

EQHRIA

Equality & Human Rights Impact Assessment



Training Resources



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Using these training resources

The Good Practice Building Blocks developed by the SHRC and EHRC with a range of experts highlight that in carrying out Equality and Human Rights Impact Assessment (EQHRIA) it is essential that policy officers and decision makers have a sufficient understanding of both equality and human rights.

The training materials contained in this section of the website aim to give policy makers and others in the public sector an understanding of the basic principles of human rights and equality. The materials can help users develop an approach to policy making that incorporates these principles, while meeting the statutory obligations of the public sector equality duty as set out in the Equality Act 2010.

The examples provided in this resource largely relate to local authorities in Scotland.

The resources will require to be adapted and made appropriate to the organisation and staff who intend to learn from them. The resources may also be supplemented by examples of good practice and other context specific guidance depending upon the organisation. Furthermore, they may be combined with guidance or materials on the relevance, importance and process of impact assessment which is not covered here. For further information please see good practice Building Block 3.

The materials are designed to increase knowledge and awareness of the relationship between equality and human rights, and give practical advice about how to apply human rights principles in the context of the legal requirement to fulfil the public sector equality duty. In particular, this includes the specific duty to undertake equality impact assessments.

These materials will help to increase understanding and awareness about:

- The link between promoting equality and promoting human rights in policies and practice.
- The public sector equality duty.
- Human rights principles in the Scottish, European and International context.
- The ways in which a human rights based approach can be applied in practice, including in existing impact assessment processes.

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The importance of equality and human rights to your organisation

It is important to consider at the outset why equality and human rights are important to your organisation by recognising that integrating equality and human rights into governance, policy and decision making structures will help to:

Achieve better outcomes for people

Equality and human rights are core to achieving national and local performance outcomes which aim to improve the quality of life and opportunities for all people across Scotland.

Improve performance

The consideration of human rights and equality issues will assist in improving performance in delivering high quality public services as efficiently, effectively and economically as possible as they will ensure they are responsive to people's individual circumstances at the point of delivery.

Demonstrate accessibility and accountability

Where equality and human rights are assessed, based on evidence and the meaningful involvement of communities, stronger relationships will be built and it will be easier to demonstrate fairness, transparency, accessibility and accountability thereby enhancing public ownership and legitimacy in policy and decision making.

Ensure compliance with the law

Proactively taking account of human rights and equality in the exercise of an organisation's functions will provide it with assurances rather than assumptions that actions are fair, not arbitrary, and that they comply with the law. This helps to prevent violations before they require redress and thus reduce both legal and financial risks and expense. All public authorities and other bodies which carry out public functions have a legal duty under the Human Rights Act 1998 to act compatibly with human rights law, and listed public bodies also have duties under the Equality Act 2010 to meet the public sector equality duties.

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Added value of human rights in impact assessment

In addition to the above the integration of human rights into your impact assessment approach will assist to:

- Broaden the scope of impact assessment
- Provide a framework for balancing competing rights, interests and risks
- Highlight the most serious impacts

Broaden the scope of impact assessment

The public sector equality duty covers the following protected characteristics: age, disability, gender, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation as well as marriage and civil partnerships, with regard to eliminating unlawful discrimination in employment.

Human rights however, belong to all of us regardless of status or any protected characteristic. The universality of rights and the equal enjoyment of rights by all persons provides a different perspective on some of the policy areas considered in the case studies and pilots.

As human rights apply to everyone, taking an human rights based approach complements an equality analysis by prompting consideration of whether the impact of a policy on people's rights is acceptable and also how a policy might drive up standards of services and enhance positive impacts for all people, not only those defined by particular characteristics. It could mean that impacts disproportionately affecting vulnerable, disadvantaged or voiceless communities are considered where they might otherwise be overlooked. This would include, for example, consideration of impacts on people living in poverty or homeless people.

A Framework for balancing competing rights, interests and risk

A human rights analysis can help balance competing rights and interests of different people. This is because very few rights are absolute. Most human rights can be interfered with when justified, in pursuit of a legitimate aim, such as the protection of the rights of others, and proportionate, that is the minimum necessary interference in pursuit of a legitimate aim.

By demonstrating that policy and decision making takes account of the rights of everyone an impact assessment can support the understanding that there are rights to be respected for all communities, whilst also paying regard to people with protected characteristics. This will assist in fostering good relations as well as promoting equality under the Equality Act.

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Furthermore an understanding of human rights and the concept of proportionality helps to balance rights and risks in decision making, getting the balance right between protecting people from risk of harm and upholding autonomy. Human rights require that we act to protect people at risk of serious harm. They require that any restriction on our right to live our life as we choose must be based on law, pursue a “legitimate aim” (such as protecting the rights of others), and be the least restrictive effective means of achieving that aim. Understanding the balance of these rights and duties provides a framework for making difficult decisions about balancing risk and rights.

Highlighting most serious impacts

Human rights are fundamentally about the human dignity of all of us and the opportunity to lead fulfilling lives.

A human rights analysis will identify where impacts on people with protected characteristic or others reach a threshold which could amount to a human rights violation. This includes but is not limited to those impacts already identified by an equality analysis. Taking an human rights based approach helps mitigate the risk of negative outcomes for everyone, regardless of whether they disproportionately impact any one group. In human rights terms everyone must be treated with dignity and respect.

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Understanding the relationship between equality and human rights

Shared Values

The values which underpin both equality and human rights are shared values which have their origins in the Universal Declaration of Human Rights 1948 which states: “All human beings are born free and equal in dignity and in rights”

The values of equality and human rights centre around for example, fairness, equality, dignity, respect, autonomy, empowerment and participation. This project and these resources encourage that this common framework of values underpins good practice approaches to EQHRIA.

Legislative requirements on public bodies

The legislative requirements of the Equality Act 2010 and Human Rights Act 1998 vary despite the common foundation of values outlined above.

The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 require authorities to assess the impact of applying a proposed new or revised policy: ensuring that the policy does not discriminate unlawfully; considering how the policy might better advance equality of opportunity; and considering whether the policy will affect good relations between people with different protected characteristics.

The public sector equality duty covers the following protected characteristics: age, disability, gender, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation. The public sector equality duty also covers marriage and civil partnerships, with regard to eliminating unlawful discrimination in employment.

The Human Rights Act obliges public authorities to ensure that they are not acting in breach of the human rights principles set out in the European Convention on Human Rights. One way a public authority can ensure that this is being achieved is by undertaking a human rights impact assessment.

The international treaties generally make less of a distinction between equality and human rights however detailing state obligations with regard to both the rights that apply to all us (such in the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights) and the rights that may be of particular relevance to certain groups (such as International Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), Convention on the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities (CRPD)).

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Integrated approaches to impact assessment

When public authorities are carrying out their equality impact assessments, in line with the requirements of the Equality Act, they have an opportunity to address the rights enshrined in the Human Rights Act at the same time as both are closely interrelated.

Meeting the requirements of the general equality duty requires organisations not only to eliminate discrimination but also to advance equality of opportunity and foster good relations. This may involve considering positive action and particular measures for disadvantaged groups. Like a human rights based approach this seeks to improve outcomes for everyone.

It is practical to use an integrated approach for integrated thinking around equality and human rights, avoiding duplication of time and effort whilst ensuring policy making which improves outcomes for everyone. Taking a Human Rights Based Approach helps put in place minimum standards of treatment for all regardless of whether they are from a protected characteristic group. In human rights terms everyone must be treated with dignity and respect.

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Equality law

The Public Sector Equality Duty

Public authorities should now be conversant with their obligations in relation to impact assessment in order to fulfil the public sector general equality duty as required by the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.

The General Equality Duty

The general equality duty requires public authorities, in the exercise of their functions, to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation or any other prohibited conduct.
- Advance equality of opportunity by, in particular: removing or minimising disadvantage suffered by people due to their protected characteristics, by taking steps to meet the needs of people with certain protected characteristics where these are different from the needs of other people, or by encouraging people with certain protected characteristics to participate in public life or in other activities where their participation is disproportionately low.
- Foster good relations, including by tackling prejudice and promoting understanding between people from different groups.

Meeting the general equality duty may involve treating some persons more favourably than others. Meeting the needs of different people may include specific steps which take account of disabled persons' disabilities.

The Specific Equality Duties

Each listed authority is required to:

- Report progress on mainstreaming the equality duty.
- Publish a set of equality outcomes and report progress towards achieving these.
- Assess and review policies and practices.
- Gather and use employee information.
- Publish gender pay gap information.
- Publish statements on equal pay.
- Consider award criteria and conditions in relation to public procurement.
- Publish in a manner that is accessible.

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ECHR Guidance

To support Scottish public authorities in meeting their equality duties, the EHRC has produced a Non-statutory guidance for Scottish public authorities.

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The Duty to assess and review policies and practices

A listed authority is required to assess the impact of applying a proposed new or revised policy or practice, against the needs of the general equality duty, in so far as is needed to meet the general equality duty.

