

# **ABERDEEN CITY COUNCIL**



## **BEST PRACTICE GUIDE ON HUMAN RIGHTS**

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**Aberdeen City Council**  
**Best Practice Guide on Human Rights**

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## **Introduction**

This Best Practice Guide is a training tool. It is to help both policy-makers and decision-takers at all levels use human rights to improve the quality of policy and decision-making and so improve service delivery.

**Chapter 1** explains why human rights matter to Aberdeen City Council. They offer a framework in which a balance can be struck between the rights of individuals and the public interest. Their values, such as participation, accountability and transparency, are what is now expected from a public authority. An understanding of them simplifies compliance with a range of other rights-based standards such as equality and diversity, investigatory powers and information management

**Chapter 2** outlines what you need to know about the Human Rights Act. It introduces you to what you need to know about how it relates to what you do on a daily basis, including the key rights and how they can be used.

**Chapter 3** illustrates why and how to take a "rights-aware approach" in policy and daily decision-making. A Best Practice Guide Flowchart is presented and examples are given of how it works to help you solve problems.

**Chapter 4** demonstrates how to apply the flowchart to examples of service area issues which were raised by the audit.

**Chapter 5** provides auditing tools to help to check ongoing human rights compliance of the Council's policies, procedures and practice.

**Appendix 1** sets out the text of the Human Rights Act.

**Appendix 2** gives an overview of the audit recently carried out.

**Appendix 3** offers case studies for use in training.

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## Chapter 1

### Why human rights matter for Aberdeen City Council

In its **Statement of Culture** the Council committed itself to the **Founding Principles** of:

- *equality*
- *accountability*
- *quality*
- *partnership*
- *economy*
- *coherence*

Within its General Statement's section on Cultural Attitudes the Council pledged to "assist in developing and maintaining close working relationships to promote a *culture of respect* and team-working".

Other values stated throughout the Council's publications include such as "*participation*", "*consultation*", "*citizenship*", "*transparency*", "*diversity*" and "*community*", etc.

Although no explicit reference is made to human rights within the Statement of Culture they can in fact be connected to the realisation of each of the Founding Principles. Such principles and values can be given a coherence and be traced to the *Universal Declaration of Human Rights* which, in its Preamble, states that ... "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...*"

An increased awareness of the role of human rights, a "rights-aware approach", can in a real way help with translating all of such values into daily practice.

Developing a "culture of respect" is essentially developing a "human rights culture", one of respect for "the other".....whether of other race, religion, gender, socio-economic background, etc.

Human rights provide the framework of values and law which enables a balance to be struck between the individual and the community. Human rights therefore play a dual role....*protecting* the individual, particularly the most vulnerable, through making public authorities accountable....and *promoting* a culture within which all individuals and the community as a whole can flourish.

The key challenge in developing a "culture of respect" is the recognition that the *starting point* in policy or decision-making is respect for the dignity and rights of individuals....then progressing to

recognise how such individual rights are to be balanced with the needs and rights of others and with the general public interest through applying the principles of "legality", "legitimate aim" and "proportionality" which are illustrated in Chapter 3.

In this way human rights can play a vital role in realising the vision of "Aberdeen Futures".

## Chapter 2

### The Human Rights Act – what you need to know

The Human Rights Act 1998 (HRA 1998) has been in effect since October 2<sup>nd</sup> 2000. It enables individuals and private bodies to use rights contained within the European Convention on Human Rights (ECHR) in our domestic tribunal and court system. Up until the HRA 1998, individuals and private bodies had generally to apply to the European Court of Human Rights (ECtHR) in Strasbourg to take advantage of such rights. The HRA 1998 is, therefore, giving further effect within the UK to the ECHR and the ECHR is having a much greater impact on the day-to-day performance of functions by public authorities, including Aberdeen City Council.

For an analysis of the Human Rights Act case law in Scotland to date reference should be made to "The Use of Human Rights Legislation in the Scottish Courts", published by the Scottish Executive and available at [www.scotland.gov.uk/library5/justice/uhrl-00.asp](http://www.scotland.gov.uk/library5/justice/uhrl-00.asp)

- 1 **The Key Features** of how the HRA brings about this very important change include the following:-
  - (a) **Public Authority Duty**  
This applies to all functions of the Council, which must now be compliant with the ECHR.
  - (b) **Victim**  
An individual or private body can use the ECHR in legal proceedings involving a public authority, either in bringing an action against the authority for an alleged breach of an ECHR right or as a defence of proceedings brought against them by a public authority (Section 7, HRA 1998).
  - (c) **Remedies**  
A court or tribunal can award an appropriate order, including damages, in favour of the individual or private body if it is found that a right under the ECHR has been breached by the public authority (Section 8, HRA 1998).
  - (d) **Courts and Tribunals**  
The ECHR case law must be taken into account by courts and tribunals (Section 2, HRA 1998) which must also, so far as possible, interpret all legislation in a way which is compatible with the ECHR (Section 3, HRA 1998). This could mean that previous court decisions, known as "precedents", no longer rule if now considered to be incompatible with ECHR.
  - (e) **"Declaration of Incompatibility"**

If the superior court (the Court of Session, High Court and House of Lords) finds Westminster legislation to be incompatible with the ECHR and unable to be re-interpreted in a way making it compatible, then a "declaration of incompatibility" can be issued by the court which, however, in the particular case must apply the Westminster legislation (Section 4, HRA 1998). Thereafter, there is a fast-track procedure whereby if the relevant Minister considers there to be compelling reasons to amend the legislation to make it compatible then an order may be made by the Minister to so amend the legislation (Section 10, HRA 1998). Legislation of the Scottish Parliament can, however, be overturned by courts and tribunals as a result of the Scotland Act 1998 which requires the Scottish Parliament and Scottish Executive to comply with the ECHR.

(f) **Time Scales**

A victim must generally commence proceedings against the public authority within one year of the alleged breach of the ECHR. The court or tribunal could exercise a discretion to allow a longer period to have elapsed depending on the circumstances but the one year rule is also subject to any rule imposing a stricter time limit in relation to the procedure in question (Section 7, HRA 1998).

Public authorities are only generally liable for acts or omissions from the commencement of the HRA 1998 on October 2<sup>nd</sup> 2000. However, in proceedings brought by a public authority an individual can rely on rights under the ECHR no matter when the act or omission of the public authority (Section 22, HRA 1998).

(g) **Application to European Court of Human Rights in Strasbourg – the right to**

take a case to the ECtHR in Strasbourg still exists but, as before, only once domestic remedies have been first exhausted (Section 11, HRA 1998).

As may be seen from the above, the Human Rights Act 1998 has brought a significant change in how public authorities may be held to account in the exercise of their functions. The extent of the impact is being determined as the challenges in case law develop both in our domestic courts and tribunals as well as at the ECtHR in Strasbourg. For public authorities to do nothing but await the outcome of challenges, however, would be to invite unnecessary difficulties. It only makes sense to incorporate human rights compliance into best practice as far as possible. While this will not necessarily prevent legal challenges, it will reduce the number of challenges and enable the Council to better defend itself than if no proactive approach were adopted. This has certainly been the experience of the Scottish Executive which has been required to be compliant with the ECHR since effectively May 20<sup>th</sup> 1999 as a result of the Scotland Act 1998.

In order to develop best practice in compliance there needs to be a familiarisation with key concepts of how the HRA 1998 and ECHR actually work.

## 2 Key concepts of HRA 1998 and ECHR

### (a) A "Public Authority"

What is meant by a “public authority”, which bodies and functions are included, are omissions as well as acts covered and what are likely defences available to a public authority?

The requirement of a “public authority” to act compatibly with the ECHR is one of the most far-reaching features of the HRA 1998. Although lacking any exhaustive definition, Section 6 of the HRA 1998 does state that a “public authority” includes “a court or tribunal” and “any person certain of whose functions are functions of a public nature”. Whilst case law is still to shed much light on this question (for example, as regards public services being carried out by private contractors) there is no doubt that all of the functions of the Council require to be compliant with the ECHR.

Not only “acts” but, in certain circumstances, “omissions” (for example, failure to take action regarding a child's protection in breach of “a positive obligation” of an authority under Article 8 and the right to respect for private life, or under Article 3 and the right not to be subject to inhuman or degrading treatment or punishment, etc) can amount to a breach of the ECHR and a complaint under the HRA 1998.

There is a very important defence provided to a public authority by Section 6(2) HRA 1998 – that the authority had no choice but to act or fail to act in the manner it did because of the requirements imposed upon it as the result of Westminster legislation. The authority must however be very careful to ensure that in fact it had no discretion to act differently even if, at first sight, that may have appeared to have been the case. In such a case, where in fact the authority can rely on Section 6(2) HRA 1998 as a defence, the victim should properly bring proceedings for “declaration of incompatibility” which would not be against the public authority. It is of course extremely important to be clear that no such defence is available concerning legislation made by the Scottish Parliament, for example the Protection of Children (Scotland) Act 2003 or the Mental Health (Care and Treatment) (Scotland) Act 2003.

### (b) A "Victim"

Who can and cannot be a “victim” and be able to use the HRA 1998 and the ECHR? The HRA 1998 can only be exercised by a person, a group of persons or private body which meet the test of either having had suffered, or at risk of so doing, a breach of an identifiable ECHR right as a result of an act or omission of a public authority. No actual prejudice or detriment needs to have been suffered by the victim, simply a breach of an ECHR right. However, the victim must be affected personally and demonstrably

and so it is not open for pressure groups, trade unions or other representative organisations to use the HRA 1998 unless it itself was a “victim”. Such bodies could of course, support any individual member who was a “victim” but could not, for example, raise proceedings in its own name in opposition to a particular policy or practice of a public authority.

- (c) **Defences of alleged breaches available to a public authority** – generally speaking the ECHR provides a framework within which the individual’s right is balanced against the public interest. Attention needs to be paid to the particular right at issue in a case. Some are “absolute” (Article 2, right to life or Article 3, right not to be subject to torture or inhumane or degrading treatment or punishment), “limited” (Article 5, right to liberty and security of person, Article 6, right to a fair and public hearing) and “qualified” (Article 8, right to privacy, Article 10, freedom of expression). Each right, or Article, has to be read as a whole in order to assess, as with Article 8 for example, whether the public authority has interfered with the right but has done so in a way as permitted by the Article itself.

