

Public sector

National report



# Human rights

Improving public service delivery

**The Audit Commission** is an independent body responsible for ensuring that public money is spent economically, efficiently and effectively, to achieve high-quality local and national services for the public. Our work covers local government, housing, health and criminal justice services.

As an independent watchdog, we provide important information on the quality of public services. As a driving force for improvement in those services, we provide practical recommendations and spread best practice. As an independent auditor, we monitor spending to ensure public services are good value for money.

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# Acknowledgements and introduction

## Acknowledgements

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We would also like to thank those public bodies that have agreed to share good practice. The production of this publication, and research on which this is based, would not have been possible without the unstinting efforts of James Baxter, a law graduate on placement at the Audit Commission.

## Introduction

The Human Rights Act can help to improve public services, as it seeks to ensure the delivery of quality services that meet the needs of individual service users. Not only has the Act increased public service providers' awareness of the rights of the individual, but it has also meant an increased risk of legal challenge by service users.

We hope that this publication, which follows our previous work outlined in *The Human Rights Act: A Bulletin for Public Bodies* will prompt all public bodies to examine how they have responded to the Act and how that response could be improved with a view to enhancing service delivery. It includes:

- the latest analysis of progress made across 175 public bodies;
- good practice examples drawn from the local government, health and criminal justice services;
- an update on the law relating to public bodies; and
- practical examples of how the Act can be used as a framework to improve service delivery.

# 1

## Why human rights continue to be important

- 1 The Act was a clear statement of rights that need to be taken into account in the delivery of public services. The vision behind the Act was that it would bring about cultural change where service decisions would be made with reference to basic rights, such as the right to privacy and family life, the right to a fair hearing and the right not to suffer degrading treatment. The Government expected that public service decision-makers would work within a human rights framework. Managers would have a clear understanding of their obligations under the Act and carefully balance an individual's rights against those of the wider community when making their decisions.
- 2 Our research suggests that:
  - three years on, the impact of the Act is in danger of stalling and the initial flurry of activity surrounding its introduction has waned;
  - public bodies continue to be subject to a host of new legislation such as the *Race Relations (Amendment) Act 2000*, the *Freedom of Information Act 2000* and the Employment Directives for age, religion and sexual orientation. However, it is often the case that the latter pieces of legislation are seen as more important and warrant an appropriate response; and
  - few links are made between equalities and human rights legislation by public bodies.
- 3 So, why should human rights continue to be important?
  - **Because it is the law:** The Act makes all public bodies in England and Wales responsible for behaving in a way that does not breach the rights of individuals, as identified by the European Convention of Human Rights. We drew attention to this in our first bulletin but it is important to re-state it here, because many organisations have still not responded to the Act.
  - **Because human rights can bring benefits to service users:** Some policies, practices and legislation that result in direct benefits to service users are being influenced by the Act. Mental health is going through radical reform, which is aimed at the improving quality of life for people who experience mental health difficulties. These changes have been influenced by the Act and will help to improve the standards of service and care of mental health patients. Similarly, the *National Health Service Plan* was written with human rights in mind. The Health and Social Care<sup>I</sup>, Fire Services, and Criminal Justice Bills<sup>II</sup>, to name but a few, are being improved because of the scrutiny process against human rights principles.

I Joint Parliamentary Committee (2003)  
*11th Report: Scrutiny of Bills.*

II Joint Parliamentary Committee (2003)  
*12th Report: Scrutiny of Bills.*

Human Rights legislation has been used innovatively as a framework to improve the equality and dignity of people with learning disabilities in their relationships with carers<sup>I</sup> and in education as part of a young citizenship programme for children. Case law<sup>II</sup> has defined an individual's rights to privacy, which will have consequences for how public authorities use information and discrimination matters have been resolved leading to fair treatment, such as housing tenancy rights for single sex partners<sup>III</sup>.

- **Because of the cost and reputational damage to an organisation:** Public bodies should not underestimate the financial impact of human rights on the services they provide. Court cases have resulted in legal costs and penalties ranging from £18,000 to £320,000. The costs of defending a challenge, whether favourable or otherwise, will almost certainly be very many times greater than the damages awarded.

Successful cases can have a universal and costly impact on the way that public bodies operate and can result in them committing valuable resources to rewriting policies and procedures<sup>IV</sup> or responding to copy cat claims. But even more important is the damage to an organisation's reputation if it is found to be guilty of a breach of the Act. Negative reporting by the media about the violation of an individual's human rights by a public body can lead to low morale and poor public perception.

<sup>I</sup> Doughty Street Human Rights Unit and the LSE Human Rights Centre (2002) *HRA Research Project: Briefing: Year one of the Human Rights Act 1998*.

<sup>II</sup> Douglas and Others v Hello! Ltd (2003).

<sup>III</sup> Mendoza v Ghaidan (2002).

<sup>IV</sup> Robertson v Wakefield City Council (2002).

# 2

## How is the Act affecting public services?

### How are public services responding to the legal challenge?

- 4 Human rights issues are increasingly being referred to the courts and judicial review process. This applies whether or not the cases have been successful. An empirical research study looking at the impact of the Act on judicial review highlighted that *the Act is cited in just under half of all judicial review claims made.*<sup>I</sup> It also concluded that *decision-makers in public bodies have yet to absorb and incorporate in their decision-making processes the values inherent in the Human Rights Act.*
- 5 Public bodies are also handling complaints with human rights implications across a wide range of services, including the provision of care for vulnerable people, policing, detention, planning and licensing. However, what is not so clear is how many of these complaints should be receiving human rights consideration, but haven't because of a lack of awareness of human rights legislation by frontline managers.
- 6 Reacting to complaints and case law when they happen is not an appropriate response to the Act and will not bring about service improvement, particularly for those who are most vulnerable and heavily dependent upon public services. Unfortunately, in many cases 'wait and see what happens' or 'let's defend a challenge' approaches are common. This is despite research by organisations such as Help the Aged<sup>II</sup> and the British Institute of Human Rights,<sup>III</sup> which have highlighted poor treatment – although not necessarily with malicious intent – of the elderly, of children and of people with disabilities. These groups of people were less likely to complain even where they had suffered unfair and/or degrading treatment at the hands of a service provider. A few public bodies have attracted negative press because of the lack of attention they have given to these issues. For example, one organisation was reported to have infringed the rights of individuals within a care home setting. For these reasons public bodies should be adopting a more proactive response to human rights by focusing attention on prevention and not cure.

I Public Law Project (June 2003), *The Impact of the Human Rights Act on Judicial Review*.

II Help the Aged (January 2003), *Memorandum on older people and human rights*.

III The British Institute of Human Rights (December 2002), *Something for everyone*.

## What is the impact of the Act on service delivery?

- 7 The challenge for public bodies is to learn from legal cases in order to:
  - avoid similar litigation in the future; and
  - to apply a human rights framework to decision making across public services in order to achieve better service provision.