This duty requires listed authorities to undertake an equality impact assessment in respect of each protected characteristic and in respect of each of the three parts of the general duty and requires that a listed authority must:

- To the extent necessary to fulfil the general equality duty, assess the impact of its proposed policies and practices, as well as changes or revisions to existing policies or practices.
- Consider relevant evidence relating to people with protected characteristics, including any evidence received from those people.
- Take account of the results of any assessment.
- Publish, within a reasonable period, the results of any policy which it adopts.
- Make appropriate arrangements to review and if necessary, revise any policy or practice to ensure it complies with the general duty.

Note that the regulations specifically state that consideration of whether or not an assessment of impact is needed is not to be treated as the assessment itself.

The guidance Assessing impact and the public sector equality duty provides practical advice for every stage of the process. It highlights the key points to remember:

- In assessing impact, authorities should start by asking what impact the policy will have on their ability to meet each of the needs of the general equality duty for each equality group.
- Assessing impact involves identifying what steps could be taken to advance equality and foster good relations, not only to eliminate discrimination.
- Assessing impact is an integral part of policy development and review, informing policy as it develops. If integrated well, impact assessment is a tool for improved policy-making and should not result in unnecessary additional activity.
- The purpose is not to complete a specific form or template, but to understand the effects of a policy or practice on equality, and take necessary action as a result.
- The time and effort involved should be in proportion to the relevance of the policy to equality.

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- Without good evidence, a proper assessment of impact will be difficult to achieve. A lack of information is not an excuse for inactivity.
- The insights from involving employees, service users, trade unions and others affected are useful evidence for your assessment.
- Publishing assessments will increase accountability and transparency.

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Introduction to the human rights legal framework in Scotland

In Scotland, human rights are protected by the European Convention on Human Rights, the UK Human Rights Act and by the Scotland Act. There are a range of international human rights treaties and while these cannot be enforced directly in the Scottish courts, these international treaties can be helpful in interpreting and clarifying the scope of justiciable rights. The international treaties also place obligations on the state to respect, protect and fulfil human rights.

The Human Rights Act

The Human Rights Act places certain obligations on public authorities. In particular, it is unlawful for a public authority to act in a way which is incompatible with a Convention right unless it is prevented from doing so by an Act of Parliament. Public authorities include all bodies with public functions including courts and tribunals.

If an individual believes that their human rights have been violated they can pursue a claim in the relevant court. This is because the Human Rights Act allows people to rely on the rights and freedoms set out in the European Convention on Human Rights directly in the Scottish courts, and (in certain circumstances) to obtain remedies for Convention violations in the domestic courts, rather than taking the case to European Court of Human Rights (Strasbourg). The Human Rights Act means that courts and tribunals must take into account judgments of the European Court of Human Rights and that all Scottish and British legislation must be read and given effect, as far as possible, in a way which is compatible with the European Convention on Human Rights.

The Scotland Act

Because of the terms of the Scotland Act, the Scottish Parliament is precluded from passing legislation which is incompatible with Convention rights and that extends to the actions of the Scottish Government and Scottish Ministers. Any actions which breach Convention Rights will be invalid and can be challenged in the courts.

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Convention rights and principles

The human rights set out in the European Convention on Human Rights are incorporated into the law of Scotland through the Human Rights Act and the Scotland Act.

Absolute, qualified and limited rights

It is important to understand that there are different types of rights in the Convention. In particular, there are **absolute rights** and **qualified rights**, and some rights are limited.

Some rights are **absolute**, in particular the right to life and the right not to be subjected to torture or to inhuman or degrading treatment or punishment. In other words, there are no circumstances when a public authority is entitled to subject someone to inhuman or degrading treatment.

Some rights can be limited, for example there are certain defined limited circumstances when you can legitimately be deprived of your right to liberty.

Some human rights are qualified, which means they can be restricted in some circumstances and within limits. These rights are written so that the first part of the Article sets out the right that is to be protected, while the second part establishes whether a public authority can legitimately restrict that right in order to protect the wider public interest.

Qualified rights include:

- The right to respect for private and family life, home and correspondence.
- The right to freedom of thought, conscience and religion.
- The right to freedom of expression.
- The right to freedom of assembly and association.
- The right to protection of property.

To consider whether a restriction to a qualified right is justified, consideration must be given to the following questions:

- Is there a legal basis for the restriction of the right?
- Is there a legitimate aim or justification for the restriction, such as the protection of other people's human rights?
- Is the action proportionate - is it the minimum necessary restriction of the right?

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Convention rights create positive as well as negative obligations

Human rights are traditionally negative obligations on a state to refrain from human rights violations. But increasingly Articles are interpreted to require states and public authorities to take action to secure the effective enjoyment of a fundamental right. States and public authorities have a positive duty to provide the resources to protect human rights, eg states have a negative duty not to kill people to ensure the right to life, but also a positive duty to protect those whose lives might be at risk.

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Right to life

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

The right to life is an absolute right which means that there is a duty on states and public authorities not to take away anyone's life; and a positive duty to take reasonable steps to protect life; and to ensure effective and proper investigation into all deaths in custody.

The public authority therefore has a duty to take steps to protect against risk to life, for example by preventing suicide, through negligence or severe malnutrition.

What this means for local authorities

Local authorities may require to take steps to prevent suicides of vulnerable residents in care, where they are aware, or should be aware of the risk of suicide. This will extend to an obligation to protect the life of vulnerable people from risk of neglect by others, such as in relation to children who may require to be removed from the care of their parents to prevent risk of death through neglect or abuse.

Case law examples

- In the case of *Osman v UK*, the European Court of Human Rights decided that the police are under an obligation to take reasonable steps to protect the life of an individual where the police were aware that there was a real and immediate risk to life. This has led to the police issuing so-called "Osman letters" where they become aware that the life of a particular individual is under threat.
- In the case of *Savage v South Essex Partnership NHS Foundation Trust*, the House of Lords found that a hospital was liable for their failure to prevent the suicide of Mrs Savage where they were aware, or should have been aware, of a real and immediate risk to her life through self harm and they failed to do all that they could reasonably have done to avoid or prevent that risk.

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Freedom from inhuman, degrading treatment or torture

Right not to be subjected to inhuman or degrading treatment or punishment: no-one shall be subjected to torture or to inhuman or degrading treatment or punishment

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

Treatment which reaches a certain level of severity will breach this right, for example, where children in care are at clear and immediate risk of serious physical or sexual abuse or neglect, where there is inappropriate use of force or restraint, such as handcuffs or solitary confinement, or inadequate personal care.

What this means for local authorities

Vulnerable people, such as children, people with a mental illness or people in care must be protected from physical or psychological abuse, not only by staff or officials, but also by others who are responsible for their care. Thus local authorities may have an obligation where they are aware of serious and immediate risk to children to remove them from the care of their parents to prevent serious neglect of abuse.

Case law examples

- In the case of *Price v UK*, the European Court of Human Rights decided that to detain a severely disabled person in police custody in conditions where she is dangerously cold, risked developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constituted degrading treatment contrary to Article 3.
- In *Napier v Scottish Ministers*, the Court of Session decided that the conditions in prison for a particular prisoner with atopic eczema, who required to “slop out” his toilet vessel contained in his cell, which he shared with another prisoner, amounted in such circumstances, given the size of his cell and the extent to which he was confined to it, to inhuman and degrading treatment contrary to Article 3.

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Case law examples

- In *Z v UK*, the European Court of Human Rights found that a local authority was liable for a failure to protect four children from inhuman and degrading treatment, given that it was known that they were suffering from severe neglect and abuse at the hands of their parents for a four year period.

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Prohibition of slavery and forced labour

No-one shall be held in slavery or servitude. No-one shall be required to perform forced or compulsory labour.

This right means that no-one is forced to perform work involuntarily; and the Article will be breached if the requirement to work is unjust or oppressive; or the work itself involves avoidable hardship.

This includes trafficking of human beings, an increasingly prevalent form of modern slavery.

What this means for local authorities

This article includes an obligation to put in place effective measures to protect victims of trafficking. Migrants in particular may be vulnerable to exploitation, and this includes women and children, as well as men. Local authorities have a general duty to safeguard and promote the welfare of children and young people in need, and should therefore be aware that where children in particular are at risk of trafficking, there is an obligation to protect them, regardless of immigration status or nationality.

Case law examples

- In *CN v UK*, the European Court of Human Rights, decided that the UK had not done enough to protect the claimant who came to the UK fleeing sexual and physical violence in Uganda. This was in circumstances where her passport was removed and she was engaged by an intermediary as a live-in carer for an elderly Iraqi couple who paid the intermediary and wrongly assumed that the pay was being passed to the claimant. At that time, while the police found evidence of trafficking for domestic servitude, this was not an offence in English criminal law.
- In contrast, the Supreme Court in *Reilly and Jameson v Department for Work and Pensions* concluded that the requirement to undertake work placement to retain jobseekers allowance came “no-where close to the type of exploitative conduct at which Article 4 is aimed”.

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Right to liberty and security

Everyone has the right to liberty and security of person. No-one should be unnecessarily detained against their will.

This right is subject to a narrow range of exceptions, such as arrest for a criminal offence or detention in a psychiatric hospital, or to prevent harm to yourself or others. There must however be an adequate reason for the detention.

