Article 8:
The right to respect for private and family life, home and correspondence

Article 8 of the European Convention on Human Rights provides that:

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

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing 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.
Article 8 protects the private life of individuals against arbitrary interference by public authorities and private organisations such as the media. It covers four distinct areas: private life, family life, home and correspondence.

Article 8 is a **qualified right**, so in certain circumstances public authorities can interfere with the private and family life of an individual. These circumstances are set out in Article 8(2). Such interference must be proportionate, in accordance with law and necessary to protect national security, public safety or the economic wellbeing of the country; to prevent disorder or crime, protect health or morals, or to protect the rights and freedoms of others.

The concept of private life in UK law is based on the classic civil liberties notion that the state should not intrude into the private sphere without strict justification. In our modern system aspects of this right are protected by several regulators and pieces of legislation, including the Data Protection Act and the Regulation of Investigatory Powers Act.

**The current legal and regulatory system is not providing adequate protection for personal information**

We discuss issues of privacy and media freedom under Article 10, freedom of expression. This chapter focuses on information privacy, which concerns the collection, use, tracking, retention and disclosure of personal information. There is evidence that technological developments and a weak legal and regulatory system leave members of the public at risk of Article 8 breaches in this area.

The review shows that:
- Britain’s legislation relating to information privacy and surveillance is patchy, and in some areas there is no protection against infringements.
- The regulators and monitors charged with protecting information privacy are not equipped to deal with the sheer amount of information being processed and shared.
• Public sector organisations continue to make serious errors which put information privacy at risk.
• Retaining the DNA of innocent people on a national database may breach their Article 8 and Article 14 rights.

**Not enough is done to protect the dignity and autonomy of people who use health and social care services**

Article 8 protects dignity and autonomy. Though these concepts are not mentioned in the article itself, they have developed through case law. Article 8 rights are often considered alongside Article 3, which covers mistreatment serious enough to constitute torture or inhuman or degrading treatment. There is evidence of mistreatment of some of those who use health and social care services which may breach Article 8.

The review shows that:
• People who are receiving health and social care from private and voluntary sector providers do not have the same guaranteed level of protection under the Human Rights Act as those receiving it from public providers.
• There is a lack of awareness, both within local authorities and among care staff, of how human rights obligations apply in a health and social care setting.
• Better complaints systems are needed across the health and social care sectors.
• Increased pressure on health and social care budgets puts the Article 8 rights of services users at risk.

**Requirements to annul marriage prior to gaining gender recognition continue to cause hardship for some transsexual people**

In the UK, a transsexual person who is married or in a civil partnership is required to have their marriage or partnership annulled before he or she can be given a gender recognition certificate under the Gender Recognition Act (2004). The European Court of Human Rights has ruled that this is not a breach of Article 8, but the requirement continues to cause hardship for those affected.
The review shows that:
- Transsexual people currently have to divorce or end their civil partnership if they want their gender to be legally recognised.

There continues to be a lack of appropriate accommodation for Gypsies and Travellers

Article 8 does not impose an obligation on public authorities to provide homes for anybody, or to provide sites for Gypsies and Travellers. It does, however, oblige authorities to respect the home. This applies particularly in situations where local authorities wish to evict people from their homes. Due to a long-term lack of authorised sites, Gypsies and Travellers often have no choice other than to live in unauthorised sites. This increases the likelihood that they will face eviction.

The review shows that:
- To date, the courts have not found a breach of Article 8 in relation to an eviction from an unauthorised Gypsy and Traveller site. However, there may be grounds for challenging this precedent.
- There continues to be a shortage of authorised Gypsy and Traveller sites, increasing the likelihood of further forced evictions from unauthorised sites.
Article 8 protects the private life of individuals against arbitrary interference by public authorities and private organisations such as the media. It is a wide-ranging article that covers four distinct areas: private life, family life, home and correspondence.

Article 8 is a qualified right, so in certain circumstances public authorities can interfere with the private and family life of an individual. These circumstances, or exceptions, are set out under Article 8(2). Such interference must be in accordance with law, proportionate, and necessary to protect national security, public safety or the economic wellbeing of the country; to prevent disorder or crime, protect health or morals, or to protect the rights and freedoms of others.

The burden is on the state to justify an interference with an Article 8(1) right. This means that the state must show that the interference falls within one of the exceptions in Article 8(2), and that it is in accordance with the law and necessary in a democratic society. This requires the state to demonstrate that the interference corresponds to a ‘pressing social need’ and that it is ‘proportionate to the legitimate aim being pursued’. A state will find it harder to justify an interference which concerns a more intimate aspect of a person’s private life.