- 8 Case law is affecting public services and it will change the way that services are provided in the future (**Box A**).

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## Box A

### New case law and how it is affecting service delivery

- The burden of proof to show that a patient is still suffering from a mental health disorder now rests with the service provider (*R v Mental Health Review Tribunal, ex parte H 2001*).
  - Mental health tribunal cases (*R (KB and six others) v MHRT 2002*) and employment cases (*Roger v GMC 2002*) must be dealt with expeditiously and heard in a reasonable time.
  - The ‘best interest of the patient’ is still being defined by the Courts in circumstances where the patient is in an ongoing and persistent vegetative state (*NHS Trust ‘A’ v M, NHS Trust ‘B’ v H 2002*).
  - There is a greater onus on health bodies to protect a patient’s medical records from inadvertent disclosure (*A Health Authority-v-X and Others 2001*).
  - A local authority may, in certain circumstances, have a duty to take positive steps to secure a disabled person’s physical integrity and dignity (*R (Bernard) v Enfield London Borough Council 2002*).
  - Appeals procedures for planning (*R-v-Secretary of State for Environment ex parte Holding & Barnes PLC 2001*) and panels to deal with the exclusion of pupils (*R v Brent LBC ex parte S 2001*) have been upheld as complying with the Act.
  - Service providers must treat a homosexual partner of a patient within the meaning of the Mental Health Act 1983 as a nearest relative (*Liverpool County Council & Secretary of State for Health 2002*).
  - Public authorities must ensure that their decision making processes take into account individuals’ human rights (*R (Robertson) v Wakefield Metropolitan Council 2002*) and (*R (K) Newham London Borough 2002*).
  - Public bodies that fail to consider human rights implications in their consultation processes have been ordered by the courts to remedy this by repeating the processes incorporating human rights elements (*R (Madden) v Bury Metropolitan Council 2002*).
  - Housing authorities must recognise that same sex partners will have the same right to take over a deceased partner’s housing tenancy (*Mendoza v Ghaidan 2002*).
  - The Courts suggested that in the future, public authorities that contract out services should require an undertaking from private service providers that they will recognise the rights guaranteed by the Human Rights Act (*R (Heather) v Leonard Cheshire 2002*).
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- 9 Despite developments, public bodies continue to struggle to make the connection between human rights, equalities and service improvement. In part, this is because the Act was introduced without any structured guidance and without a statutory duty to positively promote a human rights culture, as is the case for race and will be the case for disabilities.
- 10 Nevertheless, many organisations have provided significant support for public authorities in raising awareness of human rights issues:
- the Human Rights Unit at the Department of Constitutional Affairs has provided road shows in England and Wales, which have been supported by a well-publicised study guide.<sup>I</sup> It also sponsors a young citizenship programme for children;
  - the British Institute of Human Rights has helped to support and train a number of public bodies;
  - the Legal Action Group has produced a very useful toolkit for public sector managers to help them to make decisions using human rights as a framework;<sup>II</sup>
  - law firms are also playing a supportive role; and
  - the Commission for Racial Equality and Equal Opportunities Commission have also provided support.
- 11 However, it is a matter of concern that some of the national organisations that provided guidance for public bodies prior to the advent of the Act are not continuing with support because public bodies are not raising it as an issue or concern.

## What is happening to public services?

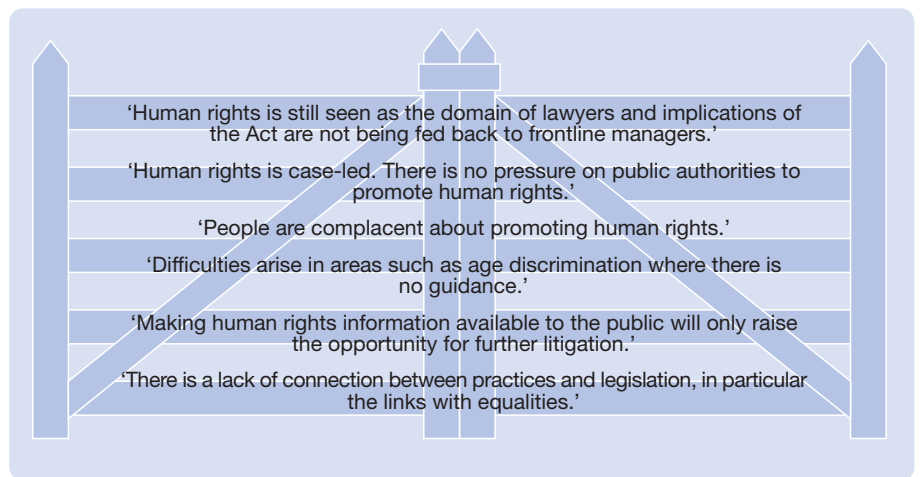
- 12 Despite the high profile of the Act, 58 per cent of public bodies surveyed still have not adopted a strategy for human rights. In many local authorities the Act has not left the desks of the lawyers. In health, 73 per cent of trusts are not taking action. Health bodies consistently lag behind other public services. In the criminal justice sector the initial flurry of activity has stopped. This will leave these bodies vulnerable to the risk of challenge because they are failing to protect themselves and will not secure service improvement.
- 13 The biggest risk to public bodies is their lack of arrangements for ensuring that their contractors and partners are taking reasonable steps to comply with the Act. Sixty-one per cent of public bodies have failed to act. However, a 15 per cent improvement has been made since our bulletin in May 2002.
- 14 To understand why organisations find it difficult to respond to human rights legislation we asked a range of public service managers what the obstacles were **(Exhibit 1, overleaf)**.

I The Lord Chancellors Department (October 2002) *Study Guide second edition Human Rights Act 1998*.

II The Legal Action Group (2003), *Human Rights Act Toolkit*.