The type of treatment which may breach this Article might be blanket policies in nursing homes which restrict movement, for example by locking residents in their rooms at night; or informal detention of individuals who do not have capacity, such as those with learning disabilities or dementia.

What this means for local authorities

Local authorities should be aware that any detention of vulnerable people, including those with learning disabilities, children and older people with psychiatric illness, may well mean that Article 5 is relevant. They should therefore ensure that the process for deciding whether or not such vulnerable people should be detained considers each individual's circumstances, and sets out adequate reasons for any decision to deprive an individual of their liberty.

Case law examples

- In *HL v UK*, the European Court of Human Rights held that the informal admission to a psychiatric hospital of an adult who lacked capacity, without the consent of his carers, was in breach of Article 5.
- In *BJ v Proudfoot and the Lord Advocate*, the Court of Session held that the while the detention of children in secure accommodation by the chief of social work and the head of secure accommodation following a decision by the Children's Panel engaged Article 5, the decision-making process did not breach the provisions of Article 5 in the circumstances.
- In *Austin v Metropolitan Police*, the House of Lords concluded that demonstrators confined within a police cordon for up to seven hours did not suffer a violation of their right to liberty, where the cordon was part of a crowd control measure to prevent a breach of public order and where the cordon was in place for no longer than was necessary.

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Right to a fair hearing

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

This right is about a fair and public hearing and due process. In certain situations, not only in criminal cases, but also in processes which determine civil rights (such as employment, property disputes, and benefits claims etc), the right to a fair trial will apply.

This might require support for an individual subject to a decision making process to ensure adequate time and facilities to present their case; ensuring a fair process in disciplinary proceedings, especially if an individual may lose their livelihood, for example fitness to practice hearings by the General Teaching Council or British Medical Association; having an opportunity to be heard or participate at some stage in the decision making or adversarial process; having a right of appeal to an independent body; having a right to a reasoned decision.

What this means for local authorities

Officials who are involved with decision-making procedures, for example in planning or child-care or those who award permits or licences, must ensure that their procedures meet these requirements. This may require appeals to be in place, and that the appeal process is clear and easy to understand, that appellants are given adequate time and facilities to prepare, access to interpreter if necessary and are entitled to reasons for the decision.

Case law examples

- In *Darnell v UK*, the European Commission on Human Rights confirmed that a lapse of nine years between the claimant's dismissal and the determination of his rights by the Employment Appeal Tribunal was not a reasonable time and therefore a breach of Article 6.
- In *Governors of X School*, the Supreme Court decided that, in the case of a teaching assistant who was accused of sexual assault, the refusal of his request for legal representation at the disciplinary hearing did not breach his right to a fair trial. While there was no automatic right to legal representation in the disciplinary hearing, an employee would be entitled to legal representation only where the outcome of the disciplinary hearing might have a significant influence on the decision of any panel subsequently determining fitness to practice.
- In *Tehrani v UK* Central Council for Nursing, Midwifery and Health Visiting the Court of Session held that the Article 6 requirements do apply where there are disciplinary proceedings which determine a right to practice a profession and here could result in removal of the claimant's name from the register of nurses. This meant that the claimant was entitled to a hearing before an independent and impartial tribunal. However, Article 6 requirements will be fulfilled where there is a statutory right to appeal to a court of law.

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Right to private and family life

Everyone has the right to respect for his private and family life, his home and his correspondence

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.

This right is very broad in scope and covers the following areas:

- Privacy: this is defined broadly and relates to all aspects of privacy and includes sexual identity, dress and freedom from intrusion by the media.
- Family life: this covers all close and personal ties of a family kind, not only those of a blood or formalised nature. It includes the right for a family to live together and enjoy each other's company.
- Physical, psychological and moral well-being: this covers the right to well being through retaining autonomy, choice and dignity. It requires that there is access to information, and can require that an individual's official records, such as medical information, are kept private and confidential. It includes participation in decisions that affect an individual's life.
- Home: this covers the right of the home life of an individual to be respected and to enjoy their homes peacefully and without exposure to excessive noise or environmental pollution.
- Correspondence: this covers all forms of communication with others such as phone calls, letters, emails etc.

The rights under this Article may be restricted, but any interference must be necessary and do no more than is needed (i.e. be proportionate link) to meet one of the legitimate aims of protecting national security, public safety, the economic well being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others.

This means that although this right is very broad in scope and therefore may be relevant in a wide range of circumstances, there is a requirement to balance the rights of the individual with the needs of the rights of others and of society in general.

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What this means for local authorities

Officials should be aware that their policies or actions might interfere with an individual's right to privacy, and should try to ensure that their decisions do not interfere with these rights, or at least if it is necessary to do so, that they can justify their actions or decision as being no more than is required to meet one of the legitimate aims.

This right may well be relevant for officials who are involved in providing or managing housing, for example to gypsy travellers; who require entry to properties; who are involved in investigation or monitoring who might make searches of homes or use covert surveillance or CCTV; who deal with families or children, especially where there is a risk that a family might be separated; who provide medical treatment or social care, recognising where people might have the right to refuse medical treatment.

This right will be particularly relevant for local authorities as employers, for example in respecting employee's privacy when monitoring e-mails and internet usage; when imposing dress codes or drug testing at work; in respecting the privacy of transgender and gay and lesbian people.

Case law examples

- In *London Borough of Hounslow v Powell*, the Supreme Court set out guidance when eviction from local authority housing amounts to a breach of tenant's human rights.
- The Court of Session in *South Lanarkshire Council v McKenna* confirmed that landlords in Scotland must consider whether eviction is proportionate, given an interference with Article 8, which is particularly likely in the case of vulnerable occupants.
- In *Winterstein v France*, the European Court of Human Rights found that there was a violation when gypsy traveller families who had lived in the same place for many years without causing any unlawful nuisance were evicted. The Court said that national authorities should take account of the fact that the claimants were a vulnerable minority which required special consideration to be paid to their needs and their different way of life when it came to devising solutions to the unlawful occupation of land or deciding on possible alternative accommodation.
- In *Copland v UK*, the European Court of Human Rights held that Article 8 was infringed when a public sector employer monitored, collected and stored personal information relating to an employee's telephone, e-mail and internet usage at work. The Regulation of Investigatory Powers Act now regulates interception of communications on all private networks, including mobiles and voicemail.

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Case law examples (continued)

- In *McGowan v Scottish Water*, the Employment Appeal Tribunal (EAT) upheld the tribunal's decision that the employee's human rights had not been breached by the company when it used covert surveillance of his home to establish whether he had been falsifying his timesheets. This principle was confirmed more recently in the case of *City and County of Swansea v Gayle*, where the EAT decided that covert surveillance may be justified to prevent crime and protect the rights and freedoms of others.
- In *Peck v UK*, the European Court of Human Rights held that there was a breach of the right to privacy when a council released CCTV footage showing the claimant shortly after he had attempted suicide, where there was no attempt to seek the claimant's consent or obscure his identity.

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Freedom of thought, conscience and religion

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

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

This means that everyone is free to hold a range of views, beliefs and thoughts and to follow a religious faith. This right can never be restricted.

The right to manifest your belief, that is through prayer or diet or through dress or adornments, may only be limited in certain circumstances. Any interference can only be justified if it is necessary to meet the aim of public safety, protection of the rights and freedoms of others.

This requires respect for cultural and religious requirements; giving opportunities for prayer or to wear religious clothing; providing support to enable people to participate in their normal religious practices.

What this means for local authorities

Officials must be aware that their decisions or actions might interfere with a person's right to manifest their religion or belief. Where circumstances mean that it is necessary to restrict that right, they can only do so to the extent that is necessary to meet one of the stated aims. This requires a balance to be struck between the rights of the individual and others.

This right may be particularly relevant for local authorities as employers and as providers of education. Consideration requires to be given, when drawing up or changing policies or practices, to whether these might conflict with someone's religious belief, such as timetabling an examination or training course on a religious holiday or setting dress codes.

Case law examples

In *Eweida, Chaplin, Ladele and McFarlane v UK*, the European Court of Human Rights confirmed that where an individual's religious observance impinges on the rights of others, some restrictions can be made. The Court ruled that individuals should not have to show their actions amounted to a mandatory requirement of their religion before they can have a legitimate complaint. Instead, it will be sufficient if the actions are "intimately linked" to the religion.

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Relevant case examples (continued)

However, while the Court was willing to accept the argument that projection of a particular corporate image was a legitimate aim, in not allowing Ms Eweida to wear a cross visibly with her work uniform, an appropriate balance was not struck between her employer's aim and Ms Eweida's right to demonstrate her religious beliefs in the workplace.

In contrast, the uniform policy applied to Ms Chaplin, which restricted all jewellery including religious symbols, was implemented to protect the health and safety of nurses and patients and the Court found that the interference in that case was necessary.

Both Ms Ladele and Mr McFarlane's cases centred on the belief that same-sex relationships are contrary to God's teaching, with Ms Ladele refusing to conduct civil partnership ceremonies and Mr McFarlane refusing to offer psychosexual counselling to gay couples. The Court accepted that the employers' actions requiring them to undertake these roles were taken with a view to services being provided in a manner which was free from discrimination. Where the religious observance clearly impinged on the rights of others, restriction was found necessary.