For the public authority to assess whether its acts or omissions, in terms of its policies, practices and procedures, are compatible with the ECHR or not, three key questions must be posed:-

- (1) Is it **"in accordance with the law"**? This requires the public authority to be acting within its powers, statutory or regulatory, and not arbitrarily or in a manner which the individual could not have been reasonably expected to have anticipated. For example, can an employees' email or telephone calls be monitored or can they be subject to covert CCTV surveillance without interfering with the right to privacy under Article 8?
- (2) Is there a **"legitimate aim"**, a justification for the interference? For example, Article 8(2) permits a breach in the following terms.... “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.” So, can a school be serving a legitimate aim if it insists upon a particular dress code for all pupils?
- (3) Is it **“necessary in a democratic society”** and **“proportionate”**? These extremely important principles require public authorities to demonstrate the pressing social need for any interference as well as the demonstration of a reasonable relationship between a legitimate aim and the means chosen to achieve such aims. This is probably for the Council the most critical question to be addressed in its day-to-day decision-making. It means that the Council could be successfully challenged if it has a legitimate aim and is acting within its powers but it has nevertheless failed to establish a pressing social need for its interference with an individual's right or it has failed to strike the

appropriate balance, the reasonable relationship between aim and means. For example, this is the critical issue in considering whether to ban or impose restrictions upon a march.

- (4) **"Margin of Appreciation"** – this is the doctrine belonging to the ECtHR which allows a member state a certain amount of discretion as to how it applies an ECHR right within its own jurisdiction. A similar area of discretion for public authorities is likely to be recognised by the domestic courts and tribunals and the further development of case law should provide some guidance as to its parameters. For example, this can arise when for budgetary reasons a local authority wishes to close a residential home for the elderly and in so doing arguably interferes with the right to respect for a resident's private and family life and home under Article 8.
- (5) **"Living Instrument"** – the ECHR is kept up to date through its being interpreted in keeping with the way society develops. This is particularly in the case of sexual identity or privacy rights, for example, and so it is important for authorities to ensure that their policies are kept up to date and compatible. This means that authorities need to be aware of developing trends in Strasbourg case law in order not to be left behind as policies and procedures become outdated and rendered potentially unlawful by the ECtHR. It is no longer good enough to await domestic legislation or to merely follow past "domestic case law".
- (6) **"Horizontal Effect"** – Authorities should be aware of the fast-changing domestic legal landscape in which courts as "public authorities" are now applying the ECHR in litigation between private parties and so providing what is referred to as a "horizontal effect" – that is, the application of the ECHR to disputes between private persons.

### 3 **The Key Articles for Aberdeen City Council**

Whilst the ECHR should be understood as a whole it is the case that certain Articles of the ECHR are more relevant than others although no Article should be disregarded. The key Articles for the purposes of this Best Practice Guide include Article 3 "right not to be subject to torture, inhumane or degrading treatment or punishment", Article 6 "right to a fair and public hearing", Article 8 "right to respect for private and family life, home and correspondence", Article 10 "freedom of expression", Article 14 "right not to be subject to discrimination" and Article 2 of Protocol 1 "right to education.". The following is an introduction to what you need to know about such Articles.

#### **Article 3**

**Prohibition of torture "No one shall be subjected to torture or to inhuman or degrading treatment or punishment"**

This is an absolute right and therefore there can be no permitted interferences.

This right can have implications regarding treatment and conditions of vulnerable individuals in residential homes or for the protection of a child from abuse within the family home. A high threshold has to be met before a breach will occur. A variety of circumstances will be taken into account including the nature and context of the treatment, how it is carried out and its physical and mental effects bearing in mind the sex, age and health of the individual.

Although the threshold has been high the ECHR is a “living instrument”, standards evolve and there have been recent cases relative to standards of Scottish prisons and child care where a breach has been declared by our domestic courts as well as the ECtHR. The Court has also recently stated that the particular vulnerability of an individual should also be taken into account including any inability to make a complaint known.

It can be anticipated therefore that there will be an increasing number of challenges to the standards of care, especially of children or vulnerable adults. The courts can be expected to subject to increased scrutiny not only the impact of a specific set of circumstances upon such individuals but also the policy decisions which may have contributed to such situations.

## **Article 6 – Right to a Fair and Public Hearing**

**"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. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of public law and order and the interests of national security in a democratic society, where the interests of juveniles or the protection of private life of the party so require, or to the extent strictly necessary in the opinion of the court where publicity would prejudice the interests of justice."**

To get Article 6 down PAT it is **P**articipation, **A**ccountability and **T**ransparency. These are the values embodied in Article 6 which is intended to guarantee the right of a person to effectively participate in the determination of a dispute of a recognised civil right.

The requirements of an Article 6 “fair and public hearing” have been demonstrated in the development of the Strasbourg case law over several decades now but they may be usefully crystallised by:-

- ❑ Right of access to an independent and impartial tribunal
- ❑ Right to a hearing within a reasonable time
- ❑ Right to a reasoned judgement
- ❑ Right of disclosure
- ❑ Right of representation
- ❑ Right of adversarial process

The last three of the above are intended to provide “equality of arms” – that one party is not placed at a substantial disadvantage to the other.

While it is beyond the scope of this Guide to provide an elaboration of what may or may not be a “civil right” it may be helpful to have in mind that a “civil right” can be that which is recognised in domestic law as such as well as any of the ECHR rights. Very many of the Council's functions obviously involve civil rights.

Article 6 is applicable only at the stage of “determination” of a dispute concerning civil rights. This clearly will include courts but also tribunals and many of the administrative decision-making bodies of a public authority. As far as the latter are concerned, however, it is very important to realise that where it is not possible for the administrative decision-making body to meet all of the Article 6 requirements (for example independence and impartiality) then an appeal to a court or a tribunal which does provide an Article 6 hearing may be sufficient to cure the defect. The further development of case law over the next few years will clarify to what extent and in what circumstances the availability of judicial review is sufficient to meet Article 6 requirements.

A recommended approach is to incorporate into best practice as far as possible the Article 6 requirements as that will stand the Council in good stead in the eyes of any appeal court or tribunal and may also serve to reduce the actual number of challenges against the council in the first place, for example in the employment relationship.

## **Article 8 - Right to Privacy**

- 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 that which 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 and morals, or for the protection of the rights and freedoms of others".**

The "right to respect" places both "positive" and "negative" obligations upon the Council.

The Council should not act in a way which disproportionately interferes, even for legitimate security considerations, with the employees' privacy rights, for example communications, relationships, confidential information, etc.

It also has a "positive" obligation to take action to protect the physical and psychological integrity of an individual, for example, an effective anti-bullying school policy

"Private life" can be given a wider definition than may at first be expected and can include, for example, questions of sexual identity and relationships.

"Family life" can also be given a wider definition than may at first be expected and certainly extends beyond the husband/wife or parent/child relationship. If a sufficiently close link can be demonstrated in practice, "family life" can include siblings, uncle/aunt and nephew/niece, unmarried partners, gay relationships, etc.

The ECHR is a "living instrument" and has in recent years extended the scope of Article 8 to protect the individual, and the home, from serious environmental interference as well as recognised the right of the individual to access to information which would enable an assessment of any such risk of severe environmental interference.

Most importantly, however, Article 8 is not an *absolute* right but a *qualified* right. It can be proportionately interfered with by the Council acting lawfully and if it fits within the permitted interferences allowed by Article 8, paragraph 2 and so addresses the three questions of legality, legitimate aim and proportionality in the context of the facts and circumstances of each case.

#### **Article 10 – Freedom of Expression**

- 1) **"Everyone has a 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.**
- 2) **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."**

As can be seen this, like Article 8 above, is a *qualified* right.

It may impact upon the Council in such areas as dress codes, whistleblowing, use of computer facilities, participation of employees in public affairs or the way in which some councillors approach conflict of interests issues.

#### **Article 14 – Prohibition of Discrimination**

**"The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any grounds 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".**

This Article is different from others in that it is not free-standing but can only be used if another Article is at least engaged even if not necessarily breached. The victim must be able to demonstrate differential treatment from others in a similar situation and if such discrimination against the victim is because of an identifiable status of the victim. The ECHR case law demonstrates that a public authority can justify discrimination, direct or indirect, if there exists reasonable and objective grounds and the action is proportionate to achieve a legitimate aim, which may be, for example, the provision of specific services to specific sections of the community.

An Article 14 checklist might be as follows:-

- ❑ **Is there another ECHR right at issue? If not, Article 14 is non-applicable.**
- ❑ **Is there a difference in treatment of others in a similar enough situation? If not, Article 14 is non-applicable.**
- ❑ **Is the difference due to "status"? If not, Article 14 is non-applicable.**
- ❑ **Is the differential treatment justifiable on reasonable and objective grounds, lawful and proportionate? If so, no breach. If not, is a breach.**

## **Article 2, Protocol 1 - Right to Education**

**"No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and teaching, the state shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."**

Education is unique in the sense that it is a "social" right and has an Article exclusively to itself.

The UK lodged a reservation, recognised by the Human Rights Act, as follows.....  
"Only in so far as it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure."

The first sentence of Article 2 was agreed after much debate. Its somewhat negative formulation is to protect states from being obliged to establish new institutions for forms of education as wished by certain parents as a result of this Article. Rather, the Article guarantees the right of access to existing institutions and this is of course reinforced within the UK following the reservation noted above.

The Article covers both primary and secondary education and includes all functions of a school – both administrative and academic, i.e. the "ethos" of the school as a whole and therefore covering such matters as discipline, records, codes of conduct, etc.

The respect to be shown by the authority is to convictions of both natural parents, even when the child is in care, but ceases for both if the child is adopted and ceases for one if the other has what has been known up until recently as "custody" of the child.

The authority is obliged only to "respect" and not necessarily follow the convictions of the parents but such convictions should be respected throughout all aspects of the child's education and is not limited to the area of religious education.

Essentially the Article is a protection against state indoctrination but it does not prevent the state from providing religious and philosophical education and information so long as it is objective, critical and pluralist.

Additionally, if the convictions of the parents are to be respected by the authority such convictions must be weighty, substantial, and worthy of respect in a democratic society, not incompatible with human dignity nor conflicting with the fundamental right of the child to education. For example, the parents' cultural or linguistic preferences need not be taken into account.