### Exhibit 1

#### What public service managers said about the obstacles

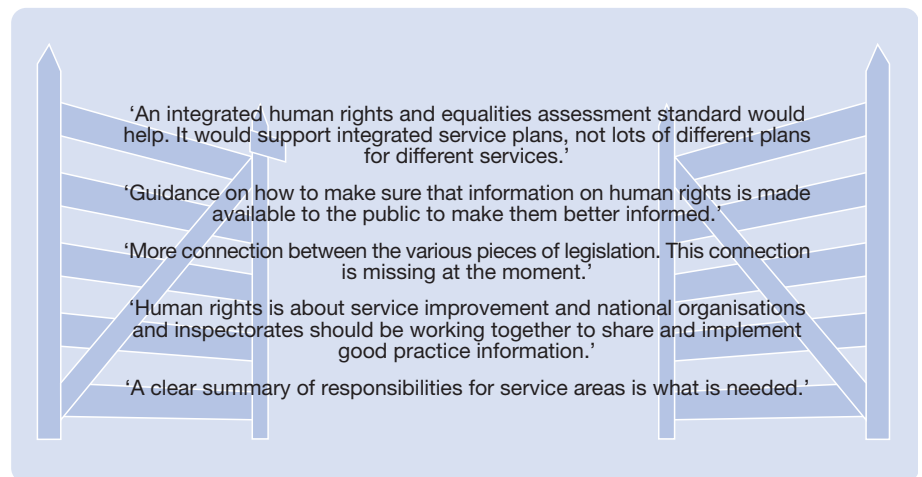


Source: Interviews with public service managers

15 We then asked them what could be done to help them (Exhibit 2).

### Exhibit 2

#### What public service managers said they need



Source: Interviews with public service managers

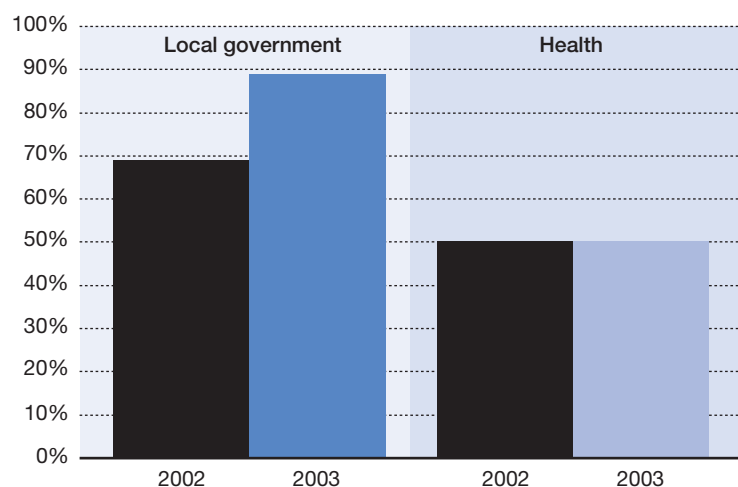
16 The Human Rights Act continues to be viewed negatively by sceptics who argue that sufficient legislation and guidance already exists to enable frontline managers to secure good standards of service. But research has shown that the application of human rights principles, for example, dignity and respect, can help to improve a patients experience and quality of care and will inevitably lead to improved outcomes.

# 3

## Our findings

- 17 Frontline staff are crucial to delivering services to the public, so it is important that they are aware of the implications of the Act and of what managers can do to help improve service delivery and protect themselves from legal challenge.
- 18 Since we reported in May 2002, the results from our assessments show a general improvement in the number of public bodies that have undertaken training with their staff. In local authorities this is 89 per cent compared to 69 per cent last year. Sixty-four per cent of police, fire authorities and probation committee staff have also received training. Although the increased level of activity is good news, health bodies have made no progress (**Exhibit 3**).
- 19 We found that training for public service managers and executive boards was often undertaken as a one-off separate event, rather than it being an integrated part of service programmes for service managers. Across a number of public bodies training and information was provided in preparation for the Act, but no rolling programme has followed. A common recommendation made by us to individual authorities and trusts was for them to develop training for frontline staff, and to support ongoing training through integrated training programmes in key risk areas, such as social care, health, education, housing and asylum.

### Exhibit 3 Training and awareness raising



Source: Analysis of progress made across 175 public bodies

20 Of 175 public bodies surveyed we found only one council that had made general information on the Act available to the public. Organisations were reluctant to promote human rights with citizens and their communities because they feared an increase in the number of complaints raising human rights issues. Most failed to see the benefits of using human rights as a vehicle for service improvement by making the principles of dignity and respect central to their policy agenda, which would place service users at the heart of what they do.

## A strategy for human rights

21 Our review revealed that 58 per cent of public bodies surveyed had no clear corporate approach – this demonstrated no improvement on last year’s findings. Most local authorities continued to review policies and practices on a piecemeal basis and to respond to case law. In the health sector the picture was worse, the new strategic health authorities are not monitoring the performance of health trusts in this area and primary care trusts (PCTs), have neither the capacity nor resources to respond to the implications of the Act. Mental Health Trusts are better prepared because of developing case law.

22 Across police authorities there is a more positive response, due to the agenda being driven nationally by the Association of Chief Police Officers (ACPO). However, probation and fire services followed a similar pattern to local government.

23 We found several examples of well-organised bodies with corporate systems in place that support frontline managers and make sure that human rights are integrated into decision-making processes. Westminster Council has a good approach to ensuring that human rights are mainstreamed into its processes (**Case study 1**).

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### Case study 1

#### Westminster council’s corporate approach

Westminster Council has mainstreamed human rights into its core processes. Prior to the Act Chief Officers were tasked with completing an audit of their departments to highlight areas of risk that might be susceptible to legal challenge. The legal department assisted with the identification of risk areas. Reports detailing each department’s findings were reported back to service committees and action plans were developed.

The facilitated approach adopted by the legal department meant that frontline officers became familiar with human rights implications and resulted in a closer working relationship on tackling these issues. For example, social services benefited when it came to amend its child protection and mental health procedures.

In 2002 all new members received training on human rights and those with specific responsibilities received specialist training. On a general level, members are kept informed on a weekly basis of emerging issues, including human rights.

The Council has also developed a best practice guide to report writing, which incorporated guidance on the Act. It is now a requirement that every report should

contain a paragraph, that sets out the precise terms and reasons why the recommendation should be approved and alternatives considered. Each report is required to show that the Act's implications have been considered.

The Council also addresses issues when new implications are made known. For example, as part of its work for the introduction of an Arms Length Management Organisation it performed a risk assessment that considered human rights issues.

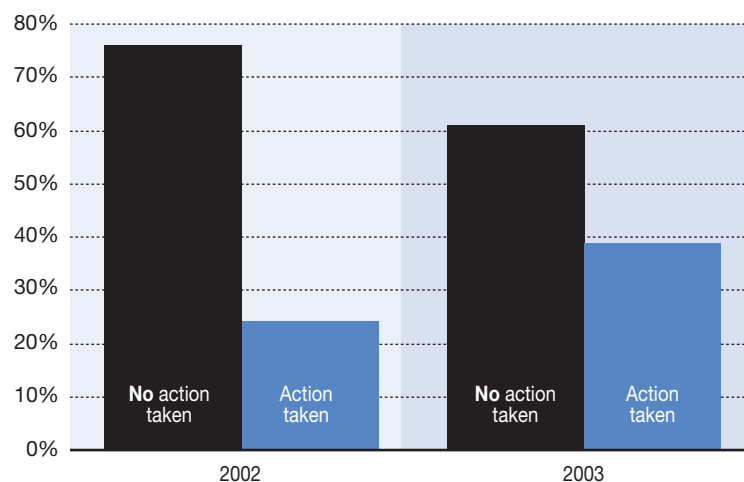
*Source: Review of Westminster Council's arrangements (2003)*

## Ensuring that contractors comply

- 24 When a public body contracts out services to a private or voluntary sector provider, it cannot assume that the service provider will be liable for any breach of the human rights of service users. Most public bodies have no arrangements. Although some improvement has been made since our May 2002 findings this continues to be a major area of weakness for public bodies and the results of our assessment reflect this. No action has been taken in 61 per cent of local government, health and criminal justice bodies.
- 25 Overall, we found more activity in this area but the health sector continued to lag behind. We found two health trusts that had taken action to encourage general practitioners to follow good practice, as set out in British Medical Association (BMA) guidance. Across local government we found some examples of tendering and contracting processes being revised to comply with human rights legislation (**Exhibit 4**).