In this case, the Court departed from previous decisions and made it clear that it will not be acceptable for an employer to say that the claimant can resign to avoid the interference, but that should be considered when weighing up overall whether the restriction was reasonable in the particular circumstances.

In *Begum v Denbigh High School*, Ms Begum refused to attend school unless she could wear the jilbab, which was in contravention of the school uniform policy which allowed pupils to wear the shalwar kameeze, which she did not consider was compliant with her Islamic faith. The House of Lords decided that any breach of her right to manifest her religion was justified, in particular to protect the rights of other pupils who might feel pressured into wearing alternative forms of dress. The decision by the school was proportionate where the school had consulted the local community to assist in developing an inclusive school uniform policy which took into account the range of faiths of pupils attending the school.

Training Resources



Freedom of expression

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

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and 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.

This means that everyone has the right to hold opinions and to express their views. This applies even if those views are controversial, offensive, shocking or disturbing. The right can be restricted in certain circumstances, but only to the extent necessary to meet the legitimate aim of public safety or national security, to prevent disorder or crime, to protect health or morals, to protect the reputations or rights of others, to prevent the disclosure of confidential information or to maintain the impartiality of the judiciary.

Expression includes publishing books, articles or leaflets, TV or radio broadcasting, communication on the internet etc. It covers the right to receive information, so covers your rights as a speaker or as a member of the audience. Restrictions for hate speech, for example, where the language used would be insulting to particular groups, are likely to be justified when balancing the rights of others.

What this means for a local authority

This Article will be relevant for media and press work, writing speeches and speaking in public, regulating demonstrations and restricting or regulating communications through the internet.

When drawing up policies and practices, consideration should be given to whether these will interfere with a person's right to freedom of expression. If so, restrictions may be justified to balance the rights of others, but would need to be the minimum necessary to meet the aims. A balance also needs to be struck between one person's freedom of expression and another's right to privacy.

Training Resources



Case law examples

- In *Financial Times v UK*, the European Court of Human Rights decided that a requirement for journalists to disclose leaked documents which might have revealed their source was an unjustified interference with their right to freedom of expression.
- In *Pay v UK*, while the European Court of Human Rights considered that dismissal of the claimant for expressions of his sexual identity (which included photographic representations on the internet) was an interference with his right to freedom of expression, this was justified in the particular circumstances of this case where the claimant was employed in the public sector and it was important for the employer to maintain the respect of the public.

Training Resources

Freedom of assembly and association

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

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

This means that everyone has the right to assemble with other people in a peaceful way. They also have the right to associate with other people and this includes the right to form a trade union. While these rights may be restricted, any restrictions must be only to the extent necessary to meet one of the legitimate aims, namely national security, public safety, the prevention of health or morals, the protection of the rights and freedoms of others. The reference to assembly means meetings, marches, public processions and demonstrations. Association includes the right to join a political party, trade union, association or voluntary groups.

What this means for local authorities

Local authorities must be aware that their actions might interfere with a person's right to freedom of association or assembly and should seek to ensure that their policies and decisions conform with these provisions. Where it is necessary to restrict the right to assemble or association, then that should only be to the minimum extent necessary, and in order to meet one of the legitimate aims of protecting national security, public safety, health and morals or the rights of others, or for the prevention of crime. Thus a balancing exercise will require to be undertaken.

This will be particularly relevant for officials who are involved in making decisions about public protests and demonstrations, and in relation to the rights of employees.

Case law examples

- In *Wilson and others v UK*, the European Court of Human Rights decided that the use of financial incentives to induce employees to give up their union membership was a breach of the right to freedom of association.
- In *ASLEF v UK*, the European Court of Human Rights held that the right to freedom of association not only means that a worker must be free to join a trade union (or not) but also that trade unions are free to choose their membership. Thus the expulsion of a member of the BNP by the train driver's union on the grounds that he was likely to bring the union into disrepute was justified.

Training Resources

Freedom from discrimination

Right not to be discriminated against

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

This means that a person must not be discriminated against in respect of the implementation of other Convention rights on the grounds listed above. While the protected grounds are listed, they are not limited and “other status” has been found to include sexual orientation, disability, age, marital status, trade union affiliation and homelessness.

This does not give people a general right not to be discriminated against, but rather to argue that they have been discriminated against in the exercise of their Conventions Rights. Nor does it mean that one of the other Convention Rights needs to be breached, but just that they are relevant.

So if people’s right to private and family life is interfered with in different ways for some groups but not others, then that may well amount to a breach of the right not to be discriminated against. Similarly, there may be a right to education, but if access to education is determined differently for protected groups, then it may be possible to claim a breach of this Article.

Under the Convention, discrimination means treating people differently without an objective and reasonable justification on prohibited grounds. So while direct discrimination can be justified, particularly weighty reasons will be required to justify the key grounds, such as sex and race.

Where the same rule applies to all but has greater adverse impact on a protected group this can amount to indirect discrimination, unless it is a proportionate means of achieving a legitimate aim.

What this means for local authorities

When any of the other Conventions rights are relevant for decisions or policies, then local authorities must be careful to ensure that they are not discriminating against one or more of the protected groups.

Where local authorities take special measures to redress an existing situation of inequality, local authorities will require to justify it by reference to particular disadvantage, and to show that it is a proportionate means of achieving a legitimate aim.

Training Resources



Case law examples

- In *Abdulaziz and others v UK*, because of the immigration rules then in force, the applicants' husbands were refused entry into the UK, although had they been men their wives would have been permitted entry. The European Court of Human Rights decided while the right to private and family life does not allow married couples to choose which country they want to reside in, so there was no breach of Article 8, but where wives were treated differently from husbands, there was a breach of Article 14.
- In *DH v Czech Republic*, the European Court of Human Rights decided that segregating Roma students into "special" schools was a breach of Article 14 and the right to education.
- In *Ghaidan v Godin-Mendoza*, the House of Lords decided that the law allowing succession to tenancies for a spouse (and couples living as husband and wife) but not same sex couples, breached the right to private and family life read with Article 14, so that the relevant legislation had to be interpreted to comply with these Convention rights.

Training Resources



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 to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions

This means that a person has the right not to be denied access to the existing education system. It also means that parents have the right to have their religious or philosophical beliefs respected in the way that their children are educated.

This does not however create a right to be educated in a particular school or in a particular manner. It is not an absolute right and cost can be taken into account when considering the rights of individuals to be educated in the system provided.

What this means for local authorities

This article may be relevant for those working in school or education departments, and those involved in education policy. Consideration should be given to this Article in relation to issues such as exclusions, punishment and uniforms. Local authorities will need to ensure that all pupils have access to education which conforms to parents' religious and philosophical convictions. Local authorities should always be able to produce reasons for their decisions.

Training Resources



Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

This means that everyone has the right to the peaceful enjoyment of their possessions. A person has the right to use, develop, sell, destroy or deal with property in any way they please. Public authorities cannot usually take away a person's property or possessions, or impose restrictions on the way in which they use them, except in specified limited circumstances.

Thus public authorities will only be able to deprive people of their property where there is a law allowing them to do so, and there is a good reason, in the public interest. A fair balance will require to be struck between the rights of individual property owners and the general public.

Possessions has a wide meaning and goes beyond personal property, including houses and leases, to include shares, goodwill in a business and some types of licenses.

What this means for local authorities

Local authorities must not deprive people of their property. Where they have a legal right to do so, any removal of property or interference with a person's use of property must be justified and to the minimum extent necessary to protect the public interest. Officials who work in an area where they can deprive people of their property or possessions, such as those working in planning or licensing, must ensure they have an objective justification for any removal or interference, and should be able to give reasons.

Training Resources

Other international human rights

There are nine core international human rights treaties. The most important of these is the Universal Declaration of Human Rights, along with the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

There is in addition the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), the Convention against Torture (CAT), Convention on the Rights of the Child (CRC), Convention on the Rights of Persons with Disabilities (CRPD).

Perhaps one of the most important of these, since the implementation of the European Convention in the UK through the Human Rights Act, is the International Covenant on Economic Social and Cultural Rights because it covers a broad range of important rights. While the rights contained in this international treaty cannot yet be directly relied on in the courts of Scotland, the UK is legally bound to meet the obligations laid down by that treaty.

This sets out economic social and cultural rights guaranteed in that treaty to which the UK is legally bound, and includes rights relating to the workplace, social security, adequate housing, food, water, health care and education.

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

Training Resources

The proportionality principle explained

The principle of proportionality is at the heart of many human rights claims as any restrictions must be a “proportionate means of achieving a legitimate aim”. Proportionality is often most clearly explained through the expression “don’t use a sledgehammer to crack a nut”.

Consider the aim to be achieved, and whether or not it is a legitimate aim. Then consider the means which are used to achieve that aim. Are they appropriate and necessary?

When considering interference/restrictions on a right, ask:

- Why are a person’s rights being restricted?
- What is the problem being addressed by the restriction on someone’s rights?
- Will the restriction lead to a reduction in the problem?
- Does that restriction involve a blanket policy or does it allow for different cases to be treated differently
- Does a less restrictive alternative exist?
- Has sufficient regard been paid to the rights and interests of those affected?
- Do safeguards exist against error or abuse?

