



Older People's Commissioner for Wales  
Comisiynydd Pobl Hŷn Cymru

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# Making rights real in public services

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# The Older People's Commissioner for Wales

The Older People's Commissioner for Wales is an independent voice and champion for older people across Wales. The Commissioner and her team work to ensure that older people have a voice that is heard, that they have choice and control, that they don't feel isolated or discriminated against and that they receive the support and services that they need.

The Commissioner promotes human rights and a rights based approach to public services and works to ensure that Wales is a good place to grow older, not just for some but for everyone.

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# Introduction

Ageism is an issue that still affects older people across Wales – many older people feel that services discriminate against them simply because of their age, whilst the language used about older people can often be derogatory and disrespectful.

As Commissioner, I take every opportunity to challenge ageist and discriminatory thinking and promote the value of our older people, making clear the significant contribution they make to our communities and why ageist practice leads to worse outcomes for older people, both in the short and longer term.

I want to grow knowledge and thinking about how to recognise and address ageism and discrimination, and why it is essential to take an asset-based approach to deliver positive change that will make a big difference to older people's lives.

This training, which builds upon a series of successful pilot sessions delivered across Wales, is designed to help professionals to better understand the impact of ageism and discrimination upon individuals, families and communities, and how this often results in public services that do not meet the needs of older people. Building upon the pilot sessions, this training also has a far greater focus on protecting older people's rights and using a rights based approach to improve service delivery.

Putting into practice what you learn through this training will help you to develop more inclusive services, with a rights based approach at their heart, essential to meet the changing needs of older people and deliver the best possible outcomes on their behalf.



**Sarah Rochira**  
**Older People's Commissioner for Wales**

# What is Ageism?

Ageism is treating people differently based upon their age or perceived age. It is a serious issue which can devastate lives. Ageism is also known as age discrimination and it is prohibited under the Equality Act 2010. This means that if you experience it, there is legal protection and you can do something about it.

## Equality Act 2010

Under the Equality Act people are not allowed to discriminate, harass or victimise (Appendix A) another person in employment and the provision of goods and services because they have any of the protected characteristics:

- Age
- Disability
- Gender reassignment
- Marriage and civil partnership
- Pregnancy and maternity
- Race
- Religion and belief
- Sex
- Sexual orientation

There is also protection against discrimination where someone is perceived to have one of the protected characteristics or where they are associated with someone who has a protected characteristic (discrimination by association).

# What are human rights?

Human rights are the basic rights we all have because we are human. They are intended to create the conditions under which all people can live in dignity and develop our full potential. These rights apply to everyone equally and can only be taken away in specific situations and according to law. They provide an important means of protection for the most vulnerable in our communities, including older people, by placing public authorities – including the government, hospitals, and social services – under an obligation to treat people with fairness, equality, dignity, respect and autonomy.

Many people think that human rights are only for overseas countries, or that they are a complex legal topic. But human rights are relevant to many of the decisions people make and the situations people experience every day. They are not just about the law and taking cases to court. Very often problems that involve human rights can be solved by talking the problem through and looking at human rights frameworks for guidance.

## What is a rights based approach?

A rights based approach is one in which human rights instruments are used pro-actively (i.e. creating the conditions in which human rights can be enjoyed rather than identifying and remedying violations after they have occurred) to achieve the following:

- empower people using public services, or ‘rights-holders’, to understand, claim and enjoy their human rights.
- increase the ability and accountability of those delivering public services, or ‘duty-holders’ to respect, protect and fulfil rights.

# PANEL Principles

The above changes may mean a significant shift in power between services and the people using them. This shift in power can be helped by using the PANEL principles:

- **Participation:** everyone has the right to participate in decisions which affect their lives. 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.
- **Accountability:** of those with a duty to protect rights; this requires effective monitoring & effective remedies. For accountability to be effective there must be appropriate laws, policies, institutions, administrative procedures and mechanisms of redress in order to secure human rights.
- **Non-discrimination:** all forms of discrimination in the realisation of rights must be prohibited, prevented & eliminated.
- **Empowerment:** everyone should know their rights and be supported to participate in decision making, and to claim their rights where necessary.
- **Legality:** public authorities should expressly apply the Human Rights Act and make linkages with international & regional human rights standards

# Why do human rights matter?

There are two main arguments about why human rights and rights based approaches matter. The first is that it a rights-based approach has intrinsic moral value: is the right thing to do. The second is that a rights based approach makes good business sense: it leads to better and more sustainable outcomes.