### Exhibit 4

#### 2002/03 comparison of arrangements made by public bodies to ensure that their contractors comply with the Act



*Source: Analysis of progress made across 175 public bodies*

- 26 The complexity and difficulty experienced by public bodies in ensuring that contractors comply with the Act cannot be underestimated. This is also compounded by emerging case law as to what can be defined as a public body under the Act. Following the decision of the Court of Appeal in *R (Heather) v Leonard Cheshire*, most private organisations that contract with public bodies to provide services do not constitute public bodies for the purposes of the Human Rights Act, despite the public nature of the work in which they engage. Unless the public body exerts a significant degree of operational control over the service provider, it is likely that the courts will consider the service provider to be outside the scope of the Human Rights Act. The courts have made it clear<sup>1</sup> that individuals may bring an action against the public body that entered into the contract rather than the supplier for failing to protect adequately their human rights (**Box B**).

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## Box B

### Suggestions from the courts for public bodies commissioning services

In order to minimise breaches of human rights by service providers, public bodies should, when negotiating contracts, require the service provider to undertake to protect the human rights of service users. This will bind service providers to the Act. If an individual's human rights are breached by a service provider who has entered into a contract that guarantees service users' rights, an individual may bring a claim directly against the service provider using the Act. If a public body enters into contracts in this way it will have endeavoured to protect the rights of service users.

*Source: Review of case law*

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- 27 If public bodies negotiate contracts with service providers that ensure that the human rights of service users will be protected, this should lead to improved services. If the service provider fails to meet its responsibilities under the contract, it is open to challenges from both the public authority with whom it contracted and the individuals who were adversely affected by its failings.

<sup>1</sup> *R (Heather) v Leonard Cheshire Foundation* (2002).

## Policies and procedures

- 28 Prevention rather than cure is a sound long-term approach to improving services and minimising the risk of challenge. Public bodies should have identified high-risk service areas and have performed departmental audits of policies and procedures for compliance with the Act.
- 29 We found that 44 per cent of public bodies have stalled. This was as high as 60 per cent in the health sector. Where progress had been made it had often stopped because of the need to respond to competing priorities and because of the negative response taken by public bodies to the Act by only responding to challenge.
- 30 One local authority, where a number of unsuccessful human rights complaints had been brought, saw this as evidence of complying with the Act. It did not see any further merit for mainstreaming the Act into its decision making, policies and practices. In another authority competing priorities prevented it from seeing the Act as an issue to pursue. By not taking into account the rights guaranteed by the Act, public bodies will not be able to offer services of a higher standard that are tailored to the needs of individual service users. Public bodies that appreciate the implications of the Act not only minimise the risk of being challenged successfully but also become better service providers.
- 31 Although equalities legislation is complementary to human rights, it is the exception rather than the rule that links are made between the two when policies and practices are reviewed by public bodies. It is often the case that public bodies will review the same policies and practices not once but twice for both sets of legislation and will probably do so again for the new employment directives for age, religion and sexual orientation. There is scope to improve service delivery if better links are made between the various pieces of legislation. However, this situation has not been helped by the complexities of the current equalities structure and legislative framework.
- 32 Of the public bodies that have carried out an assessment of their policies, 49 per cent of those made changes across a wide range of service areas. In health trusts many of these changes have been driven by clinical and ethical need and followed Department of Health and BMA guidance. For example, the BMA reviews all guidance for clinicians against human rights principles and has published general notes on the implications of the Act for various aspects of medical care, including the right to access medical treatment. It has also stressed the importance of accurate and detailed recording of both the decision and the decision-making process by medical practitioners to ensure that decisions can withstand scrutiny against the principles set out in the Act.
- 33 Where public bodies have made policy and procedural changes these have generally been ad hoc across a number of service areas. The range of policy changes also reflects the pervasiveness of the legislation (**Box C, overleaf**).

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## Box C

### Changes made by public bodies to their policies and practices

- A children's health trust has reviewed its procedures for patient's property, admissions criteria for referrals, core standards of induction training, clinical record keeping and communications.
- A health trust has conducted policy reviews of consent and resuscitation policies, violence and aggression policies, selection and recruitment and disciplinary policies, patient control and restraint policies.
- A council had revised its policy for adult care services 'working with asylum seekers' to ensure that asylum seekers who have special needs are treated fairly and without discrimination by the council.
- Several social services departments have amended their policies and procedures for mental health, working effectively with interpreters' procedures, inter-agency child protection procedures, care programme approaches and access to records policies.
- A housing department has taken advice on issues such as discrimination against non-spouses and same sex partners in succession, housing allocation policies, nuisance neighbours and racial harassment.
- A number of councils' standard contracts and grant conditions have been amended to ensure that human rights issues and obligations are clearly delineated.
- A number of planning departments have allowed public participation at planning committees and changes to licensing procedures.
- A borough council has improved its procedures for appeals by appointing an independent chair.
- A city council updated its decision-making guide for its Constitution with reference to the Act.
- A health trust has strengthened its harassment and bullying policies using the Act.
- A council's complaints procedures has been revised to include an independent panel to reside over complaints.
- A London borough is examining its eviction procedures and naming and shaming policies.

*Source: Research findings from 175 public bodies*

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## Monitoring new developments

- 34 Frequent successful legal actions have been brought by individuals against public bodies using the Act. These actions have forced service providers to change the way that they act. Public bodies must learn the lessons from these cases and they can only do this if they have systematic monitoring arrangements in place.
- 35 Our assessment showed that 56 per cent of public bodies were not monitoring case law developments on a regular basis. When this information was broken down a further 67 per cent of health bodies showed no improvement.
- 36 The problem is exacerbated in health because it is difficult to identify an appropriate officer who has responsibility for overseeing and monitoring developments. This task can be shared by several people who neither have the time, expertise or resources to perform the function well. In police authorities monitoring is more systematic with solicitors keeping a watching brief. In local government the quality of monitoring was varied, in particular lessons learnt from case law were not always being communicated to frontline managers by legal departments.

# 4

## Next steps and good practice

### What can you do?

- 37 We said in our last Bulletin that a human rights culture takes time to develop. Our current findings show that progress is slow and in danger of stalling. In our earlier Bulletin, we asked how well organisations were prepared and gave some pointers for implementing management arrangements that focused on ‘prevention and not cure’. You may want to refer to this Bulletin. To help you to meet some of the challenges involved we have set out below some practical examples, lessons to be learnt from legal cases and helpful guidance from other organisations.