It is the right of the child to education which is fundamental and which dominates this Article and where there is a conflict in competing claims of the child's right to education and the parents' convictions, it is the interests of the child which will generally prevail. This has become increasingly so as the European Court of Human Rights is increasingly referring to the UN Convention on the Rights of the Child in its judgements and is especially likely in those cases where the child is of sufficient maturity to articulate these rights even if in conflict with those of the parents.

The UK reservation underlines the wide area of discretion left by the courts to the authorities to decide how to make the best use of the available limited resources. This is obviously relevant in decisions relating to special needs education but, again, the test is still proportionality and there may be a difference between refusal to provide a laptop and refusing to provide education in a special school or hiring another teacher.

## Chapter 3

### Why and how to take a "*rights-aware approach*"

#### Why?

A "rights-aware approach" makes the connections....

- between the Council's declared values and its actual delivery of public services
- between Council policy-makers and daily decision-takers in service delivery
- among the increasing rights-based statutory compliance and policy initiatives re. equality, diversity, information management, etc.

Developing and delivering a "culture of respect" , to which reference has been made in Chapter 1 as regards the Council's "Statement of Culture", is essentially about how to develop a "human rights culture", one of respect for the dignity, identity and rights of "the other".....whether of other race, religion, gender, socio-economic background, etc.....and a culture within which there is a recognition of how such individual rights are to be balanced with the needs and rights of others and with the wider community.

Human rights provide the framework of both values and law which enables such a balance to be struck between the individual and the community. Human rights therefore play a dual role....*protecting* the individual, particularly the most vulnerable, through making public authorities accountable....and ....then progressing to *promoting* a culture within which all individuals and the community as a whole can flourish.

The key challenge in developing a "culture of respect" is then making the cultural shift by recognising that the ***starting point*** in policy or decision-making is respect for the dignity and rights of individuals.....this is the essence of developing the practice of a "rights-aware approach".

#### How?

The flowchart outlined next is a "best practice guide" to developing such a "rights-aware approach".

It outlines the practical steps to be taken in both policy-making and decision-taking.

It is also the basis upon which a court would determine the compatibility of any Council policy or decision with the ECHR.

The benefit of using the flowchart will be demonstrated with reference to two topical examples.

One will relate to policy on school uniform and one to a decision on public processions.

## Example 1

### ***School uniform policy***

In March 2005 the Court of Appeal of England and Wales ruled that an appellant Muslim female pupil had been unlawfully excluded from school for failure to comply with her school's dress code, and her rights to education and to manifest her religion under the ECHR Protocol I, Article 2 and Article 9 had been violated. (ref. All England Reporter, 2005, March, R(on the application of B) v Governors of Denbeigh High School).

The judgement listed some relevant considerations for schools to consider in relation to whether such a dress code was justified in ECHR terms.

Of most significance, the judgement can be seen to have applied the principles of legality, legitimate aim and proportionality, as contained within the proposed best practice guide flowchart, in reaching its determination. In so doing it stated that it was precisely because *"the school did not approach the matter in this way at all" and "approached the issues....from an entirely wrong direction....that its uniform policy was there to be obeyed"*, that, despite its good intentions, it had not acted legally. The court went on to essentially state that had the school followed the proper steps, as outlined in the flowchart, it may in fact have been able to justify its uniform policy.

## Example 2

### ***Decision to ban march***

In an earlier case in September 2001 the Sheriff Court at Aberdeen ruled against Aberdeen City Council that it had unlawfully banned a proposed march by the Aberdeen Bon-Accord Loyal Orange Lodge 701 and had violated Article 9's right to assembly.

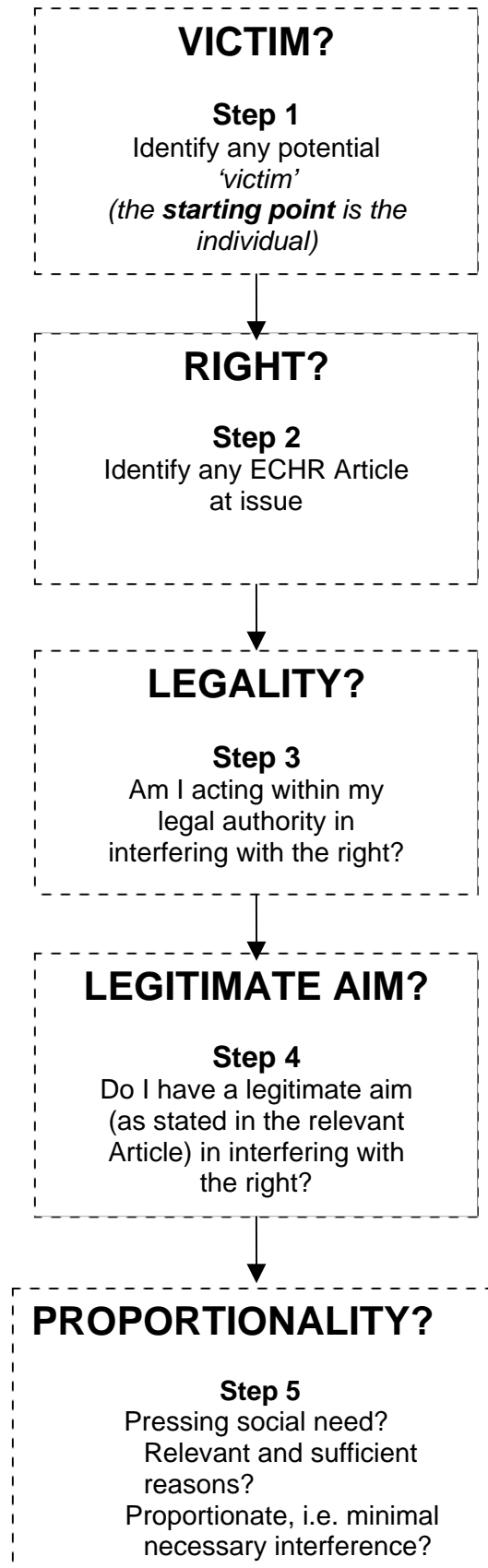
Again, essentially, this ruling was based upon the finding that the Council had not applied the principles of legality, legitimate aim and proportionality, as now contained within the best practice guide five steps of the flowchart.

The Sheriff stated that the Council had started not from recognition of the right at issue but from the position *"that there is no such right and that the scheme of the Act (Civic Government (Scotland) Act 1982) is intended to convey that processions may only take place if permitted by the local authority"*. The Sheriff stated further that *"it is for the authority to show that it is necessary to curtail the basic right before any such restriction will be upheld .....their reasons must be relevant and sufficient and their response proportionate"*.

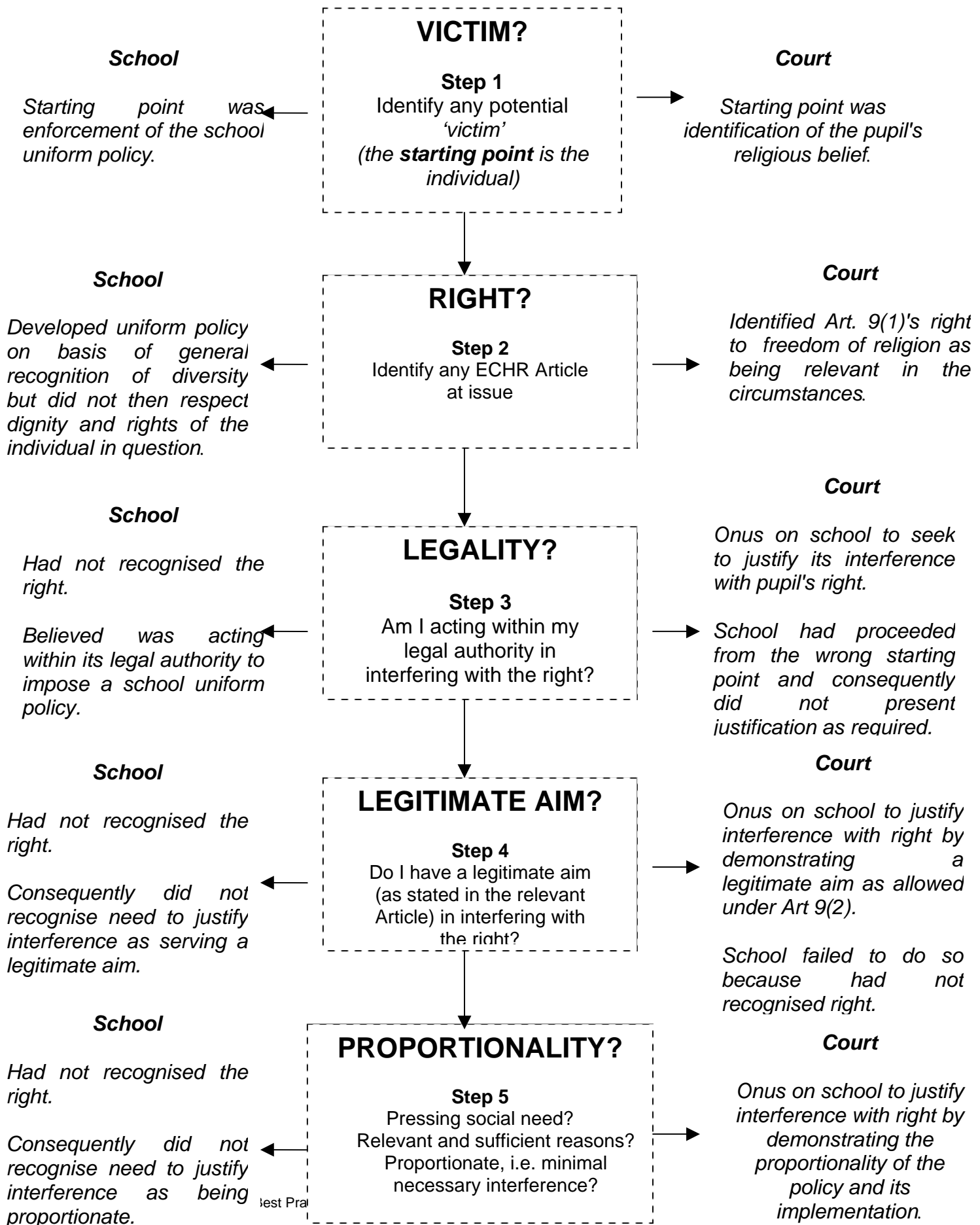
As with the school uniform example above, the issue again is that in such situations had the Council demonstrably applied the five steps of the flowchart then it may have been able to justify its decision. Indeed this may well have been the case with regard to the Council's recent banning of a proposed BNP march when the Council did appear to follow the proper steps.