Training Resources

Taking a human rights based approach

A Human Rights Based Approach (HRBA) is a way of empowering people to know and claim their rights, and increases the ability and accountability of individuals and institutions who are responsible for respecting, protecting and fulfilling rights. This means giving people greater opportunities to participate in shaping the decisions that impact on their human rights. It also means increasing the ability of those with responsibility for fulfilling rights to recognise and respect human rights. Using a human rights based approach which is integrated into policy-making, as well as the day to day running of organisations, ensures that standards are met for everyone.

The principles of a Human Rights Based Approach: the PANEL Principles

There are some underlying principles which are important in applying a HRBA in practice, known as the PANEL Principles:

Participation

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

Accountability

Accountability requires effective monitoring of human rights standards as well as effective remedies for human rights breaches. For accountability to be effective there must be appropriate laws, policies, institutions, administrative procedures and mechanisms of redress in order to secure human rights.

Non-discrimination and equality

A HRBA means that all forms of discrimination (such as age, gender, sexual orientation or ethnicity) in the realisation of rights must be prohibited, prevented and eliminated. It also requires the prioritisation of those in the most marginalised or vulnerable situations who face the biggest barriers to realising their rights.

Empowerment of rights holders

Individuals and communities should understand their rights, and be fully supported to participate in the development of policy and practices which affect their lives. Individuals and communities should be able to claim their rights where necessary.

Legality of rights

A HRBA requires the recognition of rights as legally enforceable entitlements, and is linked in to national and international human rights law.

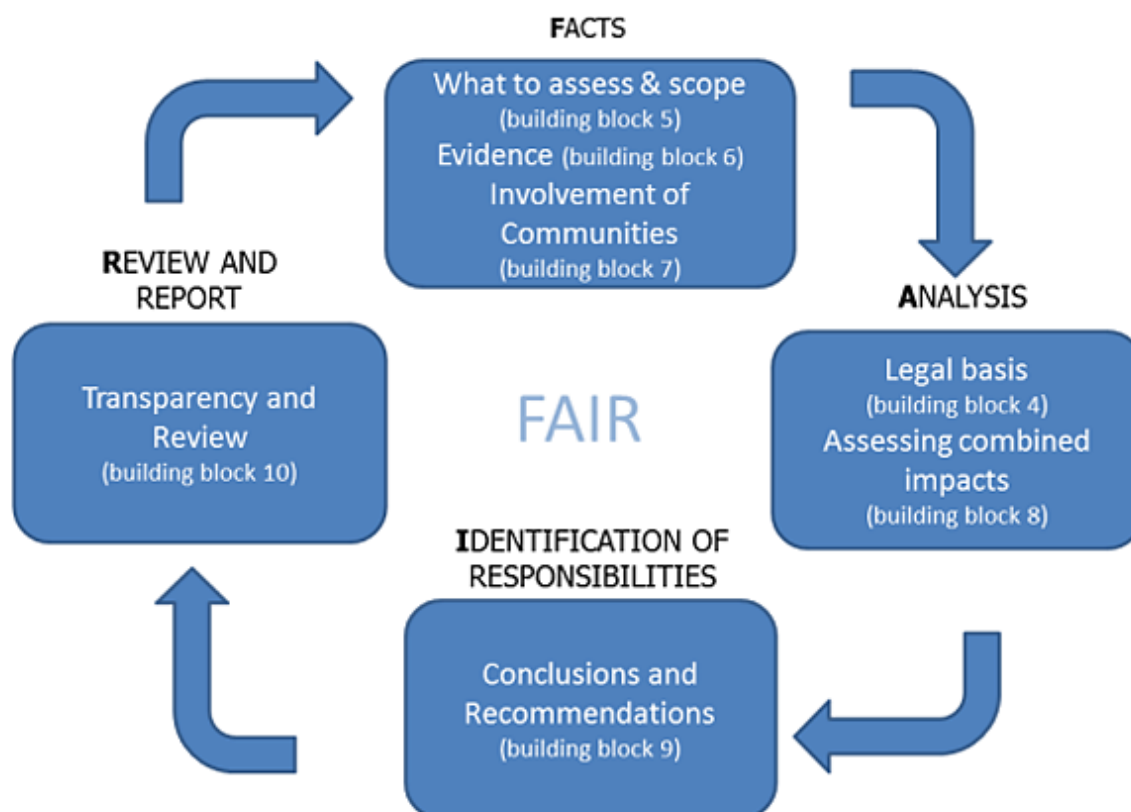
Training Resources

The FAIR approach - putting a human rights based approach into practice

The Scottish Human Rights Commission has developed the 'FAIR' approach to help you apply the standards and principles of human rights in practice. The basic steps of the FAIR approach are:

- **Facts:** What is the experience of those involved and what are the important facts to understand?
- **Analyse rights:** Develop an analysis of the human rights at stake
- **Identify responsibilities:** Identify what needs to be done and who is responsible for doing it
- **Review actions:** Make recommendations for action and later recall and evaluate what has happened as a result.

This FAIR approach can be applied in a number of ways. Firstly, it can be seen to reflect the overall process of good practice impact assessment. See the diagram and table below which maps FAIR against the Good Practice Building Blocks of impact assessment:



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Steps of FAIR	Good Practice Impact Assessment Building Blocks
What is the experience of those involved? Are they being heard and if not, do they require support to do so?	What to assess & scope (building block 5)
What are the important facts to understand?	Evidence (building block 6)
Analysis of right(s) at stake	Involvement of Communities (building block 7)
What are the human rights or issues at stake?	Legal basis (building block 4)
Is the right to life or the right not to be subjected to inhuman or degrading treatment at stake? If so, these rights are absolute and cannot be restricted.	Assessing combined impacts (building block 8)
Can the right be restricted? What is the justification for restricting the right?	
Is the restriction on the right 'proportionate'? i.e. is it the minimum necessary restriction to meet the aim or is a "sledgehammer being used to crack a nut"?	
Identification of shared responsibilities What changes are necessary?	Conclusions and Recommendations (building block 9)
Who has responsibilities for helping to make the necessary changes?	
Review Actions	Transparency and Review (building block 10)
Have the actions taken been recorded and reviewed and has the individual affected been involved?	

FAIR can also be applied as a framework to assist in thinking through and discussing equality and human rights issues at stake. This should be done with the full participation of affected rights holders. The FAIR framework has been used to analyse the case studies.

Training Resources



Case Studies and Feedback Guidance

The four case studies in this section of the materials can be worked through either on your own or, preferably as a group discussion, and will assist you to better understand how to apply both human rights and equality in practice.

The feedback for each case study does not provide “answers” but rather is designed to assist in the facilitation of discussion following the application of the FAIR steps.

CASE STUDY 1: REFOCUSING SOCIAL CARE PROVISION

CASE STUDY 2: SCHOOL UNIFORM POLICIES

CASE STUDY 3: MARCHING AND DEMONSTRATION POLICIES

CASE STUDY 4 – LOCATING A TRANSIT SITE FOR GYPSY TRAVELLERS

Training Resources



Case Study 1: Refocusing social care provision

A local authority decides to re-define those who are 'in need' of social care in their own home. Those agreed to be in high need of care will continue to receive it free of charge but criteria for charging fees for services for those in lesser forms of need will be introduced as an attempt to increase income and lower demand.

Although the need to rationalise and reduce expenditure is the primary driver for this policy the social care team also believe that resources could be better targeted at those in highest level of need and thus increase entitlements for some.

The authority has developed options and draft criteria for different levels of need in preparation for a consultation in advance of a decision by elected members. As this policy is directly relevant to both equality and human rights of both users and carers of the current and future services, they decide to conduct an EQHRIA.

Task

How should the local authority proceed? Using the questions below, follow the FAIR model to develop your response:

Facts: What are the important facts?

Are there specific, potentially disproportionate, negative impacts on particular groups including those with protected characteristics?

Which individuals and groups need to be heard?

What sources of evidence (qualitative and quantitative) could be used to assess the current and future impacts of the policy options?

When gathering the facts:

1. What methods would you use to ensure that those affected by the policy are consulted and involved in decisions that affect them, in an active and meaningful way?
2. Can you identify any of the individuals or groups who are likely to need support to engage with you, and if so, who will provide that support?
3. What information will those affected by the policy need in order to be able contribute effectively to the consultation process?

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Analysis: What are the human rights at stake and what are the implications of the policy for compliance with the Equality Act?

- What are the human rights issues at stake?
- Are the rights absolute?
- Can the right be restricted and if so, what is the reason for the restriction in this case?
- If the right is being restricted, is the response proportionate? (i.e. is it the minimum restriction necessary to achieve your objective – or is it a “sledgehammer to crack a nut”?)
- From the evidence gathered are the protected groups likely to be treated less favourably than others by the policy?
- If the policy applies to everyone, are the protected groups likely to suffer a particular disadvantage compared with other groups?
- Is the policy designed to achieve positive benefits for protected groups? For example, will the policy remove or minimise disadvantage, meet particular needs or encourage participation?
- What is the potential impact on “good relations” - that is the “promotion of understanding and the reduction of prejudice.”