### Learning from the cases

#### What can the case law teach public bodies about service provision?

- 38 We have identified a number of interesting cases for public service managers. In all case decisions important lessons must be taken on board from court judgments. If these judgments are applied properly they can help to improve services. Case examples and lessons learnt are included in **Box D**.

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#### Box D

##### Case examples and lessons learnt

###### **P & Q v Home Secretary (2002)**

**Case:** The case concerned the prison service’s policy that all children of female prisoners aged under 18 months were to be taken into care. Although the court stated that there was nothing wrong with this as a general policy, it was held that certain exceptions should exist so that prisoners’ Article 8 rights to a family life were not infringed. For example, it would be disproportionate for the policy to operate in a situation where the prisoner was coming to the end of her sentence. It is suggested, therefore, that general policies should contain some flexibility not only in order to comply with the Act but also to provide better services.

**Lessons learnt:** If a public body recognises that a general policy should be flexible enough to contain exceptions, it becomes more in tune with the individual needs of service users, resulting in improved services. Another important message to emerge from the case law concerns blanket policies. The court, while accepting that a public body may quite rightly formulate general policies, insisted that a degree of flexibility must also exist so that exceptions to such a policy may subsist, especially where human rights are concerned. Where continued application of the policy would lead to a disproportionate restriction on an individual’s human rights, an exception to the general rule must be found in order for the public body’s actions to comply with the Act.

### **Runa Begum v Tower Hamlets (2003)**

**Case:** The local authority had a duty to secure accommodation for the applicant, who was homeless. She was offered accommodation but rejected it on the grounds that the area was characterised by racism and drugs problems. A local authority officer reviewed the accommodation and concluded that it was suitable. However, the House of Lords upheld a Court of Appeal decision that this process did not comply with Article 6 ECHR, which provides that every person, in the determination of their civil rights and obligations, is entitled to a fair and public hearing by an impartial and independent tribunal. The local authority should have at least considered using its statutory powers to direct a review by an independent body rather than conducting a final review by its own officer.

**Lessons learnt:** Local authorities may be required, when making such decisions, to consider whether it would be appropriate to direct a review by an independent body rather than conduct the review itself. The requirement to act in this way not only avoids a potentially lengthy and expensive legal challenge but also carries the added benefit of improving the service provided to the individuals concerned. Their rights as individuals to fair, independent and impartial hearings are a legal necessity and a primary concern in decision-making procedures that affect them.

The House of Lords did not say that the local authority had to direct a review by an independent body but merely that it should have considered this as an option. If they had good reasons for believing that there was no need for review by an independent body, their procedures may well have been compliant with the Act.

### **R (Madden) v Bury Metropolitan Council (2002)**

**Case:** The local authority's decision to close a care home had to take into account the Article 8 rights of the residents to respect for their homes.

**Lessons learnt:** Local authorities must ensure that their procedures are compliant with the Human Rights Act so that decision makers fully explore the impact on the human rights of the individuals concerned and consider whether any infringement on these rights is both legitimate and proportionate. Not only does this result in better services, but it also avoids the costly litigation and damage to reputation that a successful challenge involves.

### **R (KB) v Mental Health Review Tribunal (2003)**

**Case:** The applicants were being detained under powers contained in the Mental Health Act 1983. They applied to the Mental Health Review Tribunal for a review of their respective detentions. Delays occurred in hearing their applications and the court found that this constituted a breach of their human rights. Consequently, the applicants were awarded damages.

**Lessons learnt:** The tribunal should have considered the patients' cases within the time limit stipulated in the Mental Health Act and European Article 5 caselaw. Had they done so, not only would they have avoided a costly legal challenge that culminated in the award of significant damages but the patients themselves would have received a better service, since they would not have suffered the distress of waiting for an unreasonable

time to have their cases reviewed. The court held that where human rights were an issue, public authorities could not rely on resource arguments to justify ineffective administration. In this case, the failure of the Mental Health Review Tribunal to review the detention of the applicants within the time limit specified by the relevant legislation resulted in an unlawful breach of their human rights. Adequate structures and procedures should be implemented by organisations to avoid breaching time limits.

#### **R v Mental Health Review Tribunal, ex parte H (2002)**

**Case:** The court held that the service provider is required to show that a patient is still suffering from a mental health disorder. The previous requirement that patients demonstrate that they are no longer suffering from such disorders was deemed to be too great a restriction on their Article 5 right to liberty.

**Lessons learnt:** Public authorities should consider the burden of proof in all such decision-making procedures in order to assess whether they are likely to be compliant with the Act.

#### **R (on the application of Haggerty) v St Helens Council (2003)**

**Case:** The Court held that the refusal by a council to increase the rates paid to a private residential home to the extent demanded by the home, and the subsequent closure of the home, did not breach the Convention rights of the elderly, mentally confused residents of that home. The private sector home was not a public body under section 6 of the Act but without deciding this issue, the council was obliged to consider the Convention rights of residents in its dealings with the home.

**Lessons learnt:** The decision has caused concerns about the application of the Act to the private sector. Nonetheless, in circumstances where, for financial reasons, a council must move elderly residents of a care home, great care must be taken to ensure that these residents' rights under Article 8 are not breached. This is likely to involve full consultation with residents, staff and relevant professionals in order to minimise the possibility of an inadvertent breach of Article 8.

- 
- 39 These cases are an illustration of some of the ways in which public bodies have been forced to alter their practices in order to be compliant with the Act. In most of these examples, the legal challenge could have been avoided had the right steps been taken to ensure that the human rights of the service users had been taken into account by the respective public bodies. Although case decisions are not the most important thing which will lead to systemic change, the examples illustrate how conforming to the demands of the Act will often lead to service improvement.

## Raising awareness

- 40 Developing a human rights culture means raising the awareness of everyone in the organisation. Building upon what we found last year, we came across a variety of approaches among the organisations we surveyed. Best practice was found in police and local authorities, as shown in **Case studies 2 and 3**.

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### Case study 2

#### Approach adopted by several police authorities

Police authorities identified raising officer awareness as one of the main areas of work. Education and training was delivered across their forces in a number of ways, including:

- specific training at all levels;
- integration of human rights into a variety of training courses;
- wide circulation of specific guidance, including Association of Chief Police Officers (ACPO) quarterly up-dates; and
- video training.

*Source: Analysis of good practice*

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### Case study 3

#### Warrington Borough Council's response

As part of Warrington's ongoing response to human rights, its legal department had facilitated cross-departmental training events with frontline managers. This was accompanied by specialist training given to members on the development control and licensing committees. Human rights has been further integrated in induction training for new members, along with the ethical governance and equalities. Tenants and headteachers have also been targeted for training with further awareness raising communicated through newsletters.

*Source: Analysis of good practice*

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- 41 Specific training is an added practical advantage of helping organisations to amend policies and procedures that could infringe the human rights of individuals. A training session held with fire service personnel helped them to identify and focus attention on policies and procedures that posed greatest risk (**Case study 4, overleaf**).