The Best Practice Guide Flowchart, outlined below, will then be applied to the two examples –

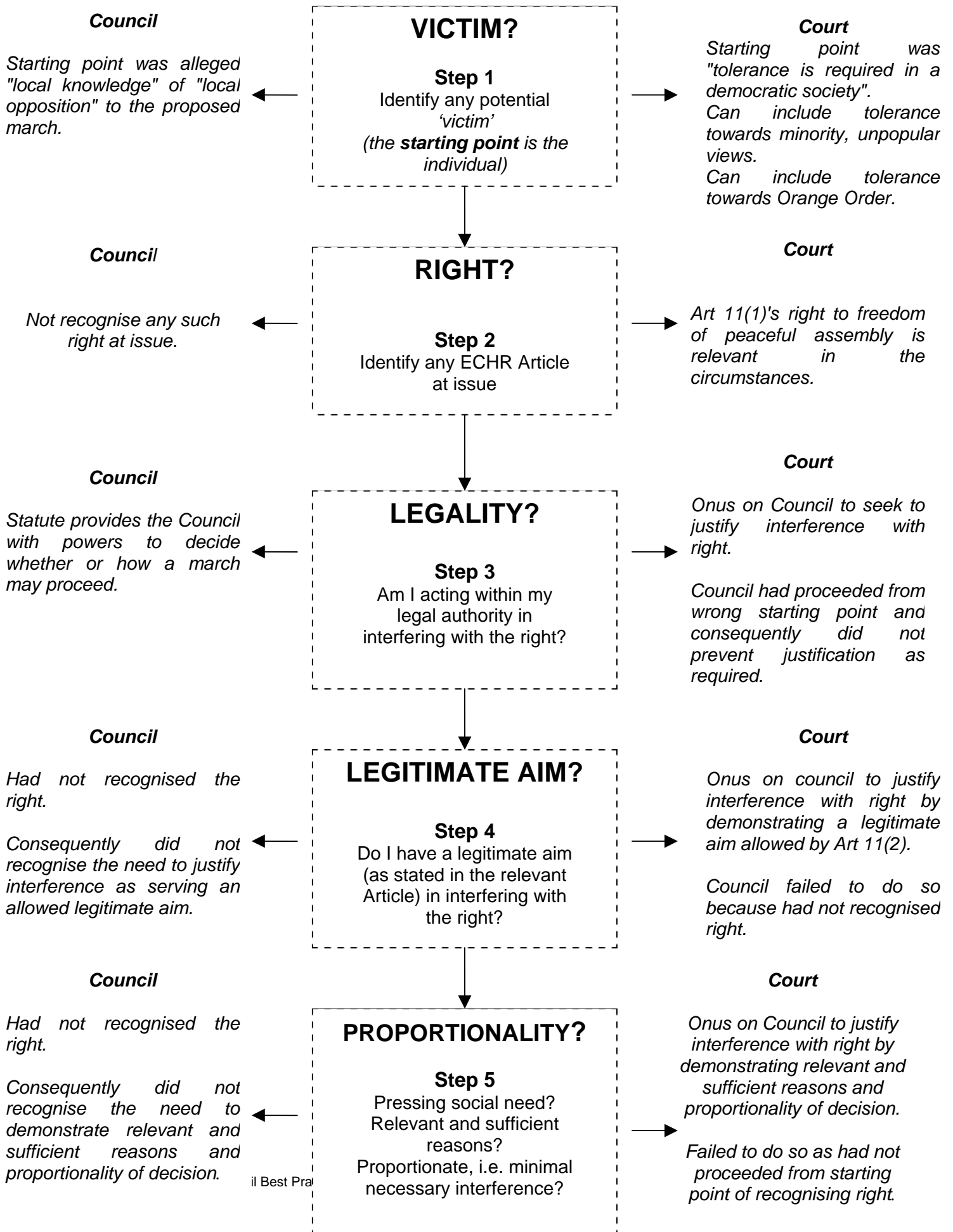
## BEST PRACTICE GUIDE FLOWCHART



**Example 1** School Uniform Policy (see Appendix 1 for text of Art. 9)



**Example 2** Decision to Ban March (see Appendix 1 for text of Article 11)



## **Chapter 4**

A variety of queries and dilemmas were presented during the audit.

The key issue is to learn how to use a "rights-aware approach" in resolving everyday dilemmas whether as a policy or decision-maker in service delivery. In fact such an approach can serve to better connect policy and practice.

The five key steps are as outlined below, as taken from the Best Practice Guide Flowchart in the previous chapter, and are then applied to those dilemmas identified during the audit in order to provide case studies for training purposes.

### **Step 1**

#### ***Is there a victim or potential victim?***

(Whose right/s may potentially be interfered with by our policy/act/omission?)

### **Step 2**

#### ***Is there an identifiable right/s?***

(In terms of a specific Article/s of the ECHR?)

If there is a negative answer to either of the above questions then there is no need to progress any further to Steps 3, 4 and 5.

If there is a positive answer to Questions 1 and 2, then proceed to the next three critical questions.....

### **Step 3**

#### ***Am I acting within my legal authority?***

(Is there a basis in relevant domestic law for our policy/act/omission?)

### **Step 4**

#### ***Do I have a legitimate aim?***

(Is there a legitimate aim, as stated in the relevant Article, being served by any such interference?)

### **Step 5**

#### ***Am I acting proportionately?***

(Is the policy/act/omission necessary in a democratic society? Is there a pressing social need? Are there relevant and sufficient reasons? Is the policy/act/omission proportionate to the legitimate aim being pursued ( i.e. the minimal necessary interference with the individual's right/s?)

## 1. School Transport

There is a concern that there is a lack of an appeal procedure provided by the Council for those children who are refused free transport and whose parents consider the travel arrangements to be inadequate.

### **Step 1**

#### ***Is there a victim or potential victim?***

The child may be a victim and/or the family of the child.

### **Step 2**

#### ***Is there an identifiable right/s?***

Article 6- Right to a fair and public hearing

Article 2 Protocol 1 – Right to Education

Article 8 – Right to respect for private and family life

Article 14 – Right not to be subject to discrimination

Depending on the individual circumstances any, or all, of the above rights may be relevant.

For Article 6(1) to apply:

- (i) there must be a genuine claim or dispute;
- (ii) this dispute must relate to a right or obligation in domestic law;
- (iii) this right or obligation must be broadly civil in character; and
- (iv) the outcome of the dispute must be directly decisive for the right or obligation.

It would seem that the right to free school transport is a discretionary benefit and not in itself a civil right. The decision as to whether it should be provided may not therefore be an Article 6 issue.

There is of course an argument that the Article 2, Protocol 1 right to education, as a civil right, itself could be relevant if the lack of free school transport effectively prevented a child from attending school. If this were to be accepted then Article 6 could be engaged and the overarching principles of fairness would apply. Article 6(1) provides generally for:

- right of access to an independent and impartial tribunal
- right to a hearing within a reasonable time
- right to a reasoned judgement
- right of disclosure
- right of representation

- o right of adversarial process

Access to judicial review should satisfy any Article 6 rights of the child or family.

A best practice issue for the Council would therefore be to try to meet Article 6 so far as it reasonably can, for example, by demonstrating that the child or family had been consulted, given the opportunity to present all material issues, were made aware of all relevant factors and of the policy as well as the reasons for the decision which should be made without unreasonable delay.

**Article 8:** It may be possible that in certain particular circumstances that a child's private or family life could be adversely affected by the application of the policy and it must be ensured that special family circumstances are taken into account in considering whether a child should receive free transport to school.

For example, if the child is being bullied on the way to school then care should be taken that any special circumstances not envisaged by the policy are considered.

**Article 14:** the non-discrimination right, could become relevant if it were linked to another Article and in the particular circumstances it could be presented that the policy had been applied differently to children dependent on their sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. It is to be recognised, however, that discrimination in certain circumstances could be allowed if there were factors which provided a reasonable and proportionate justification for it, for example, in recognition of the particular vulnerability of a child due to one of the above grounds.

The key issue then for Step 2 is to start with understanding the actual situation of the child and the specific impact of the application of the policy on any specific related right/s of the child.

### **Step 3**

#### ***Am I acting within my legal authority?***

Education (Scotland) Act 1980 s51 provides that an education authority may make such arrangements as they consider necessary for the provision of free or subsidised school transport, having regard to the safety of the pupils. The statute does not outline any process of how objections are to be dealt with.

### **Step 4**

#### ***Do I have a legitimate aim?***

The Council's School Transport Policy defines the limits of the zones within which there is no entitlement to free school transport. The policy aims to provide a framework of entitlement within which it strikes a balance between allocation of resources and the needs of children. The policy also enables discretion to be exercised to take into account the circumstances of a particular child so as to avoid any unintended effect of a "blanket" policy. It does this by providing for discretion to be exercised in circumstances where children who live within the zone have no

other viable alternative to get to school or where the children or carers have a medical condition which requires them to have assistance to get to school. The policy therefore aims to provide free transport for all those who are in genuine need.

### **Step 5**

#### ***Am I acting proportionately?***

- *is the policy or the act necessary in a democratic society?:*
- *is there a pressing social need for such policy or act?:*
- *are there relevant and sufficient reasons for the policy or act?:*
- *is the policy or act proportionate?:* (i.e. is it the minimal interference necessary to achieve the legitimate aim?)

The explanation of the reasons for the Council School Transport policy, as given above, is likely to satisfy the tests of "necessary in a democratic society" and "pressing social need".

As long as there is proper investigation and consideration given to the specific situation of the child in question, and no arbitrary application of a "blanket" policy, then the tests of "relevant and sufficient reasons" are likely to be met. The test of "proportionality" is likely to be met if it can be demonstrated that the discretion allowed for under the policy was exercised reasonably in the particular circumstances.