Identification of shared responsibilities

- What changes if any, are necessary to the policy that would mitigate any negative impact of the policy?
- Who has responsibilities for helping with any necessary changes?

Review actions and policy

- Have the actions taken been recorded?
- How often, and in what circumstances, will the policy be reviewed and by whom?

Training Resources



FEEDBACK CASE STUDY 1: REFOCUSING SOCIAL CARE PROVISION

An important fact in this case is that although the need to reduce expenditure on social care has been initiated by the national government, the local authority has the responsibility for deciding how that will be implemented. They will need to ensure that the impact of the policy does not disproportionately disadvantage any of the groups with shared protected characteristics as well as ensure the human rights of those affected are protected.

The groups most likely to be affected by the potential reduction of services include disabled people and older people, especially the very elderly.

Women are disproportionately represented within the older age groups because they live longer. Women are also more likely to be the carers, both paid and unpaid, and the reduction in services is likely to require them to take on extra unpaid caring work which will impact on their availability to carry out paid work

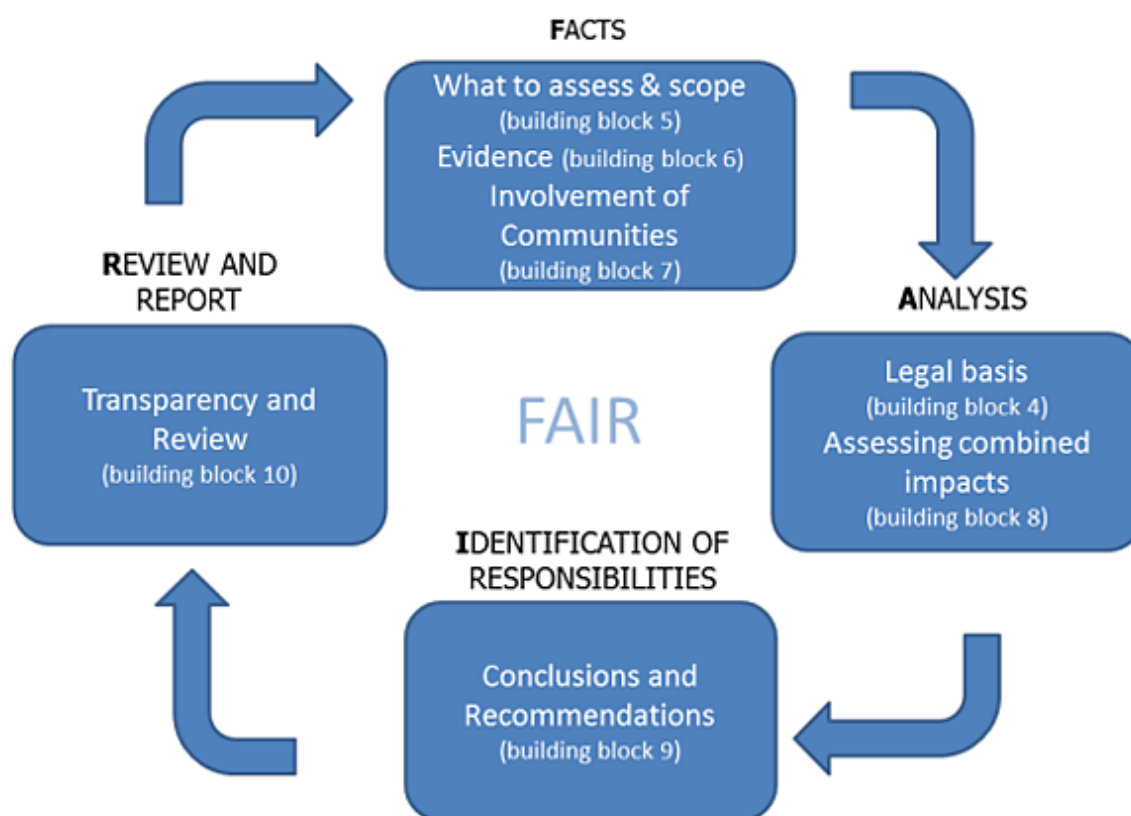
The key human rights engaged are:

- Right to life (Article 2 HRA): there is a particular danger to the elderly of a reduction in services even for those whose care needs have been identified as low or moderate;
- Right not to be tortured or treated in an inhuman or degrading way (Article 3 HRA): the withdrawal or reduction of services could endanger the lives of those who are already vulnerable.
- Right to respect for private and family life (Article 8 HRA): an increased number of people may have to go into care homes because social care at home is no longer available and the physical and psychological integrity of those who require care but are not deemed to be in high need may be impacted.

Those who should be consulted include those currently receiving or needing care, unpaid carers, friends and family, staff who provide the care, other health and social care professionals and groups who represent the interests of those in care.

The consultation and the evidence from other sources might lead the authority to either reconsider their decision or to put in place some mitigation measures to deal with the negative impacts, for example, setting up emergency service so that carers can obtain priority consultation over medical treatment for service users where required and ensuring that the existing help-line for people needing care and carers is given more information to sign-post other sources of care.

Training Resources



Training Resources

Case study 2: School Uniform Policies

An urban education authority is in the final stages of planning the opening of a new, non-denominational secondary school. The school catchment area is ethnically and religiously diverse and it is likely that a significant number of disabled pupils will also attend.

The head teacher, in partnership with the school board, is now due to develop a uniform policy for the school. This policy will set out what is, and what is not, acceptable in terms of dress for all pupils attending the school. It is intended that the policy will be enforced and a failure to conform with the policy could potentially lead to disciplinary action including exclusion. “Dress” is interpreted as comprising both clothing and jewellery.

Task

How should the head teacher design the consultation phase to ensure that a range of voices are heard? What factors may need to be taken into account when balancing rights whilst ensuring that the final policy has a proper basis in law, and is necessary and proportionate?

Using the questions below, follow the FAIR model to develop your response:

Facts: What are the important facts?

- Are there specific, potentially disproportionate, negative impacts on particular groups including those with protected characteristics?
- Which individuals and groups need to be heard?
- What sources of evidence (qualitative and quantitative) could be used to assess the current and future impacts of the policy options?

When gathering the facts:

1. What methods would you use to ensure that those affected by the policy are consulted and involved in decisions that affect them, in an active and meaningful way?
2. Can you identify any of the individuals or groups who are likely to need support to engage with you, and if so, who will provide that support?
3. What information will those affected by the policy need in order to be able contribute effectively to the consultation process?

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Analysis: what are the human rights at stake and what are the implications of the policy for compliance with the Equality Act?

- What are the human rights issues at stake?
- Are the rights absolute?
- Can the right be restricted and if so, what is the reason for the restriction in this case
- If the right is being restricted, is the response proportionate? (I.e. is it the minimum restriction necessary to achieve your objective – or is it a “sledgehammer to crack a nut”?)
- From the evidence gathered, are the protected groups likely to be treated less favourably than others by the policy?
- If the policy applies to everyone, are the protected groups likely to suffer a particular disadvantage compared with other groups?
- Is the policy designed to achieve positive benefits for protected groups? For example, will the policy remove or minimise disadvantage, meet particular needs or encourage participation?
- What is the potential impact on “good relations”- that is the “promotion of understanding and the reduction of prejudice.”

Identification of shared responsibilities

- What changes if any, are necessary to the policy that would mitigate any negative impact of the policy?
- Who has responsibilities for helping with any necessary changes?

Review actions and policy

- Have the actions taken been recorded?
- How often, and in what circumstances, will the policy be reviewed and by whom?

Training Resources

FEEDBACK SHEET FOR CASE STUDY 2: SCHOOL UNIFORM POLICIES

The important fact in this case is that the school uniform policy will be applied to everyone who attends the school, and so you must consider whether it might engage some pupils human rights (such as freedom of expression or religion/belief) and whether it might disadvantage some protected groups (for example pupils from particular faith/religious groups).

The primary protected groups who could be affected by this policy are: boys and girls (in terms of having a gender neutral or gender specific dress code); certain religious groups (who may be required to wear symbols or adhere to dress codes as a requirement of the faith); disabled pupils who may need adjustments to be made to comply with the dress code; and pupils who may be in transition between genders.

The primary human rights Articles at stake here are freedom of thought, conscience and religion/belief (Article 9), the right to education (Protocol 1, Article 1) and the right to freedom of expression (Article 10). Both freedom of expression and freedom to manifest one's religion are qualified rights which means that public authorities may interfere with these rights in certain limited circumstances. However this is only possible where the authority can show that its action has a proper basis in law, and is necessary and 'proportionate' in order to protect public safety, public order, health or morals or to protect the rights and freedoms of other people.

A 'proportionate' response is one that is no more than is necessary and appropriate and not excessive in the circumstances.

The focus for any policy development from both an equality and a human rights perspective would be the extent to which the policy has a negative impact on different groups / communities within the school and the extent to which this negative impact might constitute a breach of their rights or constitute discrimination under the Equality Act.