## **Human rights are the right thing to do. They:**

- Offer fresh ways to address the dilemma faced by public services of how to keep human beings, rather than ‘systems’ or ‘targets’, at the heart of these services.
- Contribute to equality and social justice by encouraging consideration of a broad range of social groups.

## **Human rights make good business sense. They:**

- Ensure public services meet their legal obligations.
- Provide a framework to aid decision making and mitigate risk.
- Can provide guidance in ambiguous situations and clarify expectations about fair and dignified treatment.
- Can drive up quality and accountability.
- Do not eliminate hard choices about where to spend resources, but do help ensure fair decision-making to guide policy development, service redesign and resourcing decisions.



# What are the costs of not adopting a rights based approach?

The costs of overlooking rights in the design, delivery and review of services runs the risk of services being too generic; a 'one-size fits all' approach that doesn't meet people's needs. In turn, this means that people using the service may keep returning with the same or worsening issues, may make complaints or even seek legal advice about litigation. With current financial pressures, this diverts resources into crisis management, responding to complaints and dealing litigation, rather than from contributing to people's well-being, safeguarding and prevention.

## Which human rights instruments can I use to uphold and protect the rights of older people in Wales?

Rights are protected by a range of international human rights instruments which contain obligations for states and rights for individuals within that state. Although not enforced directly in UK courts, these human rights instruments are monitored internationally. Such human rights instruments include:

- UN Convention on the Elimination of All Forms of Discrimination Against Women
- UN Convention on Rights of Persons with Disabilities
- UN Convention on the Rights of the Child

In Wales, the legal status of the UN Convention on the Rights of the Child has been strengthened in the Rights of Children and Young Persons (Wales) Measure 2011. Whilst older people don't enjoy their own convention, they do have guidance provided by the UN Principles for Older Persons (Appendix B). In Wales, public authorities are expected to have due regard to these principles whilst carrying out functions under the Social Services and Well-being Act 2014.

In the UK, human rights are most directly protected by the European Convention on Human Rights (ECHR). This was drafted by all the states of the Council of Europe -

including the UK - and came into force in 1953. The Convention consists of a series of Articles: short statements defining a right or freedom, together with any permitted exceptions. The rights in the Convention apply to everyone in the UK.

The Human Rights Act 1998 (Appendix C) brings most of the rights and freedoms contained in the ECHR directly into UK law. This means that cases based on the rights and freedoms in the Act can be argued in a UK court or tribunal. It also means that all other legislation should also be interpreted and applied in a way that is consistent with the rights included in the Act. Public authorities (e.g. hospitals, local authorities) have an obligation to act in accordance with the Convention rights and therefore public officials must understand human rights and take them into account in their day-to-day work. This is the case whether officials are delivering a service directly to the public or devising new policies or procedures.

# Qualified & Absolute Rights

Some rights are known as ‘absolute’ rights. This means they can never be limited or restricted under any circumstances. Other rights are non-absolute (i.e. they are limited or qualified) and may be limited or restricted under certain conditions, such as to protect the rights of others or the wider community. The conditions under which they can be limited or restricted are specified in the article that sets out the right. To consider whether a restriction of a qualified right is justified, it is helpful to think through the following questions:

- Legality: is there a legal basis for the restriction of the right?
- Is there a legitimate aim or justification for the restriction such as the protection of public health or the protection of other people’s human rights?
- Is the action proportionate (Appendix C): is it the minimum necessary restriction of the right?

## Using human rights instruments

It’s important to remember that human rights are not always about a ‘right or wrong’ answer. Human rights can help ensure the process of decision making - in the often busy, fast-paced environment of public services – is a fair one, with the individual at its centre. Using a human rights framework should help you to make the best decision in the circumstances. The Scottish Human Rights Commission produced the FAIR Flowchart to assist thinking and decision making in scenarios with human rights implications (<http://www.scottishhumanrights.com/careaboutrights/flowchart>).

## 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?
- 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?

# What do older people want from public services?

- To be safe
- To be well cared for
- To be made better where possible
- To be helped to stay living as independently for as long as possible and to do the things that give meaning and value to their lives
- To be treated with dignity and respect
- To be treated with value and worth and be able to contribute

All of us will use public services at some point in our lives. For older people, this often means getting care or support from health or social services, often when they are at their most vulnerable. Human rights values are, in many ways, the very same values that lie at the heart of good public services.

# Case Study: Hospital

**Name:** Gwilym

**Age:** 83

**Family / Housing:** Lives in supported, adapted accommodation with domiciliary care provided by the local authority. His daughter visits most weeks. Currently in hospital with kidney stones.

**Livelihood:** Previously, farming, although long term disabilities – Gwilym is blind and has limited mobility - mean he has claimed health related benefits for approximately 15 years.