## **2 Administration of Medicine in Schools**

A concern outlined was that if no proper procedures for the administration of medicine in schools were in place then certain pupils may be disadvantaged as to the enjoyment of their right to education. Schools were also concerned that a child may not want to take medicine although a parent had consented to medicine being given in school, had completed paperwork and expected this to be carried out in school. A further concern was that in exceptional circumstances there may be a family with religious beliefs who do not wish medical help to be given even in an emergency.

### **Step 1**

#### ***Is there a victim or potential victim?***

The child or the child's parents are potential victims.

### **Step 2**

#### ***Is there an identifiable right/s?***

Article 2, Protocol 1- Right to Education

Article 9- Freedom of thought, conscience, religion

Article 8- Right to respect for private and family life

Article 2- Right to life

Article 3- Prohibition of torture and inhuman and degrading treatment or punishment

Article 14 – Right not to be subject to discrimination

**Article 2 Protocol 1:** This provides that no one is to be denied the right to education. Possibly at issue therefore is whether a child denied appropriate medicines is effectively being denied the right to education.

**Article 9:** The religious beliefs of the child or of the child's parents must be taken into account before any medical intervention is made.

A best practice approach would be for schools to establish if the pupil, parents or carers have strong views on acceptable medical treatments and consult with them when considering the administration of medicine. The requisite consent forms and questionnaires will be essential in enabling the school to carry out medical procedures without infringing upon the child's or parents' rights.

**Article 8:** Where health professionals are contacted to assist in caring for a child's medical needs care must be taken that no private details of the child's medical or family history are disclosed unnecessarily and without their consent.

**Article 3:** An issue may arise as to whether in certain exceptional circumstances either a denial of medicines or an invasive method of administration of medicine results in subjecting a pupil to inhuman or degrading treatment. For example, certain intimate care, if not administered properly, may potentially fall within the scope of inhuman or degrading treatment.

Best practice would be that the Scottish Executive guidelines on this should be followed, namely that to protect the dignity of the child as far as possible as well as protecting the interests of staff two adults should be present when intimate care is being given and one should be of the same gender as the pupil. Pupils should be encouraged to administer their own medicine and a consent form should be signed from parents. Clearly, if pupils refuse to take medication then school staff should not force them to do so. The school should inform the child's parents as a matter of urgency if the child is below the age of legal capacity.

### **Step 3**

#### ***Am I acting within my legal authority?***

Standards in Schools (Scotland) Act 2000 places a duty to educate children to their fullest potential and this will include meeting the healthcare needs of children. Although the statutory duty to meet the medical needs of children in schools lies with the NHS Boards, education authorities should liaise with the NHS in order to provide proper care.

Schools will be acting within their legal authority where medicine is administered in accordance with the wishes of the parent and the child. There will also be legal authority to administer medicine against the wishes of the parents and in accordance with the wishes of the child where the child is over 16 by virtue of the Age Capacity Scotland Act 1991. A child over 16 has the legal capacity to consent to any surgical, medical or dental procedures if in the opinion of a health professional that person is capable of understanding the nature of the treatment.

Where an education authority contacts a hospital/doctor/nurse the privacy of the child/ family must be observed except where it felt that disclosure may be necessary (see Step 5).

#### **Step 4**

##### ***Do I have a legitimate aim?***

The inherent legitimate aim is to act in the best interests of the pupil.

#### **Step 5**

##### ***Am I acting proportionately?***

- *is the policy or the act necessary in a democratic society?:*
- *is there a pressing social need for such policy or act?:*
- *are there relevant and sufficient reasons for the policy or act?:*
- *is the policy or act proportionate?: (i.e. is it the minimal interference necessary to achieve the legitimate aim?)*

The tests of "necessary in a democratic society" and "pressing social need" may be met where a child's health is suffering whilst in school care. For there to be "relevant and sufficient reasons" for either the administration of medicine or the refusal to administer medicine the school must ensure that it is aware of the specific circumstances of the pupil, including any religious beliefs of the pupil or family.. For a proportionate response to be reached the particular circumstances of the pupil's situation will require to be considered and to be seen to have been considered.

Any interference with Article 8 or 9 rights must be justified in terms of the relevant Article, i.e. in accordance with law, necessary in a democratic society, in the interests of public safety, protection of health or morals or the protection of the rights and freedoms of others.

An interference with Article 9 rights where the parents do not believe in medical intervention of any kind or an interference with the Article 8 right to respect for private and family life may be justified, depending upon the circumstances, for the protection of the child's rights where it is felt the right to education or the right to life, in extreme circumstances, is being interfered with. This illustrates how conflicting interests and different rights under the ECHR require to be weighed against each other. In any given situation these rights must be considered and a proportionate response reached. The above questions will assist in assessing whether a proportionate and necessary response is being reached.

### 3. School Uniform Policy

**A concern was raised about issues relating to the application of a school uniform policy. This is a topical and widespread concern which has recently been considered in the courts and received much publicity. Reference can be made to Chapter 3 which demonstrates the application of such a policy and a best practice guide flowchart.**

#### **Step 1**

***Is there a victim or potential victim?***

A pupil is a potential victim if denied the right to manifest a religious belief, denied the right to education or discriminated against on the grounds of religion, gender or other status.

#### **Step 2**

***Is there an identifiable right/s?***

Article 9 – Freedom of thought, conscience and religion

Article 14 – Prohibition of Discrimination

Article 2 Protocol 1 – Right to Education

Where a school does not recognise that respect for such rights are the starting point of policy and its application then there is a risk that the policy or its application may amount in certain situations to an unjustified interference.

#### **Step 3**

***Am I acting within my legal authority?***

Schools are permitted to adopt a uniform policy.

#### **Step 4**

***Do I have a legitimate aim?***

Article 9 (2) states that interferences with the right to manifest one's religions or beliefs can be permitted ...."in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others. So, for example, social cohesion within the school community, a perceived sense of community within and outwith school, combating of bullying, etc. may then be considered as serving a recognised legitimate aim in interfering with an individual's rights when formulating and implementing a uniform policy.

## **Step 5**

### ***Am I acting proportionately?***

- *is the policy or the act necessary in a democratic society?:*
- *is there a pressing social need for such policy or act?:*
- *are there relevant and sufficient reasons for the policy or act?:*
- *is the policy or act proportionate?:* (i.e. is it the minimal interference necessary to achieve the legitimate aim?)

It may be argued that it is "necessary in a democratic society" that such a policy is implemented and that the "pressing social need" is to maintain order within the school.

"Relevant and sufficient reasons" for such a policy may include:

- (1) to promote a more effective climate for learning;
- (2) to create opportunities for self-expression;
- (3) to increase school campus safety and security;
- (4) to foster school unity and pride;
- (5) to eliminate "label competition;"
- (6) to ensure modest dress;
- (7) to simplify dressing; and
- (8) to minimise cost to parents.

The policy will be seen to be a proportionate response to the legitimate aim being pursued where the individual's rights and particular circumstances have been seen to have been duly considered in formulating such a policy and that nevertheless, for the reasons cited above, it is deemed that there is an overriding interest in the policy being implemented.

Such a policy must be considered carefully in light of the above questions and justified on those terms in order to avoid a potential breach.

## **4 Park and Outdoor Area Management Rules**

A concern was expressed that sections 116 and 117 of Civic Government (Scotland) Act 1982 by themselves do not offer adequate Article 6 protection where such rules excluding people from certain areas are enforced

### **Step 1**

#### ***Is there a victim or potential victim?***

Those who are expelled under the rules and have no statutory recourse to challenge the decision.

## **Step 2**

### ***Is there an identifiable right/s?***

Article 6- Right to a fair and public hearing

- A civil right could be at stake in certain circumstances and so Article 6 requirements may need to be met. Article 6 (1) provides for:
- Right of access to an independent and impartial tribunal
- Right to a hearing within a reasonable time
- Right to a reasoned judgement
- Right of disclosure
- Right of representation
- Right of adversarial process

The specific provisions of s117 provide for some of the overarching principles of fairness by providing, for example, that an exclusion order gives notice of the reasons and the individual is entitled to make written or oral representations, etc.

An issue may be that Article 6 requires access to an independent and impartial tribunal. This must be determined by assessing such matters as the 'manner of appointment of its members and the duration of their terms of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence'. The local authority in the first instance will not fulfil this requirement as it would be reviewing its own decision. There can still be compliance, however, by a right of appeal which may be by means of judicial review where there is no statutory appeal provided. The potential of the court to consider, by way of judicial review, the legality of the decision and the procedures followed may then in such circumstances be sufficient to ensure compliance with Article 6.

## **Step 3**

### ***Am I acting within my legal authority?***

The Civic Government (Scotland) Act 1982 s112 confers the powers to create the management rules, s116 and 117 governing expulsion orders for breach of management rules.

The Management Rules themselves regulate the use of land and buildings under the Council's control and the conduct of persons there, provided there is public access to that land or building.

At present there are management rules governing the use of several nature reserves in Aberdeen as well as of premises operated by the Council's art galleries and museums section and library and information services section. Access to public parks, cemeteries and burial grounds and the city's crematorium and Hall of Remembrance is also governed by management rules.

## **Step 4**

### ***Do I have a legitimate aim?***

Perhaps the only potential Article, other than Article 6, at issue in exceptional circumstances may be the Article 8 right to respect for private and family life. This Article permits interferences "in the interests of....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."

The Council purpose is, of course, to exercise control over public amenities so as to preserve them for the public good and to enforce the management rules in a fair and practical way and so it is likely that Council actions could be seen to be serving a legitimate aim as outlined above.

### **Step 5**

#### ***Am I acting proportionately?***

- *is the policy or the act necessary in a democratic society?:*
- *is there a pressing social need for such policy or act?:*
- *are there relevant and sufficient reasons for the policy or act?:*
- *is the policy or act proportionate?: (i.e. is it the minimal interference necessary to achieve the legitimate aim?)*

The purpose of the policy of seeking to control public amenities to preserve them for the public good will satisfy the test of "necessary in a democratic society" and "pressing social need". In every individual circumstance there must be relevant and sufficient reasons given for the expulsion order and these ought to be stated by the decision making body. The test of proportionality will then apply where applicable.

## **5 Postal votes and the blind/ partially sighted**

A concern that postal voters with sight problems were being effectively denied the right to vote freely where Braille postal votes were not issued.

### ***Step 1***

#### ***Is there a victim or potential victim?***

Blind/partially sighted people.