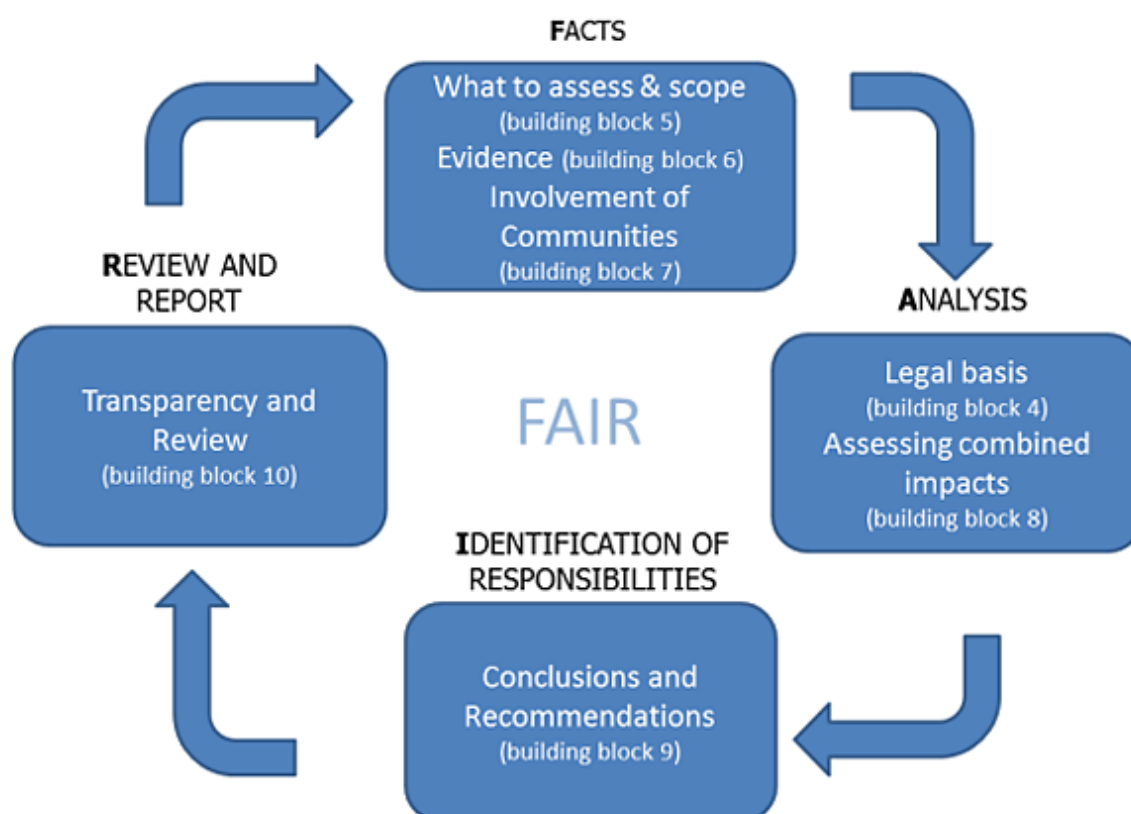
The school therefore needs to develop a policy, using a thorough equality and human rights impact assessment process, to take account of all these different and complex factors.

To do this effectively they would need to carry out extensive consultation about their policy and they would need to make sure that they create a process whereby everyone feels safe to give their view. They might wish to consult with pupils in the school, the staff and management of the school, the local community including any parents' organisations and representatives of the local faith and belief organisations and other equalities groups.

Training Resources

It is also important to note that a policy which is perceived to be either “preferential” or unfair by or to any groups could have a negative impact on good relations both within and outside the school. This highlights the importance of a robust consultation process so that all those affected by the policy understand how the decision was arrived at.

One important point which may arise in discussion of this case study is the extent to which the answer is to be found by determining whether or not the dress code is an essential requirement of the religion/belief. The courts have said, even after hearing religious experts on both sides, that it is not the job of the courts or judges to make that decision, and that the key focus is on whether or not the belief in the requirement to manifest religion in that particular way is genuinely held.



Training Resources

Case study 3: Marching and demonstration policies

“Scotland Against Mosques” (SAM) has applied for permission from the council to stage a demonstration in a major city centre square this coming Saturday to protest against the “Islamification of Scotland”. They propose to march through the city centre before holding a rally in the square.

SAM’s mission statement is to ensure that no further mosques are built in Scotland, as they believe Islam is “un Scottish,” through all peaceful and legal means.

The proposed route of the march passes the central mosque.

The last time that an anti-Islamic lobby group staged a demonstration to protest in the city centre they attracted support from other far right groups and a counter demonstration by left wing groups. This resulted in some violent clashes and three arrests.

The council’s policy in relation to applications to stage demonstrations is that permission will be refused if there is any possibility of violence. In considering whether or not to grant the application, the council takes account of concerns which are expressed by local shopkeepers, community leaders, and religious groups about a re-occurrence of violence.

The council is concerned that a decision against SAM might interfere with their right to freedom of assembly and their freedom of expression. However, they are also concerned that a decision to allow SAM to march will raise tensions within the Muslim and other communities and might mean that the council will not meet their requirement under the Equality Act to foster good relations.

They decide that they should carry out an equality and human rights impact assessment to guide their decision.

Task

How should council proceed? Using the questions below, follow the FAIR model to develop the response:

Facts: What are the important facts?

Are there specific, potentially disproportionate, negative impacts on particular groups including those with protected characteristics?

Which individuals and groups need to be heard?

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What sources of evidence (qualitative and quantitative) could be used to assess the current and future impacts of the policy options?

When gathering the facts:

1. What methods would you use to ensure that those affected by the policy are consulted and involved in decisions that affect them, in an active and meaningful way?
2. Can you identify any of the individuals or groups who are likely to need support to engage with you, and if so, who will provide that support?
3. What information will those affected by the policy need in order to be able contribute effectively to the consultation process?

Analysis: what are the human rights at stake and what are the implications of the policy for compliance with the Equality Act?

- What are the human rights issues at stake?
- Are the rights absolute?
- Can the right be restricted and if so, what is the reason for the restriction in this case.
- If the right is being restricted, is the response proportionate? (i.e. is it the minimum restriction necessary to achieve your objective – or is it a “sledgehammer to crack a nut”?)
- From the evidence gathered are the protected groups likely to be treated less favourably than others by the policy?
- If the policy applies to everyone, are the protected groups likely to suffer a particular disadvantage compared with other groups?
- Is the policy designed to achieve positive benefits for protected groups? For example, will the policy remove or minimise disadvantage, meet particular needs or encourage participation?
- What is the potential impact on “good relations “ – that is the “promotion of understanding and the reduction of prejudice.”

Identification of shared responsibilities

- What changes if any, are necessary to the policy that would mitigate any negative impact of the policy?
- Who has responsibilities for helping with any necessary changes?

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Review actions and policy

- Have the actions taken been recorded?
- How often, and in what circumstances, will the policy be reviewed and by whom?

FEEDBACK FOR CASE STUDY 3: MARCHING AND DEMONSTRATION POLICIES

The important facts in this case are that the rights of different groups are in tension. SAM wants to raise awareness about their opposition to the “Islamification of Scotland” but their purpose is both disputed and opposed by large sections of the community, both Muslim and non Muslim.

The key human right at stake here for SAM, and any potential counter demonstrators, is freedom of assembly (Article 11) and the right to freedom of expression (Article 10).

These are both qualified rights and therefore the focus should be on the proportionality question: in what circumstances might it be permissible to refuse SAM the right to protest and would a refusal be appropriate in this case?

The right to freedom of assembly can be restricted where the council have a good reason such as national security, public safety, preventing crime, protecting health or protecting others rights.

So when considering what decision to make, the council will take into account the fact that it is anxious to avoid a repeat of the violence last time an anti-Muslim group marched in the city. However, in order to ensure a proportionate response, the council has to decide which course of action will cause the least interference to the rights of SAM.

The options open to them are:

- To allow the march and demonstration to go ahead as planned and to make sure that it is adequately policed and stewarded.
- To require SAM to use a different route so as not to provoke counter demonstrators.
- To refuse permission for the march and /or the demonstration.

In reaching their decision they need to take into account the views of SAM, as well as members of the public affected by the route, opponents of the group and also shoppers and shopkeepers trading in the area who might be disrupted. The council would also need to liaise with police about their decision.