**Physical Health:** Generally good.

**Interests:** Gardening and walking his dog.

## In Gwilym's own words:

“Oh, I hate it here. They say I need laxatives to help me pass the kidney stones, but I can't stand the pain and I begged them not to give them to me. I can't see what they are giving me and they get impatient when I ask them what I'm taking. They say I must take the laxatives and basically told me to stop mithering them. They treat me like a child.

“When I take the laxatives, I can't get to the toilet fast enough. I don't know my way around as they keep moving me from ward to ward. A few times now, I've soiled myself and have to find the bathroom to wash me and my clothes. It's humiliating. I just want to go home – I know where everything is there and I have my dog to help me get around places I don't know.

“I don't know how to get a drink without bothering the nurses or other patients. And food is a problem. I don't know what they mean when they say 'the designated food point' and so I've missed some meals. Sometimes they bring my food, though I don't always know it is there and even when I feel for it and find it, I don't know what is on the tray. I burnt my legs one day when I accidentally knocked it over myself.”

## Related Good Practice

Using human rights principles, Betsi Cadwaldr University Health Board Nutrition and Hydration Human Rights Project Group developed a toolkit for ward managers to drive up nutritional and hydration standards of care. At the heart of their toolkit are the following premises:

- Nutrition and hydration are important in protecting and promoting the right to life.
- Ensuring patients' get high quality nutrition and hydration is an essential aspect of care and they are basic requisites in supporting recovery.
- Nutrition and hydration are important factors that influence patient clinical outcomes and also their satisfaction with the quality of care provided and hospital stay overall.

The toolkit and learning are available to use: <http://www.wales.nhs.uk/sitesplus/861/page/70331>

## Legal Case

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 her 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 these notices on her file as her doctors thought it would distress her.

Human rights were used in this scenario and the case was taken to court (*R. (on the application of Tracey) v Cambridge University Hospitals NHS Foundation Trust* (2014)). The court found that there should be a presumption that the patient be involved in such an important decision and that there needed to be convincing reasons not to involve her. Convincing reasons would need to be a risk of physical or psychological harm, rather than just distress. The court declared that the failure of the hospital to consult this patient in their decision to insert a DNACPR in her notes was unlawful and in breach of Article 8 of the Human Rights Act (specifically, her right to have her physical integrity and autonomy protected under Article).

# Case Study: Home Environment

**Name:** Betty

**Age:** 62

**Family / Housing:** Supported to live independently at home. Betty's husband also lives at home and was Betty's carer until he developed a heart problem over the last year. A private provider supplies a carer, Gweneira, paid for by the Local Authority.

**Livelihood:** Receives disability related benefits.

**Health:** Betty takes mood stabilisers & is significantly overweight. She spends a great deal of her time in bed and very rarely leaves the house, not least because she has been unable to obtain a fitted wheelchair.

**Interests:** Jigsaw puzzles, feeding and watching the birds, reading novels, watching general knowledge quizzes.

## In Betty's own words:

"It's been four weeks since I had a bath. Gweneira pulled a muscle helping me last time and since then, her boss says she can only help me strip wash. Something about protecting her from harm at work. I don't want that ... It's embarrassing though and I don't ever feel properly clean. Especially now it's getting hotter and I'm more sweaty than usual.

I've asked the council for a shower, but can't get any sense out of them, even after 2 years of asking. It's getting me and my husband down. I need to lose weight because then maybe I could get in and out of the bath on my own. I'd also be able to use a standard wheelchair and get out of the house. The tablets I'm on don't help, mind. I look at food and I put on weight".



# Case Study: Care Home

**Name:** Non

**Age:** 89

**Family / Housing:** Lives in a local authority, residential care home in Blaenau Ffestiniog. Her son, daughter and 5 grandchildren live in the same village with one or more of them visiting most days. Non is a first language Welsh speaker and receives all her care in Welsh.

**Livelihood:** Previously a primary school teacher and seamstress. Now retired.

**Physical Health:** Generally good. Non is particularly pleased with her mobility following a knee replacement operation 10 years ago.

**Interests:** Meeting friends in local coffee shops and attending craft fairs when a lift is available.

## **In Non's own words:**

"I've lived here for 12 years & absolutely love it. I thought I'd spend my last days here. I see my son, daughter, grandchildren and friends almost every day. All the cafes know us – they give us free cake on our birthdays. It's a lovely community. I couldn't be happier. Well, until last month. They said this place is 'no longer financially viable' and is going to close. They told me they are moving me to Betws-y-Coed. Moving me? Don't I get any say?"