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## Case study 4

### Training with fire service personnel and tackling human rights issues raised

A session on human rights was held for fire service personnel being trained on fire service management courses. The session was given by an external solicitor and covered the background to the Human Rights Act and the convention rights. Issues that were identified in the discussions on the various rights included:

- right to life – rescuing the public/protecting employees and cadets/link with corporate manslaughter;
- degrading treatment – discipline and chastisement/horseplay and initiations;
- right to a fair trial – disciplinary and employment/service and enforcement of statutory notices and any ensuing prosecution;
- right to respect for family and private life – shift working/monitoring employees at work/locker inspections/home visits;
- freedom of thought, conscience and religion – dress code/standards of behaviour/opportunity to practice religion;
- freedom of expression – politically restricted posts/comments to the media/facial hair/length of hair/uniform;
- freedom of assembly – trade union activity/recognition of trade unions; and
- prohibition of discrimination – employment and severance issues/equality between whole time/retained/volunteers.

Issues such as the disciplinary code and the relationship between whole time, retained and volunteer firefighters are being actively looked at. They were also well aware of the issues relating to uniform and appearance and possible impact on health and safety legislation.

*Source: A workshop held with fire service personnel by an external solicitor*

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42 **Case study 5** shows similar approaches across a county's health community.

### Case study 5

#### A county's health community approach to human rights issues

A local health community, including acute, primary, mental health and NHS Direct as part of the ambulance service came together in a workshop because they felt that they had not adequately addressed the implications of human rights legislation and were uncertain how to do it.

Their objective was to begin to equip themselves to address the potential service risks and to mainstream human rights into their service improvement methodology.

Participants reviewed the Convention articles key to the NHS with specific examples. This provided a catalyst for the group to consider the implications for their service. They identified a number of examples of ways to improve their procedures. For example, Article 8 – right to respect of family and private life – led to a discussion about medical records, where it became clear that when transferring information between trusts it was vital that appropriate safeguards were in place. Also, article 5 – the right to liberty and security – had implications for mental health services. The group could think of a number of examples where organisations had probably breached the Act simply because the processes in place had not taken account of human rights.

The group considered implications for their organisations as employers and their role of commissioners of services for nursing homes and general practitioners, including what they need to do to have proper arrangements in place.

Participants agreed to:

- act as champions for their organisations;
- ensure that human rights was included as an agenda item at their Board meetings;
- form a human rights local network to share knowledge; and
- target high-risk policies as identified in the workshop.

*Source: An Audit Commission workshop held with health providers*

43 A number of organisations have used human rights as a framework to address service policy weaknesses. As a result they have successfully changed their policies for the better and identified where they need further assistance. To improve the delivery of core services, a probation service reviewed its policies and procedures in tandem with work on other equalities legislation, including the Race Relations (Amendment) Act 2000 (**Case study 6, overleaf**).

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## Case study 6

### Using Human Rights as a framework to risk assess policy weaknesses in probation services

As part of an integrated approach to human rights and diversity a probation service set about using human rights legislation as a framework to improve its services. Senior managers and staff leading on diversity issues identified a number of policies and procedures that warranted further attention. Examples included:

#### Article 6 – right to fair trial

- external complaints procedures that were inconsistent;
- lack of staff awareness of complaints procedures;
- concerns about exclusion from hostels; and
- availability of advice from solicitors for managers.

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

- risk to probation staff in making home visits;
- sanctity of rights and needs of victim; and
- protection of client information and lack of policy.

#### Article 9 – freedom of religion

- the need for staff to have greater community awareness;
- a wide variety of partnership arrangements were in place, but staff were not always aware of them; and
- a need for further work to give clear policy direction on managing implications of different faiths.

Since the workshop the Probation Service has committed itself to an improvement plan to address all of the issues.

*Source: An Audit Commission workshop held with probation service managers*

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## Strategy policies and procedures

### Positive promotion of human rights

- 44 The best approaches we identified were where organisations were positively promoting human rights in their equalities strategies, policies and practices and not just reacting to legal cases. We found:

#### Local government

- The positive promotion of human rights principles by a local education authority. Their school admissions policy integrates human rights. It begins *clearly education policies have human rights implications* and sets out that the policy exists to pursue a legitimate aim and is proportionate.



- Best practice is about positive rather than negative compliance and at the same council, when considering the approval of the drugs action teams annual return the human rights implications section states *the actions contained within the plan will aim to support in particular Article 8 – the right to privacy and respect for family life, home and correspondence.*
- Positive compliance has been taken by a number of local authorities in respect of planning and development control. Procedures have been strengthened for public consultation and members of the public are allowed to address committees on planning applications.
- Young Minds, a mental health charity for young people, has run workshops with teachers and school governors explaining the key principles of the Act and its implications for education services. In particular, they were made aware that, as decision makers, they must consider whether what they do restricts the Convention rights of pupils and whether such interference is justified.

#### Health

- Services configured around good practice meant that a health trust had arrangements in non-clinical areas for compliance with human rights legislation. There was good access for patients and their families to translation services, cultural issues were dealt with sensitively for both patients and staff, including well developed chaplainry provision for different faiths and religions, flexible policies for staff and paternity leave to accommodate religious festivals.
- A positive commitment to integrate human rights into corporate policies was made by a health trust in its annual plan 2003-04 which is made available to the patients and the public. Among a number of initiatives, it is developing a tool kit for health service managers and making arrangements to ensure that external contractors and suppliers comply.

#### Cross cutting

- The Greater London Authority (GLA) equalities agenda is underpinned by human rights. It has taken ‘a rights-based approach’ to its strategy for promoting equalities in London. It has also made it a public document and goes further than the requirements set out in existing legislation, thus promoting equality of opportunity across race, sex, disability, age, sexual orientation and religion.
- A learning disabilities guide promoted the Act as a tool for improving services to people with learning disabilities<sup>1</sup>. It stressed what human rights means for people with learning disabilities and how those rights could be protected. The Guide provided a framework to question and, if necessary, challenge any policy that appears to be in breach of the Act.

<sup>1</sup> The British Institute of Learning Disabilities:  
*Easy Guide to the Human Rights Act*  
(2002).

## Human rights as a framework for decision making

- 45 Enabling frontline staff to adapt their practices to the demands of the Act is one of the key challenges that public bodies face. Human rights legislation can help to improve the decision-making process in particular by strengthening both the detailed recording of the decision and the decision-making process. One way to achieve this is through the use of checklists, that require staff to consider how their actions might impact on the human rights of service users. Lancashire County Council has developed its own approach to ensure that decision makers take human rights into consideration when making decisions (**Exhibit 5**).