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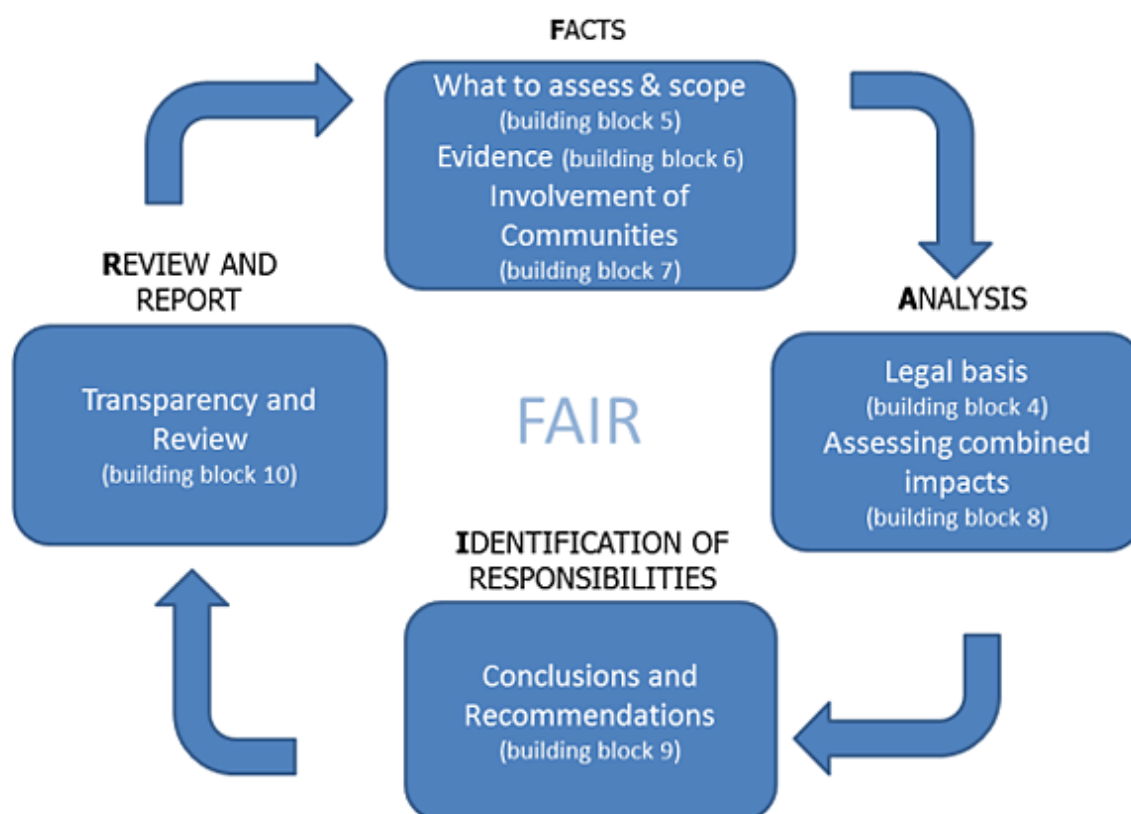
The council also has an obligation under the Equality Act to pay due regard to the need to “foster good relations”. This is a positive duty, not a reactive one. What constitutes “good relations” has not been tested in law. However it is clear that a demonstration which has the potential to incite religious hatred is not compatible with a general requirement for the council (and police) to “reduce prejudice”.

Their final decision should be the one that, in their judgment, interferes the least with SAM’s rights to march and demonstrate, but also allows for the legitimate expression of protest against SAM’s views. They might decide to allow the march on the condition that it is re-routed, that specific conditions are placed on the organisers to undertake not to display or utter offensive symbols or words or to undertake a course of action which would be likely to incite religious or racial hatred. Alternatively, the council may decide that the presence of the marchers would inevitably lead to illegal acts taking place (inciting religious hatred) and decide that this requires a restriction on the right to march or assemble at all.

This situation may result in a decision to review the policy. It will therefore have to be viewed through the human rights and equalities lens and using the balancing act of proportionality for every individual request as the circumstances will always be different. However, the council’s policy currently allows restriction whenever there is any possibility of violence. That is likely to be viewed as too restrictive as the council should weigh up in the individual case the likelihood of violence. A policy which allows for a blanket ban on a particular group marching because of violence in the past will almost certainly breach the right to freedom of assembly.

This case is based on the types of decisions which councils require to make in relation to rallies, demonstrations and marches, such as the Orange Walk. A case along similar lines was considered recently by Aberdeen City council, which published a note of the outcome on the internet, see [here](#).

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Case study 4 – Locating a halting site for gypsy travellers

A local authority has assessed a need to build a halting site for Gypsy Travellers who pass through the area during the summer months. Although historically Gypsy Travellers have been used to “pulling in” on unused land or have camped with farmers’ permission, increasingly such sites have been closed to them. As there is little spare capacity on the council’s official site, Gypsy Travellers who wish to reside temporarily in the area are increasingly being forced into urban areas, which brings them into conflict with other land users and homeowners.

During a previous unsuccessful attempt to designate a site, the council encountered considerable opposition from local communities, who believed they would be affected by locating a site on their doorstep, from the local press and from a number of elected members. Since the decision to attempt to consult again on sites became public knowledge, tensions have grown again with two local community councils opposing the sites on the grounds of safety for the sites’ residents and green belt considerations. People speaking on behalf of Gypsy Travellers have accused the community councils of being “racist”.

The council is currently drafting a policy to support the development of specific named halting sites in their area and it will consult on the proposal.

Task

How should the council proceed with its consultation bearing in mind the strongly held and polarised opinions which are likely to be raised on all sides?

Using the questions below, follow the FAIR model to develop your response:

Facts: What are the important facts?

- Are there specific, potentially disproportionate, negative impacts on particular groups including those with protected characteristics?
- Which individuals and groups need to be heard?
- What sources of evidence (qualitative and quantitative) could be used to assess the current and future impacts of the policy options?

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When gathering the facts:

1. What methods would you use to ensure that those affected by the policy are consulted and involved in decisions that affect them, in an active and meaningful way?
2. Can you identify any of the individuals or groups who are likely to need support to engage with you, and if so, who will provide that support?
3. What information will those affected by the policy need in order to be able contribute effectively to the consultation process?

Analysis: what are the human rights at stake and what are the implications of the policy for compliance with the Equality Act?

- What are the human rights issues at stake?
- Are the rights absolute?
- Can the right be restricted and if so, what is the reason for the restriction in this case.
- If the right is being restricted, is the response proportionate? (i.e. is it the minimum restriction necessary to achieve your objective - or is it a “sledgehammer to crack a nut”?)
- From the evidence gathered are the protected groups likely to be treated less favourably than others by the policy?
- If the policy applies to everyone, are the protected groups likely to suffer a particular disadvantage compared with other groups?
- Is the policy designed to achieve positive benefits for protected groups? For example, will the policy remove or minimise disadvantage, meet particular needs or encourage participation?
- What is the potential impact on “good relations “ - that is the “promotion of understanding and the reduction of prejudice.”

Identification of shared responsibilities

- What changes if any, are necessary to the policy that would mitigate any negative impact of the policy?
- Who has responsibilities for helping with any necessary changes?

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Review actions and policy

- Have the actions taken been recorded?
- How often, and in what circumstances, will the policy be reviewed and by whom?

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FEEDBACK SHEET FOR CASE STUDY 4 – LOCATING A TRANSIT SITE FOR GYPSY TRAVELLERS.

The fact that there are very strong views and emotions on either side should not cloud the issue of the rights of the Gypsy Traveller community, the duties of the local authority and the legitimate concerns of the settled community. The negative and stereotypical views that many of the settled community hold about the Gypsy Traveller community should not be a factor in determining the correct course of action.

All of the interested parties need to be consulted and all need to be made aware of the legal position in relation to the provision of sites.

Local authority legal requirements

Although local authorities are required to assess the housing needs of Gypsy Travellers every 5 years in their Housing Plan, they are not formally required to meet this need by the Scottish Government.

If a local authority fails to assess Gypsy Travellers needs in its Housing Plan the Government is permitted to take action to improve the plan.

Nevertheless, beyond this formal requirement human rights law means it is unlawful for a public authority to act in a way which is incompatible with the human rights set out below.

Human rights issues

The human rights at stake include the right to private and family life (Article 8) and the protection of property (Article 1, Protocol 2).

Members of both the Gypsy Traveller community and the settled community have a right to have their home life respected and to enjoy their homes peacefully and without exposure to excessive noise or environmental pollution. Members of both groups have the right to the peaceful enjoyment of their possessions. However, members of both groups might think that the other is interfering with their ability to exercise those rights.

In applying Analysis steps of the FAIR questions it will have to be considered what a minimum necessary interference with the rights of either community would be and what measures can be taken to ensure any negative impacts are minimised.

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The application of the Equality Act

The general duty of the Equality Act 2010 applies to every local authority planning function.

It could be argued that by failing to provide official sites Gypsy Travellers are forced onto contested land and/or to form unlawful encampments which do little to foster good community relations. The local authority would need to demonstrate how it was fostering good relations in the absence of site provision.

Community Councils are also covered by the general duty of the Equality Act 2010.

Individual applications for sites are subject to the Equality Act 2010 as this forms part of the public functions of a local authority, and discrimination in the decision making process is therefore unlawful. However as with other planning applications the Council has to weigh the merits of the applications against the objections and then pay due regard to equality in decision making.

The council needs to ensure that in the consultation process all of the groups involved, including the elected members, are fully aware of the legal framework that must underpin their decision. The fears and concerns of the settled community must be addressed (e.g. guaranteeing that the site will be maintained, as appropriate, by the council) and the fears and concerns of the Gypsy Traveller community must also be addressed (e.g. guaranteeing that the police will respond to attacks on their site).

There is a useful EHRC publication: “Gypsies and Travellers: simple solutions for living together.”

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