Under the Human Rights Act 1998 (HRA), the obligations placed upon the state by the European Convention on Human Rights pass on to all public authorities.

Ultimately, the courts decide whether the requirement is met by applying a proportionality test to determine whether the interference is justified in the light of particular circumstances of the case.

Article 8 imposes two types of obligations on the state and public authorities:

- **a negative obligation** not to interfere with an individual’s private life, family life, home and correspondence
- **a positive obligation** to take steps to ensure effective respect for private and family life, home and correspondence, between the state and the individual, the individual and private bodies, and between private individuals through law enforcement, legal and regulatory frameworks and the provision of resources.
Private life

Private life includes an individual’s physical and psychological integrity, personal or private space, the collection and publication of personal information, personal identity, personal autonomy and sexuality, self-development, relation with others and reputation. Article 8 also provides a framework for monitoring the gathering and retention of personal data. It is designed to ensure that the right to keep personal data from being disclosed to third parties can be balanced against legitimate aims of a democracy, such as crime prevention or the economic wellbeing of society. Types of data that would fall within the scope of Article 8(1) include census information and ID schemes.

Most forms of surveillance will constitute an interference with the right to a private life. This includes the use of CCTV, phone-tapping, the installation of listening devices in the workplace and home, and surveillance via GPS. The digital recording of a public scene, for example by CCTV, can give rise to Article 8 considerations.

Family life

The concept of family life goes beyond formal or traditional relationships. It covers engaged couples, cohabiting couples and same-sex couples. It also covers relationships with siblings, foster parents and foster children and grandparents and grandchildren.

In Britain, Article 8 issues arise frequently in the context of immigrants and asylum seekers. It is generally accepted that Article 8 may be engaged by an interference with family ties in Britain, but immigration control is usually cited as a legitimate reason under Article 8(2) for the interference. The issue in dispute is generally the proportionality of the interference. So, for example, case law suggests that it will rarely be proportionate to order removal for immigration purposes of a spouse to a country that the other spouse cannot reasonably be expected to reside in. Nor may it be proportionate to sever a genuine and subsisting relationship between parent and child. In deportation cases of non-British citizens who have committed a serious crime it is still necessary to draw the balance of proportionality under Article 8. Extradition in accordance with an extradition treaty is a proportionate interference with Article 8(1), save for in exceptional circumstances.

Home

A home is not just one’s current residence, but can also include a holiday home, business premises, caravans and homes built in contravention of applicable town planning regulations. More recently, ‘home’ has been described as ‘the place, the physically defined area, where private and family life develops.’

Obvious examples of interference with one’s home would include a search of the premises, the occupation of one’s house and land, and emissions or smells which prevent someone from enjoying their home. The applicants in Guerra v. Italy lived approximately one kilometre away from a chemical factory which made products which were classified as high-risk. The European Court of Human Rights found that Italy had failed to take steps to ensure effective protection of the applicants’ Article 8 rights: it had failed to provide residents with essential information that would have enabled the applicants to assess the risks they and their families might run if they continued to live in their homes which were exposed to danger in the event of an accident at the factory.

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Correspondence

Correspondence includes postal correspondence, telephone calls, emails and text messages. Examples of interference with correspondence include opening, reading, censoring or deleting correspondence. The European Court of Human Rights has held that the indiscriminate and routine checking of prisoners’ correspondence violates Article 8. In a series of successful cases the Court held that telephone interception was in breach of Article 8 in the UK because it was not ‘in accordance with the law’. In other words, there was no domestic law to regulate it. These rulings led to new laws, including the Regulation of Investigatory Powers Act 2000. More recently, telephone hacking civil cases are being brought under Article 8. The most recent case, brought by Chris Bryant, Lord Prescott and Brian Paddick and others against the Metropolitan Police, successfully argued that there was a breach of Article 8 because the police failed to provide them with information about the hacking and failed to carry out an effective investigation as part of its positive duty under Article 8.

How Article 8 relates to other articles

Because of their wide scope, Article 8 rights are often closely related to other rights protected under the Convention. They include, in particular, other qualified rights such as Articles 9 (freedom of thought, conscience and religion), 10 (freedom of expression), 11 (freedom of assembly and association and Protocol 1, Article 1 (protection of property).