### Exhibit 5

#### Lancashire County Council human rights checklist



**Human rights checklist**

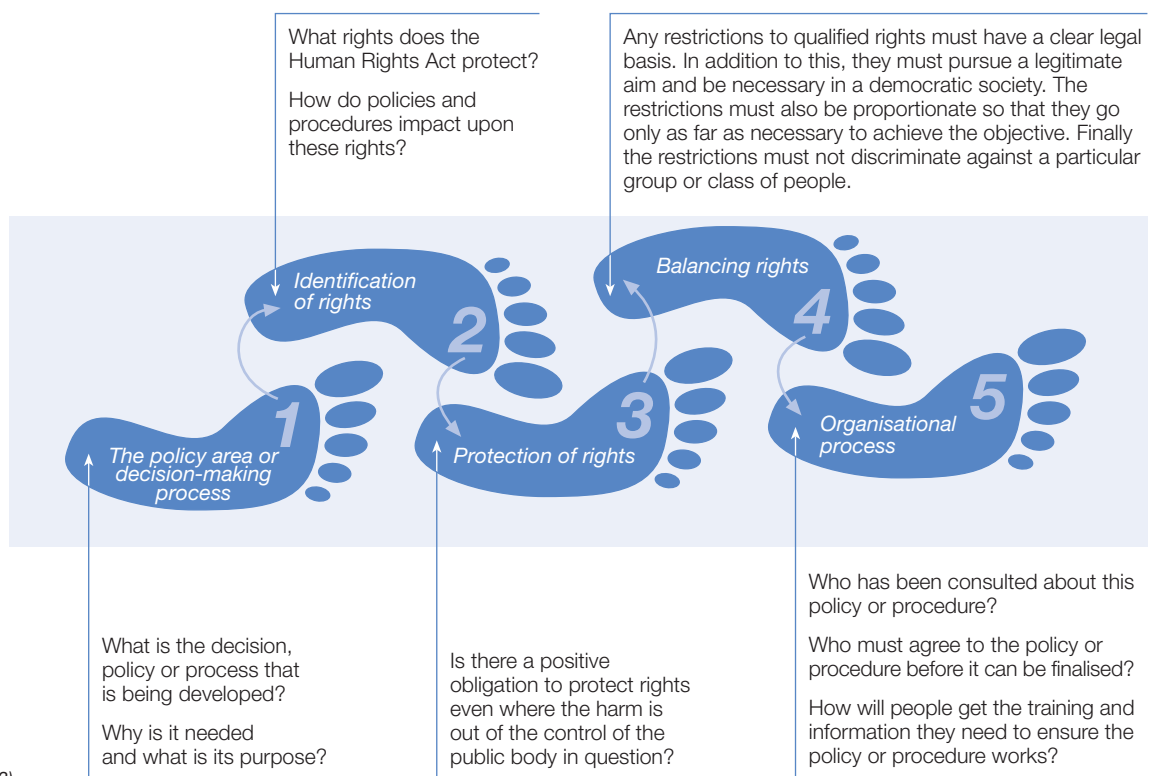
- 1 Has the author of the report taken into account the Human Rights Act? If not, the item must be returned to the author.
- 2 Is the proposed recommendation or action likely to result in any Human Rights Act implications?
- 3 Identify the Convention right or rights likely to be affected.
- 4 Outline briefly any Consultation with interested parties.
- 5 Identify groups or individuals likely to be affected.
- 6 Explain why an action or recommendation is necessary in a democratic society by reference to the actual Convention/Act.
- 7 What is the legal authority for taking a decision/action?
- 8 What is the aim of the recommendation/action and are the potential effects proportionate to this aim?
- 9 Does the report take into account any human rights issues highlighted above?

**Source:** Lancashire County Council's approach to human rights

- 46 Other organisations, such as the Legal Action Group (LAG), and Standards Board for England, have provided practical guidance to help frontline service managers and members using human rights as a framework to aid better decision making. For example, practical guidance has been provided for members who sit on local authority standards committees on how to uphold article 8 rights when balancing issues of good conduct and the protection of the private life of members.<sup>1</sup> Similarly, the requirements of respect and dignity underpin the Ethical Code of Conduct, which they have to comply with.
- 47 The LAG decision-making model (**Exhibit 6**) also provides a sound approach for helping managers to understand the implications of human rights on service decisions.

### Exhibit 6

#### Decision-making model for non executives and service managers



Source: Legal Action Group  
Human Rights Act Toolkit (2003)

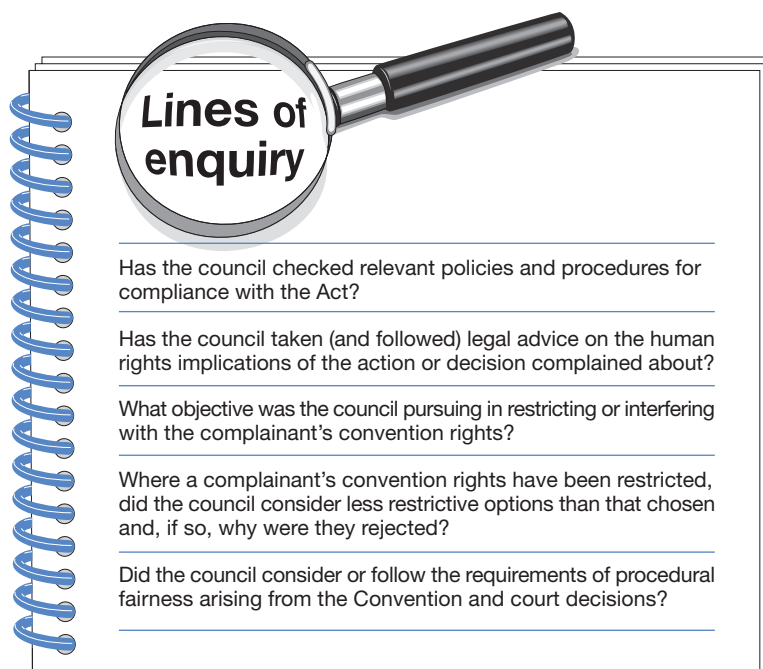
<sup>1</sup> The Standards Board for England: *The case review: the code Q&A: Vol1: No 1* (2003).

## Managing complaints effectively using human rights

- 48 One of the challenges for public bodies is to have effective complaints procedures that make reference to the Act. A good practice organisation would ensure that the person scrutinising the complaint has sufficient knowledge of the Act and its relevance. Depending on the nature of the complaint the initial scrutiny should consider whether the subject engages one or more of the Convention rights and whether or not the organisation's actions are compliant with the Act. Managing complaints in this way should ensure that:
- the risk of a complaint escalating into a court case or judicial review is minimised;
  - risk control systems are strengthened and lessons can be learnt and actions can be taken where non-compliance occurs;
  - decisions and the complaints process can withstand external scrutiny; and
  - accountability is improved for the complainant.
- 49 The Investigation Manual of the Commission for Local Administration in England sets out a number of useful examples of lines of enquiry that refer to the Act for investigating complaints in local authorities (**Exhibit 7**).

### Exhibit 7

#### Examples of lines of enquiry for investigating complaints



- 50 These are examples of the kind of enquiry that may lead to more effective handling of complaints and have relevance to all public bodies. However, it must be stressed that reacting to complaints without paying attention to the positive promotion of human rights is not an appropriate response to the Act.