"I don't know what I'll do. How will my family get there? There are no buses and even if there were, it'd take them forever. The place I'm going to doesn't speak Welsh either, another big worry for me. My nerves have started again and I've been having panic attacks. This is my home, I don't want to go. I'm worried sick to be honest."

## Legal Case

A Local Authority in Plymouth was considering closing a residential care home for older people for financial reasons. The residents brought a case against the authority claiming that the closure of the home would be a breach of their human rights, including their right to respect for private life, family life and home. They argued that they had a reasonable expectation that the home would be their home for life. The panel deciding their case agreed and the home was not closed. The panel said that people's age should not be used as a justification for restricting their rights.

R (on the application of Cowl and others) v Plymouth City Council (2001)

From: [http://www.ageuk.org.uk/documents/en-gb/for-professionals/equality-and-human-rights/older\\_people\\_human\\_rights\\_\\_expert\\_series\\_pro.pdf?dtrk=true](http://www.ageuk.org.uk/documents/en-gb/for-professionals/equality-and-human-rights/older_people_human_rights__expert_series_pro.pdf?dtrk=true)

# Appendix A: Equality Act 2010 Definitions

**Discrimination** means treating one person worse than another because of a protected characteristic (known as direct discrimination) or putting in place a rule or a policy or way of doing things that has a worse impact on someone with a protected characteristic than someone without one, when this cannot be objectively justified (known as indirect discrimination). An example of direct discrimination is a person being refused medical treatment on the basis that they are 'too old'. An example of indirect discrimination is not investigating a person's physical condition thoroughly because their symptoms are assumed to be arthritis.

**Harassment** includes unwanted conduct related to a protected characteristic which has the purpose or effect of violating someone's dignity or which creates a hostile, degrading, humiliating or offensive environment for someone with a protected characteristic. An example is a person's colleagues at work repeatedly make jokes about their age, which the individual finds offensive. This would also apply if the individual is offended by age-related comments made about someone they associate with, such as a partner.

**Victimisation** is treating someone unfavourably because they have taken (or might be taking) action under the Equality Act or supporting somebody who is doing so.

# Appendix B: UN Principles for Older Persons 1991

## Independence

**Principle 1:** Older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help.

**Principle 2:** Older persons should have the opportunity to work or to have access to other income-generating opportunities.

**Principle 3:** Older persons should be able to participate in determining when and at what pace withdrawal from the labour force takes place.

**Principle 4:** Older persons should have access to appropriate educational and training programmes.

**Principle 5:** Older persons should be able to live in environments that are safe and adaptable to personal preferences and changing capacities.

**Principle 6:** Older persons should be able to reside at home for as long as possible.

## Participation

**Principle 7:** Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations.

**Principle 8:** Older persons should be able to seek and develop opportunities for service to the community and to serve as volunteers in positions appropriate to their interests and capabilities.

**Principle 9:** Older persons should be able to form movements or associations of older persons.

## Care

**Principle 10:** Older persons should benefit from family and community care and protection in accordance with each society's system of cultural values.

**Principle 11:** Older persons should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness.

**Principle 12:** Older persons should have access to social and legal services to enhance their autonomy, protection and care.

**Principle 13:** Older persons should be able to utilize appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment.

**Principle 14:** Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.

## Self-fulfilment

**Principle 15:** Older persons should be able to pursue opportunities for the full development of their potential.

**Principle 16:** Older persons should have access to the educational, cultural, spiritual and recreational resources of society.

## Dignity

**Principle 17:** Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.

**Principle 18:** Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.

# Appendix C: Human Rights Act 1998

## **The rights included in the Human Rights Act are:**

Article 2: Right to life

Article 3: Right not to be tortured or treated in an inhuman or degrading way

Article 4: Right to be free from slavery or forced labour

Article 5: Right to liberty

Article 6: Right to a fair trial

Article 7: Right to no punishment without law

Article 8: Right to respect for private and family life, home & correspondence

Article 9: Right to freedom of thought, conscience & religion

Article 10: Right to freedom of expression

Article 11: Right to freedom of assembly & association

Article 12: Right to marry & found a family

Article 14: Right not to be discriminated against in relation to any of the rights contained in the European Convention

## **Definitions**

### **Public Authority**

The term 'public authority' includes the NHS, social services, the police and central regional and local government, as well as any person or organisation which performs 'functions of a public nature'.

# Proportionality

The principle of proportionality is at the heart of human rights. When thinking about decisions that affect any of the qualified rights, it is important that the right is restricted with as little as possible, only going as far as is necessary to achieve the legitimate aim. The following questions can help 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 basic ideas behind the human rights at issue?