### ***Step 2***

#### ***Is there an identifiable right/s?***

Article 3 Protocol 1- "free elections" at "reasonable intervals" through a secret ballot and under conditions which "will ensure the freedom of expression of the opinion of the people."

Article 14- Prohibition of Discrimination

### **Step 3**

#### ***Am I acting within my legal authority?***

Representation of the Peoples Act 2000 Schedule 4-Absent Voting in Great Britain allows for postal voting subject to certain criteria.

In this instance, because of the critical Article being Article 14, the specific Article 14 checklist (as outlined in Chapter 2) should now be applied, as follows.....

- **Is there another ECHR right at issue? If not, Article 14 is non-applicable.**

Yes, as identified above, Article 3 of Protocol 1 is at issue.

- **Is there a difference in treatment of others in a similar enough situation? If not, Article 14 is non-applicable.**

Arguably, those who are neither blind nor partially sighted are given the opportunity to vote by postal ballot.

- **Is the difference due to "status"? If not, Article 14 is non-applicable.**

Arguably, being blind or partially sighted could be regarded as being a "status".

- **Is the differential treatment justifiable on reasonable and objective grounds, lawful and proportionate? If so, no breach. If not, is a breach.**

It is not immediately obvious that any differential treatment for blind or partially sighted individuals would meet the above tests.

However it is also certainly arguable that, notwithstanding the above, in circumstances where there are alternative voting methods available for the blind or partially sighted, the failure to provide Braille postal ballots may not necessarily amount to a breach of Article 3, Protocol 1, namely the undertaking by the state to "hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

But if in a particular circumstance a blind or partially sighted person had no other practical available alternative, e.g. attending a polling station, then there may well be argued that there had been a breach of Protocol 1, Article 3.

As far as the concern raised by the audit therefore it would be advisable for the responsible authority to ensure that it was complying with the terms of the Representation of the People Act by making Braille postal ballots available to all who were eligible in terms of such Act.. Attention should also be paid to the Disability Discrimination Act 1995.

## 6 Drinking in public places bye- laws

Concerns were raised that bye-laws in general could be unlawful because they could amount to criminalisation of conduct on a local, rather than national, basis. There was also concern that the specific bye-law prohibiting drinking in public places could be unlawful interference with individual rights and that it may particularly affect homeless people.

### **Step 1**

#### ***Is there a victim or potential victim?***

Those convicted under bye-law.

### **Step 2**

#### ***Is there an identifiable right/s?***

Article 8 – right to respect for private life

Article 14 – Prohibition of Discrimination

Article 7 – No punishment without law

The prohibition on discrimination set out in Article 14 only applies in circumstances where there is another Article at issue (see Chapter 2). It is possible that this bye-law will adversely affect certain groups, such as the homeless, more than others which on the face of it may suggest indirect discrimination. However, so long as the interference can be justified in the terms set out below then there is unlikely to be any human rights non-compliance.

**Article 7:** Article 7 provides that the law must constitute a crime under national law for anyone to be held guilty of the offence.

In this case the bye- law may be said not to be national law as such. However, the power to create the law comes from primary legislation and so long as the bye-law is enacted correctly the local authority will be acting under national law within its lawful authority. The scope of Article 7 has not developed to encompass the criminalisation of conduct on a local basis.

Should there be any infringement of the ECHR as a result of any bye-law the European Court of Human Rights would hold the UK liable for any infringement based upon its state accountability for infringement within its jurisdiction.

In a similar manner, indeed, the Scotland Act 1998 binds the Scottish Parliament to act compatibly with the ECHR, including within the field of criminal justice, on the basis that compatibility with the ECHR is a UK international legal obligation.

Accordingly, as long as the offences created by the bye-law are accessible and foreseeable (i.e. published and sufficiently precise that an individual can be reasonably expected to understand just what kind of conduct is prohibited) then

Article 7 should not be breached by the creation of criminal offences through the passing of bye-laws.

### **Step 3**

#### ***Am I acting within my legal authority?***

Local Government (Scotland) Act 1973, s201, 202, 203 confers the power to make the bye-law.

A bye-law itself, if enacted properly, is therefore within the lawful authority of the local authority. There is then legal authority to implement the bye-law but care should be taken that it is not enforced discriminately against certain groups such as young people or homeless.

### **Step 4**

#### ***Do I have a legitimate aim?***

Whilst Article 7 is an absolute right and cannot be interfered with there can be permitted interferences with Article 8 such as "in the interests of ....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."

Accordingly, the purpose of the bye-law to preserve public order and reduce drink related crime and nuisance would be likely to be seen as serving a legitimate aim.

### **Step 5**

#### ***Am I acting proportionately?***

- *is the policy or the act necessary in a democratic society?:*
- *is there a pressing social need for such policy or act?:*
- *are there relevant and sufficient reasons for the policy or act?:*
- *is the policy or act proportionate?: (i.e. is it the minimal interference necessary to achieve the legitimate aim?)*

The policy may be justified as "necessary in a democratic society" and as having a "pressing social need" where it can be shown that drinking in public places is causing nuisance to the public. There may well be a strong public interest being served by such a bye-law. Relevant and sufficient reasons, such as that there has been drink related disturbances and nuisance in the area, should be present. It would be helpful, for example, to show there has been consultation with the police in showing that such a bye-law was necessary.

In order that the implementation of the bye-law is seen to be a proportionate response to a specific problem of drink related nuisance it must be shown to be the minimal interference necessary with the right to private life of the individuals concerned. Again relevant and sufficient reasons must be present in the particular circumstances in order that the bye-law is not perceived to be applied in a discriminatory or arbitrary way, e.g. against the homeless.

Best practice would be to keep the policy under review and have continued consultation with the police and public as to the need for the bye-law.

## **7 Taking entry to private land/ survey and investigation work in connection with improvements/ maintenance.**

Concern expressed that property owners' objections dealt with under s140 of the Roads (Scotland) Act 1984 does not offer adequate protection of Article 6 rights.

### **Step 1**

#### ***Is there a victim or potential victim?***

Property owners.

### **Step 2**

#### ***Is there an identifiable right/s?***

Article 6 – Right to a Fair and Public Hearing.

Article 1 Protocol 1– Right to Peaceful Enjoyment of Property

As a civil right (the right to enjoyment of property) may be in dispute Article 6 will be engaged.

This will allow for:

- right of access to an independent and impartial tribunal
- right to a hearing within a reasonable time
- right to a reasoned judgement
- right of disclosure
- right of representation
- right of adversarial process

The issue which was raised in the audit is that there appears to be no right in the statute for a land owner to object to entry to their land in the circumstances contained within s140. This could be problematic potentially if the local authority gives property owners no opportunity to object. There is a defence under sec. 6(2) of the Human Rights Act for public authorities acting in a way incompatible with a right under the ECHR that *'as a result of one or more provisions of primary legislation, the authority could not have acted differently'* It seems in these circumstances, however, that there may be nothing in the statute prohibiting the Council adopt a best practice approach of ensuring that property owners have time to object to the notice and that a process of consultation takes place taking account of the general principles of Article 6 requirements. Critically, the objector may then also be able to seek judicial review of the decision in order to obtain the Article 6 right of access to an independent and impartial tribunal.

### **Step 3**

#### ***Am I acting within my legal authority?***

S140 Roads (Scotland) Act 1984 allows for powers of entry where a person authorised by the roads authority has an authenticated document showing his right to enter land at reasonable hours. 7 days notice of intended entry must be given.

If there is no legal appeal procedure provided by the statute there is nothing preventing a consultation or objection procedure from being established by the Council and this could constitute best practice.

#### **Step 4**

##### ***Do I have a legitimate aim?***

Article 1, Protocol 1 permits interferences "in the general interest" and it is therefore likely that the Council purposes of carrying out works, especially those of a relatively unobtrusive nature, efficiently and without unnecessary delay would generally fall within such general interest.

#### **Step 5**

##### ***Am I acting proportionately?***

- *is the policy or the act necessary in a democratic society?*
- *is there a pressing social need for such policy or act?*
- *are there relevant and sufficient reasons for the policy or act?*
- *is the policy or act proportionate?: (i.e. is it the minimal interference necessary to achieve the legitimate aim?)*

The first tests of "necessary in a democracy" and "pressing social need" will likely be met by the need for the works, surveying or inspecting to be carried out in the public interest. Similarly it is to be expected that entry would generally not be sought in the absence of relevant and sufficient reasons. So, the critical issue would be to ensure that the extent of the interference was the minimal necessary to achieve the legitimate aim.

## **Chapter 5**

### **Human Rights Compliance – Auditing Tools?**

Human rights auditing needs to be carried out at all the different levels of a public authority – corporate, departmental and individual.

The following tools for each level are based upon experience in auditing and training across a range of public authorities throughout the UK and abroad as well as working with the Home Office Human Rights Task Force which oversaw the HRA compliance preparations of all of the UK major public bodies.

## NO. 1 THE FIVE DO'S AND DON'TS OF A CORPORATE AUDIT

### The Five Don'ts

- *Ghettoise* – don't reserve human rights exclusively to a specialist unit
- *Legalise* – don't reserve human rights exclusively to your legal department
- *Delegalise* – don't neglect potential legal challenges on the basis that it is just a cultural change of thinking which is required and that you are all nice people already
- *Compartmentalise* – recognise that in a work of multi-agency partnerships, a public authority is only as strong as the weakest link in the chain
- *Internalise* – recognise the "in-house" or "institutional" norms and values as potential for a complacency or narrow-minded approach that all of this may be viewed as not much more than an unwelcome interference with the job you have already become used to and are good at already

## The Five Do's

- *Externalise* – Complement internal preparations with external expertise to advise and test your systems by seminars, training, human rights auditing, "walk-through" cases etc. This is a specialised area of law and a jack-of-all-trades approach, not taking advantage of a "view from outside" could let you down
- *Familiarise* – Mainstream coherent understanding of the logic of the Human Rights Act and the ECHR in a user-friendly way
- *Actualise* – Recognise examples of potential implications of ECHR in your everyday experiences
- *Modernise* – Update all your systems to ensure as far as possible good practice compliance with ECHR
- *Systematise* – Set up systems for constantly keeping up to date with ECHR and case law at home and abroad as it develops

## **2 A Departmental Audit Questionnaire**

### **Checklist**

- 1 Which ECHR Articles may be engaged?
- 2 Who are potential victims and how?
- 3 Is there a legal basis for the action?
- 4 Is there a legitimate aim being pursued?
- 5 If so, is it primary or secondary legislation?
- 6 Do we have any discretion in applying legislation?
- 7 Is the action necessary in a democratic society? (a) justified by a pressing social need, (b) proportionate, least possible interference to achieve a legitimate aim (c) is there relevant and sufficient reason for the interference?
- 8 Have there been any complaints and, if so, how were they dealt with?
- 9 Do you have any concern that we may be in breach?

