a service whereby another person conducts discussions with or makes representations to the Tribunal or any other person involved in the proceedings on behalf of a person mentioned in subsection (2).</p>	<p>http://www.legislation.gov.uk/asp/2009/7/contents</p>
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<p>Guidance on Looked after Children (Scotland) Regulations 2009 and the Adoption and Children (Scotland) Act 2007</p>	<p>Provides guidance on the requirement to consider the views of the child. The underlying principle is summarised as follows: children and young people should not be passive in decision making processes. They have the right to input into decisions about their lives and the services provided to them.</p>	<p>http://www.scotland.gov.uk/Publications/2011/03/10110037/0</p>
<p>The Children's Hearing (Scotland) Act 2011</p>	<p>The Act introduces a requirement to ensure that children and young people going through the Children's Hearings system will, for the first time, be able to get advocacy support. The 2011 Act defines advocacy support as; services of support and representation for the purposes of assisting a child in relation to the child's involvement in a children's hearing.</p>	<p>http://www.legislation.gov.uk/asp/2011/1/contents</p>
<p>Charter of Patient Rights and responsibilities 2012</p>	<p>The Charter sets out a summary of the rights and responsibilities of patients using the NHS in Scotland, and of people who have a personal interest in such patients' welfare. The Charter states that:</p> <ul style="list-style-type: none"> ▶ You have the right to request support when making decisions about your health care. ▶ You may ask (and if you have a mental health disorder you have a right) to have an independent advocate to help you give your views. NHS staff can help you arrange this. 	<p>http://www.gov.scot/resource/0039/00390989.pdf</p>

Social Care (Self-directed Support) (Scotland) Act 2013

The Self-directed Support Act 2013, which applies to children, adults and carers, states that:

The authority must give the person...

(d) in any case where the authority considers it appropriate to do so, information about persons who provide independent advocacy services (within the meaning of section 259(1) of the Mental Health (Care and Treatment) (Scotland) Act 2003 (asp 13)).

<http://www.legislation.gov.uk/asp/2013/1/contents/enacted>



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