## Ensuring that subsidiary bodies comply

- 51 A good practice public body will adopt a pro-active approach to protecting service users' convention rights when contracting out the provision of its services. Some authorities are beginning to build human rights concerns into their risk management systems; others adopt contract clauses with termination notices if a contractor defaults on its human rights responsibilities.
- 52 Local government has a key role to play if human rights are to be successfully integrated into the community. We found a notable example of a local authority social services community mental health team responsible for the assessment, treatment and care of people in the community briefing service providers and raising human rights as a regular agenda item on a contractor's forum. At another authority we found an example of a report writing guide, *getting it right* for service managers who write contracts. The guide took account of human rights issues.
- 53 Consideration of human rights legislation can lead to improvements in the contracting process. The contracts secured will be better tailored to the needs of the individual and, in particular will seek to protect their Convention rights. You may want to consider whether or not your organisation has taken all of the necessary steps to improve its contracting process for human rights and to minimise the risk of legal challenge. You could use the checklist set out overleaf as a starting point.

## Checklist

### How well prepared are you for ensuring that contractors comply with human rights legislation?

If you are not sure whether your organisation has taken any steps, use this checklist as a starting point. If any of your answers are 'no' or 'don't know' then you may need to take some action.

	Yes	No	Don't know
1. The organisation's contracting arrangements identify the risks associated with the delivery of contracts for compliance with the Human Rights Act.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. When negotiating contracts you require the service provider to protect the human rights of service users.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3. Key contracts contain clauses that set out the service provider's responsibility for ensuring that all reasonable steps are taken to protect the rights of service users.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4. The organisation's procurement strategy sets out an approach for taking on board human rights legislation.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5. There is a contract plan, which among other contract terms, sets out how service providers will be monitored against compliance with human rights legislation.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. A system is in place to respond to third party complaints regarding service providers.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Contract monitoring sets out how to deal with serious failures of non-compliance with human rights legislation.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. The rules by which contractors are added to and removed from an approved list are clearly specified and reasons for turning down a contractor are clearly communicated.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. An appeals process is in place that allows bidders or contractors to question the decision-making process.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
10. I know where to find advice and support to help me with contracting arrangements.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Source: Audit Commission diagnostic

## Monitoring new developments

- 54 We stress that public bodies must have systematic monitoring processes in place if they are to learn the lessons from cases and apply them to improving services. Last year we drew attention to a number of practical ways in which this can be done. Best approaches included the following:
- Bexley Council reviews case law developments and summarises them in a human rights newsletter to all staff. The newsletters alert managers to the implications of case law on their services. An internal survey showed that 63 per cent of managers thought the newsletters helpful to the running of their services.
  - Working with frontline managers a legal services department has integrated human rights into the formulation of all policies and procedures, thereby keeping the Human Rights Act under continuous review.

# 5

## Our work in this area

- 55 This publication gives a flavour of the Audit Commission's continuing work in this area in relation to local government, health and the criminal justice sector.
- 56 We have available a number of self-assessment tools and management arrangements reviews. These can help public bodies to assess how effective their arrangements are for complying with the Act. A new development is our workshops, which have been used both with single and multiple organisations. Each review is facilitated by a specialist trained in this area.



## Other guidance

- 58 Further information on aspects of the Human Rights Act 1998 and its implications is available from the following websites.

### Web sites

**[www.lcd.gov.uk/hract/hramenu.htm](http://www.lcd.gov.uk/hract/hramenu.htm)**

The Human Rights Unit at the Department of Constitutional Affairs has information on its latest human rights seminars, new study guide for public authorities, frequently asked questions and statistics on human rights since October 2000.

**[www.legislation.hmso.gov.uk/acts/acts1998/19980042.htm](http://www.legislation.hmso.gov.uk/acts/acts1998/19980042.htm)**

Full transcript of the Human Rights Act.

**[www.echr.coe.int](http://www.echr.coe.int)**

Detailed analysis of up-to-date Strasbourg case law.

**[www.doh.gov.uk/humanrights](http://www.doh.gov.uk/humanrights)**

Dedicated site for guidance on the human rights act for health bodies, case studies and updates.

**[www.charitycommission.gov.uk](http://www.charitycommission.gov.uk)**

Mainly concerning charities but covers issues relevant to public services.

**[www.lga.gov.uk/lga/humanrights](http://www.lga.gov.uk/lga/humanrights)**

Includes core guidance for local authorities.

**[www.cheshire.police.uk/rights](http://www.cheshire.police.uk/rights)**

Includes ACPO audit guide and links on other human rights.

**[www.parliament.uk/commons/selcom/hrhome.htm](http://www.parliament.uk/commons/selcom/hrhome.htm)**

Up-to-date information on reviews of primary legislation, the case for a human rights commission.

**[www.venables.co.uk](http://www.venables.co.uk)**

A website dedicated to human rights and mental health sponsored by Lambeth Healthcare Trust.

**[www.doughtystreet.co.uk](http://www.doughtystreet.co.uk)**

Dedicated human rights site for barristers' chambers.

**[www.scottishhumanrightscentre.org.uk](http://www.scottishhumanrightscentre.org.uk)**

A national body for policy and research and case law in Scotland.

**[www.courtservice.gov.uk/lexicon](http://www.courtservice.gov.uk/lexicon)**

Court service web portal.

**[www.humanrights.org.uk](http://www.humanrights.org.uk)**

One Crown Office Row's HR up-date: a database of 400 reports and cases on human rights which demonstrate its impact on cases for practitioners.

**[www.cre.gov.uk](http://www.cre.gov.uk)**

The Commission for Racial Equality: human rights information.

**www.lag.org.uk**

Legal Action Group: human rights publications and training.

**www.bihhr.org**

British Institute of Human Rights – latest developments, lunchtime seminars, newsletters.

**www.nhs.uk**

The NHS Litigation Authority has recently set up a new human rights information service for the health service.

## Publications

*Rights brought Home: The Human Rights Bill*, Human Rights Unit at the Department of Constitutional Affairs.

*Core Guidance for Public Authorities*, Human Rights Unit at the Department of Constitutional Affairs.

*Deciding Rights – applying the human rights Act to good practice in local authority decision-making* (Local Government Association).

Blackstone's *Human Rights Digest* by Keir Starmer (this pulls out the principles underneath the law).

*The Human Rights Act and the European Convention on Human Rights* by Keir Starmer – an easy read for non-lawyers.

*Something for everyone* published by the British Institute of Human Rights, authored by Jenny Watson. It looks at the implications of human rights for vulnerable sectors.

*Human Rights Act Toolkit* – Jenny Watson and Michael Woolf, The Legal Action Group.

The Easy Guide to the Human Rights Act: Learning Disabilities Guide – BILD.



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National Report, 2000, ISBN1862402248, £20  
Stock Code LNR1395



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Management Paper, 2003, ISBN 1862404135, £25  
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