## **Current Compliance**

- Law
- Policy
- Procedure
- Practice
- Action required and by whom?

## **Register of Audit**

- Service delivery
- Number
- Date
- Description of policy/practice/procedure
- Legal basis for action
- Relevant Articles
- Potential basis for challenge
- Further action required

## Individual Audit Questionnaire

### CONVENTION CHECKLIST

<b>Do you touch on any of the Convention rights in your work?</b>	
<b>YES</b>	<b>NO</b>

Yes	<b>Is there a victim?</b>	No	<b>Check again – remember the Convention rights have a broad application</b>
Yes	<b>Can the Convention right concerned be interfered with legitimately?</b>	No	<b>You may be in <u>breach</u> – seek legal advice <u>before continuing</u></b>
Yes	<b>Have you any choice in the matter?</b>	No	<b>You may be in <u>breach</u> – seek legal advice <u>before continuing</u></b>
Yes	<b>Is your action (or inaction) prescribed by law?</b>	No	<b>You may be in <u>breach</u> – seek legal advice <u>before continuing</u></b>
Yes	<b>Are you pursuing a legitimate claim?</b>	No	<b>You may be in <u>breach</u> – seek legal advice <u>before continuing</u></b>
Yes	<b>Is what you are doing, or not doing, necessary in democratic society? (pursues a pressing social need, is proportional and there are relevant and sufficient reasons for it)</b>	No	<b>You may be in <u>breach</u> – seek legal advice <u>before continuing</u></b>
Yes	<b>You may be compatible - but seek legal advice if there is any doubt</b>		

## **Appendix 1**

# **Human Rights Act 1998**

1. - (1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in-

- (a) Articles 2 to 12 and 14 of the Convention,
  - (b) Articles 1 to 3 of the First Protocol, and
  - (c) Articles 1 and 2 of the Sixth Protocol,
- as read with Articles 16 to 18 of the Convention.

(2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).

(3) The Articles are set out in Schedule 1.

(4) The Secretary of State may by order make such amendments to this Act as he considers appropriate to reflect the effect, in relation to the United Kingdom, of a protocol.

(5) In subsection (4) "protocol" means a protocol to the Convention-

- (a) which the United Kingdom has ratified; or
- (b) which the United Kingdom has signed with a view to ratification.

(6) No amendment may be made by an order under subsection (4) so as to come into force before the protocol concerned is in force in relation to the United Kingdom.

## **Interpretation of Convention rights**

2. - (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any-

- (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,
- (b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention,  
whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

(2) Evidence of any judgment, decision, declaration or opinion of which account may have to be taken under this section is to be given in proceedings before any court or tribunal in such manner as may be provided by rules.

(3) In this section "rules" means rules of court or, in the case of proceedings before a tribunal, rules made for the purposes of this section-

(a) by the Lord Chancellor or the Secretary of State, in relation to any proceedings outside Scotland;

(b) by the Secretary of State, in relation to proceedings in Scotland; or

(c) by a Northern Ireland department, in relation to proceedings before a tribunal in Northern Ireland-

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force.

### *Legislation*

#### **Interpretation of legislation**

**3. - (1)** So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section-

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

Declaration of incompatibility.

4. - (1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied-

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility,

it may make a declaration of that incompatibility.

(5) In this section "court" means-

(a) the House of Lords;

(b) the Judicial Committee of the Privy Council;

(c) the Courts-Martial Appeal Court;

(d) in Scotland, the High Court of Justiciary sitting otherwise than as a trial court or the Court of Session;

(e) in England and Wales or Northern Ireland, the High Court or the Court of Appeal.

(6) A declaration under this section ("a declaration of incompatibility")-

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and

(b) is not binding on the parties to the proceedings in which it is made.

## **Right of Crown to intervene**

**5.** - (1) Where a court is considering whether to make a declaration of incompatibility, the Crown is entitled to notice in accordance with rules of court.

(2) In any case to which subsection (1) applies-

- (a) a Minister of the Crown (or a person nominated by him),
- (b) a member of the Scottish Executive,
- (c) a Northern Ireland Minister,
- (d) a Northern Ireland department,

is entitled, on giving notice in accordance with rules of court, to be joined as a party to the proceedings.

(3) Notice under subsection (2) may be given at any time during the proceedings.

(4) A person who has been made a party to criminal proceedings (other than in Scotland) as the result of a notice under subsection (2) may, with leave, appeal to the House of Lords against any declaration of incompatibility made in the proceedings.

(5) In subsection (4)-

"criminal proceedings" includes all proceedings before the Courts-Martial Appeal Court; and

"leave" means leave granted by the court making the declaration of incompatibility or by the House of Lords.

## *Public authorities*

### **Acts of public authorities**

**6.** - (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if-

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section "public authority" includes-

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

(4) In subsection (3) "Parliament" does not include the House of Lords in its judicial capacity.

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes a failure to act but does not include a failure to-

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.

## **Proceedings**

7. - (1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may-

(a) bring proceedings against the authority under this Act in the appropriate court or tribunal,

or

(b) rely on the Convention right or rights concerned in any legal proceedings,

but only if he is (or would be) a victim of the unlawful act.

(2) In subsection (1)(a) "appropriate court or tribunal" means such court or tribunal as may be determined in accordance with rules; and proceedings against an

authority include a counterclaim or similar proceeding.

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act.

(4) If the proceedings are made by way of a petition for judicial review in Scotland, the applicant shall be taken to have title and interest to sue in relation to the unlawful act only if he is, or would be, a victim of that act.

(5) Proceedings under subsection (1)(a) must be brought before the end of-

(a) the period of one year beginning with the date on which the act complained of took place; or

(b) such longer period as the court or tribunal considers equitable having regard to all the circumstances,

but that is subject to any rule imposing a stricter time limit in relation to the procedure in question.

(6) In subsection (1)(b) "legal proceedings" includes-

(a) proceedings brought by or at the instigation of a public authority; and

(b) an appeal against the decision of a court or tribunal.

(7) For the purposes of this section, a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act.

(8) Nothing in this Act creates a criminal offence.

(9) In this section "rules" means-

(a) in relation to proceedings before a court or tribunal outside Scotland, rules made by the Lord Chancellor or the Secretary of State for the purposes of this section or rules of court,

(b) in relation to proceedings before a court or tribunal in Scotland, rules made by the Secretary of State for those purposes,

(c) in relation to proceedings before a tribunal in Northern Ireland-

(i) which deals with transferred matters; and

(ii) for which no rules made under paragraph (a) are in force,

rules made by a Northern Ireland department for those purposes,

and includes provision made by order under section 1 of the Courts and Legal Services Act 1990.

(10) In making rules, regard must be had to section 9.

(11) The Minister who has power to make rules in relation to a particular tribunal may, to the extent he considers it necessary to ensure that the tribunal can provide an appropriate remedy in relation to an act (or proposed act) of a public authority which is (or would be) unlawful as a result of section 6(1), by order add to-

(a) the relief or remedies which the tribunal may grant; or

(b) the grounds on which it may grant any of them.

(12) An order made under subsection (11) may contain such incidental, supplemental, consequential or transitional provision as the Minister making it considers appropriate.

(13) "The Minister" includes the Northern Ireland department concerned.

Judicial remedies.

**8.** - (1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including-

(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and

(b) the consequences of any decision (of that or any other court) in respect of that act,

the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining-

- (a) whether to award damages, or
- (b) the amount of an award,

the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention.

(5) A public authority against which damages are awarded is to be treated-

- (a) in Scotland, for the purposes of section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 as if the award were made in an action of damages in which the authority has been found liable in respect of loss or damage to the person to whom the award is made;
- (b) for the purposes of the Civil Liability (Contribution) Act 1978 as liable in respect of damage suffered by the person to whom the award is made.

(6) In this section-

"court" includes a tribunal;

"damages" means damages for an unlawful act of a public authority; and

"unlawful" means unlawful under section 6(1).

## Appendix 2

### Human Rights Audit

#### Analysis of effect of the audit process – the key points....

- 1 To some extent the audit process served both as a "*spotlight*" and a "*magnet*". A number of specific questions of concern were identified, examples of which are included in Chapter 4, which pointed up matters of best practice if not strict human rights legal compliance issues. It also demonstrated in practice how policies and decisions – both the content and the process – are to be assessed to ensure human rights compliance and best practice as is demonstrated by Chapter 3's best practice guide flowchart which can now be used for wider training purposes to promote a wider awareness.
- 2 The results of the audit should neither lead to maintenance of the status quo nor wholesale overnight change but rather to the *task of weaving the human rights dimension into the fabric* of the everyday policies, procedures and practices of the Council.
- 3 The audit process has already and is likely to continue to have the effect of *facilitating the development of best practice*, as is demonstrated in Chapter 3 through the application of the Best Practice Guide Flowchart to such identified issues as school dress codes and marches.
- 4 The audit process has increased confidence that a *mature and proactive approach*, rather than a minimalist and reactive, is called for recognising that in most instances a balance is to be struck between individuals' rights and the public interest through applying the framework of "legality, legitimate aim and proportionality".
- 5 The audit process has demonstrated a certain "*policy fatigue*" and, therefore, the clear need and benefit of developing a more coherent and cohesive "rights-aware approach" which integrates human rights with equality and diversity, freedom of information and data protection and other rights-based statutory requirements and policy initiatives. This would be assisted by the development of and training focussed around an adapted Best Practice Guide Flowchart.

#### Audit analysis – key points

- 1 **Policies** - no *red lights* were identified, but a strict caveat is to be noted with reference to the inconsistencies in levels of current awareness, ref. Point 6 below on awareness-raising/training. It may be therefore that there was insufficient awareness to identify any such policies.

- 2     **Procedures** – need to address certain lack of adequate guidance on policy implementation, ref. to Chapter 4 and examples of questions of concern re. policy implementation identified.
- 3     **Practice** – need to address inconsistent levels of awareness across and within service areas, and the Council generally, as regards the appropriate decision-making process to be followed in circumstances where a human right/s is at issue, ref. Chapter 3's application of the flowchart.
- 4     **Resources** – need to address inconsistent levels of awareness as regards the balancing factors to be taken into account re-service delivery and resource limitations, ref. Appendix 3 case study.
- 5     **Culture** – need to further develop an "ethos" of respect for the dignity and rights of the individual, rather than the application of a "blanket" policy, as being the starting point from which point a balance with the public interest is then struck through the application of the framework of "legality, legitimate aim and proportionality", ref. examples provided by Chapter 3.
- 6     **Awareness-raising/training** – need to develop a programme of awareness-training and training on an integrated "rights-aware approach" so as to address inconsistencies across and within service areas, a certain disconnect between policy and practice and a certain lack of corporate strategic clarity on the role of human rights. Rather than any wholesale change of policy the challenge is to weave human rights – especially the practical use of "proportionality" – into the fabric of daily decision-making. In this sense the audit is really a starter rather than a completed project.

### Overall Key Audit Recommendation

- Increasing **coherence** through developing a "rights-aware approach" integrating human rights, equality and diversity will facilitate an increased **cohesion** across all rights-based statutory and policy fields as well as between policy-makers and decision-takers.

This could be most effectively achieved in terms of cost, organisation and output by a Council **awareness-raising and training programme on a "rights-aware approach"** integrating human rights with equality and diversity and other right-based statutory requirements and policy initiatives.

This would also serve to prepare the Council for the enactment next year of the Equality Act which will merge the existing Equal Opportunities Commission, Commission for Racial Equality and Disability Rights Commission into a single UK Commission for Equality and Human Rights which is anticipated as working in Scotland alongside a newly created Scottish Human Rights Commission.

### **Appendix 3**

#### **Training Case Studies**

**Apply the Best Practice Guide Flowchart to the following case studies.....**

#### **Case Study A**

##### **Child Protection**

A child protection conference was held by the social work department of the Council in May 2005. It relates to a 14 year old girl, Susan. Her mother, Sandra, is believed to suffer from a drug addiction and to be involved in prostitution within the family home as a means of funding her addiction. There are concerns that Susan is at risk.

Sandra has another 2 year old daughter, Jane, from a relationship with James who contributes to her upbringing although the relationship between Sandra and James has now ended. However James continues to live in the family home, essentially as a tenant. Jane is not the subject of the child protection conference.

All those present at the conference were social services professionals in addition to Sandra and James.

A report was presented to the conference by one of the social workers, Ms. Smith. It contained a reference to a concern that James may have been "grooming Susan for prostitution purposes". This originated in an earlier report of May 2003 from a voluntary agency to the social services department. The department had not carried out any investigation, had not asked James or Sandra for their response and had not provided a copy of the child protection conference report to either James or Sandra in advance of the conference.

When the report was read out during the conference James was extremely distressed, disputed the allegation and protested against it being part of the conference.

Ms. Smith defended the inclusion of the allegation in the report as being her professional duty to bring to attention any information held which may assist in child protection.

The conference is adjourned by the Chair who states that she has some concerns about the situation.

James states that he is going to take legal advice.

- 1 **Is there a "victim"?**
- 2 **If so, what is the right/s at issue?**
- 3 **Was the Council acting within its legal authority?**
- 4 **Was the Council serving a legitimate aim?**

5 **Was the Council acting proportionately?**

**\* Are there any lessons for best practice?**

## **Case Study B**

### **Education**

Karen, a 15 year old pupil, had come to the attention of her school due to increasing non-attendance. Non-attendance had been a persistent problem for almost 3 years but not to the extent that it was regarded as such a problem which needed action to be taken. Now, however, her preparations for her Standard Grade exams were being seriously undermined.

Following consultation by the school with Karen's mother, Mrs. Mitchell, it came to light that for the last 3 years Karen had been complaining of being unhappy and that she had been teased at school due to a perception by classmates that she was "slow" and a "loner".

She was therefore referred to the education psychologist who assessed a learning difficulty which required special facilities being provided. The condition was assessed as being borderline in terms of whether the educational needs could be met at mainstream secondary or at a special needs school.

Mrs. Mitchell was adamant that Karen should remain at her school as it was closer to home and suited family arrangements in terms of Mrs. Mitchell's work arrangements and Karen's availability to look after her little sister after school. Mrs. Mitchell also claimed that she understood that it was now thought that those such as her daughter were better to be included within a mainstream school rather than in a special needs school.

Karen was not happy to stay at her present school because of her experience there and she disagreed with her mother.

However it was decided, after consultation between Mrs. Mitchell and the school, that Karen would remain there. This pleases Mrs. Mitchell and she tells her daughter that there is now nothing else to be done about it.

Karen's cousin advises her to contact the new Scottish Commissioner for Children and Young People for advice as to her rights.

- 1 **Is there a "victim"?**
  - 2 **If so, what is the right/s at issue?**
  - 3 **Was the Council acting within its legal authority?**
  - 4 **Was the Council serving a legitimate aim?**
  - 5 **Was the Council acting proportionately?**
- \* Are there any lessons for best practice?**

## **Case Study C**

### ***Planning and environment***

The Shaw family are gypsies. There are three children aged 4, 6 and 8 who reside with their parents on a local authority travellers' site. The eldest child attends the local primary school, the second eldest attends a special needs school in the vicinity and the youngest has severe asthma and eczema health problems. The family has in fact lived there for 15 years and there are two older males, aged 19 and 21, who have left the site and live elsewhere.

The two elder brothers frequently visit the family at the site and there are repeated complaints received by the Council about their nuisance behaviour. Council warnings to the family are fruitless and notice is given that possession proceedings are being taken. The sole reason given is that licence conditions have been breached although no factual reasons are provided.

The family dispute a breach of conditions on the basis that it cannot be held responsible for the actions of others but a petition for judicial review is refused. Possession proceedings on the basis of a breach of conditions continue and, although no factual reasons are given, lead to an order being granted by the court in favour of the Council.

The family are effectively rendered homeless and seek further legal advice.

- 1 **Is there a "victim"?**
- 2 **If so, what is the right/s at issue?**
- 3 **Was the Council acting within its legal authority?**
- 4 **Was the Council serving a legitimate aim?**
- 5 **Was the Council acting proportionately?**

**\*Are there any lessons for best practice?**

## **Case Study D**

### ***Housing and social work***

In 1995 Mrs. Smith, a 70 year old disabled widow, was placed by the Council in a residential home. The Council promised her at the time that she should regard this as her "home for life". However, 5 years later in 2000 the Council was required to find savings. It closed its residential homes and moved Mrs. Smith into another residential home owned and operated by a private company.

Unfortunately, the health of Mrs. Smith then deteriorated. Her daughter returned from Australia and was concerned that not only the move itself took a severe toll of her mother but that the subsequent combination now of inadequate hygiene, nutritional and health care standards caused her mother's health to deteriorate. Her mother had also been used to socialising with other residents in her former residential home but was now confined to her room. She feels this was due to too few care staff being employed and that, notwithstanding her deterioration in health, she could still have benefited from such contact.

The daughter's concern was also due to the fact that she had simply been notified as next-of-kin of her mother's move and she didn't think that her mother had either the opportunity or capability to make her views known throughout the move nor since her taking up residence in the new home.

The Council explained to the daughter that it had needed to make budget cuts and that this often was a question of making difficult judgements and that it had limited resources. It also advised her to take up her concerns now with the operators of the new home.

The daughter remains dissatisfied with the Council and decides to take legal advice.

- 1 **Is there a "victim"?**
- 2 **If so, what is the right/s at issue?**
- 3 **Was the Council acting within its legal authority?**
- 4 **Was the Council serving a legitimate aim?**
- 5 **Was the Council acting proportionately?**

**Are there any lessons for best practice?**

## **Case Study E**

### **Employment**

Lorna is employed within the planning department of the Council. She has a concern about a development project which she thinks may pose a serious health risk to local residents. The project is high profile, a political priority and has already been subject to delay and much expense incurred by the Council. Her department is consequently under much pressure.

She does not enjoy a good relationship with her manager and has recently received a final written warning arising from a dispute between them. As a single parent and concerned about her pension entitlements she feels vulnerable and is afraid to voice her concerns about the development project with her manager. She also feels sure that he must already know about the health risk posed by the development as he too would have seen the private consultant's report which had caused her concerns.

She therefore communicates her concerns during a lunch break by email and phone to the Press and Journal. A journalist then makes a request to the Council under the Freedom of Information Act for access to the report in question and an article is subsequently published. This generates an internal inquiry as to who could have leaked the existence of such a report. The email and telephone call are subsequently traced to Lorna.

She freely admits that she was the "whistleblower" but attempts to justify her action as being in the public interest. However she is dismissed for gross misconduct.

Lorna then applies to an employment tribunal.

- 1 **Is there a "victim"?**
- 2 **If so, what is the right/s at issue?**
- 3 **Was the Council acting within its legal authority?**
- 4 **Was the Council serving a legitimate aim?**
- 5 **Was the Council acting proportionately?**

**\*Are there any lessons for best practice?**

## Appendix 4

### Sources of human rights case law

- ECtHR – to keep up to date with Strasbourg decisions, full text of judgements can be downloaded free of charge from [www.echr.coe.int](http://www.echr.coe.int)
- ECHR – full text of major decisions to date available on CD (Blackstone's Human Rights Digest). Other printed sources available include European Human Rights Reports and European Human Rights Law Review by Sweet & Maxwell, Butterworth's Human Rights Cases
- UK – key UK human rights case reports include Human Rights Law Reports – UK Cases (Sweet & Maxwell) and UK Human Rights Reports (Jordan's)
- Scotland – Scottish Human Right Journal, Scottish Human Rights Service (both published by Greens) both report key case law developments.
- Scottish Court decisions can be accessed at [www.scotcourts.gov.uk](http://www.scotcourts.gov.uk).
- An analysis of Scottish human rights case law to date can be found in the "The Use of Human Rights Legislation in the Scottish Courts" at [www.scotland.gov.uk/library5/justice/uhrl-00.asp](http://www.scotland.gov.uk/library5/justice/uhrl-00.asp)