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12 For interception of telephone calls see Malone v. the United Kingdom [1984] 7 EHRR; for emails, Halford v. the United Kingdom [1997] 14 24 EHRR 523; and for post, Golders v. the United Kingdom [1975] 1 EHRR 524.
15 See, for example, Malone v. the United Kingdom [1990] and Halford v. the United Kingdom [1997].
16 R (on the application of Bryant and others) v Commissioner of the Police of the Metropolis [2011] EWHC 1314 (admin); in February 2012, the Metropolitan Police admitted it had acted unlawfully and the case was settled out of court. For a report of the settlement, see BBC website, 7 February 2012, ‘Phone hacking: Met police failed to warn victims.’ Available at: http://www.bbc.co.uk/news/uk-16922305. Accessed 27/02/2012.
Article 8 rights often compete with other qualified rights, in particular the freedom of expression. Case law has made it clear that neither article has automatic precedence over the other. Ultimately, the court must decide on a case-by-case basis how the balance should be struck. For example, in *Re Guardian news and Media Ltd and others*¹⁸, the Supreme Court had to consider whether three men who were suspected of facilitating terrorism, and who were subject to orders freezing their accounts, were entitled to anonymity orders which would prevent the press from naming them when reporting the proceedings. The three men argued that their Article 8 rights would be infringed if they were named by the press, while the media organisations argued that their Article 10 rights would be infringed by the anonymity orders, and that if the men were not named, readers would be less interested in the report and the informed debate would suffer. The court had to balance the two competing rights, and found that the powerful general public interest in identifying the men in any report of the proceedings outweighed the effect on their Article 8 rights. For more information on this subject, see the chapter on Article 10.

Article 8 rights are often also considered alongside Article 3 in cases where ill-treatment violates dignity but does not meet the level of severity demanded by Article 3 to constitute torture, or inhuman or degrading treatment.¹⁹ This is discussed in the chapter on Article 3.

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¹⁸ *Re Guardian news and Media Ltd and others* [2010] 2 All ER 799.
¹⁹ *S. and Others v. Slovakia* [2009] ECHR 8227/04. See also Chapter 3.
The development of Article 8 in Britain

The concepts relating to respect for private and family life, home and correspondence in UK law are based on the classic civil liberties notion that individuals should have the right to be ‘let alone’ and to enjoy their private space without arbitrary interference from the state or other individuals.²⁰ English law has traditionally provided a significant amount of protection for the individual against the arbitrary power of the state. For example, state officials can force entry into an individual’s home only if a power has been provided for in legislation or the common law, a principle that was established in law in 1765.²¹

Before the Human Rights Act 1998 (HRA) was enacted, there was no explicit right to privacy in English law. Instead, remedies for breaches of particular privacy interests have relied on certain aspects of the common law. For example, a person’s reputation and confidential information were protected by the defamation and confidentiality laws; personal and property interests by the law of trespass.²²

In some areas, developments in legislation over the last 100 years have seen increasing amounts of personal information collected from individuals and massive expansion in state surveillance; this has been driven in large part by the rapid growth of the welfare state, as well as the growth of other state functions such as policing and the security services, and has been facilitated by fast-paced developments in technology.²³ If in 1765 the powers available to officials to force entry into someone’s home uninvited were limited, it was estimated in 2007 that at least 266 separate pieces of legislation permitted such an intrusion.²⁴

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In other respects, such as our freedom to develop personal relationships, the state has become less intrusive. For example, the past 40 years have seen the legal rights of same-sex couples progressively transformed since the decriminalisation of homosexuality in 1967.

The UK has ratified several international conventions relevant to Article 8. They include the UN’s Covenant on Economic, Social and Cultural Rights (CESCR), which the UK ratified in 1976, and which provides for ‘[t]he widest possible protection and assistance ... to the family ... particularly for its establishment and while it is responsible for the care and education of dependent children’. In 2009 the UK ratified the Convention on the Rights of Persons with Disabilities, which requires signatory states to ensure that disabled people have the support they need to live independently in the community. There is currently little protection for personal data and information privacy under international conventions other than at the European level.

By incorporating Article 8 into UK law, the HRA changed how privacy is viewed and valued in the UK. It has led to increased protection for the right to private and family life, and imposed obligations on the state to protect and promote Article 8. For example, the Regulation of Investigatory Powers Act 2000 provides protection from infringements of privacy relating to personal data and surveillance.

Enhanced protection for the right to privacy for individuals who have undergone gender reassignment was introduced with the Gender Recognition Act 2004. The concept of the right to respect for human ‘dignity’, which is now widely accepted as being protected under Article 8, is embedded in the Mental Capacity Act 2005 and the Health and Social Care Act 2008, which require service providers to meet minimum standards of care.

In October 2011, the home secretary announced the government’s intention to implement changes to the immigration rules. This would involve setting out in legislation the balance to be struck between an individual’s right to respect for family and private life and the wider public interest in protecting the public and having effective immigration controls. The Equality and Human Rights Commission has offered to work with government to clarify the meaning of Article 8 in this context, without jeopardising the important protections it offers.27

However, despite the legal and institutional framework that has been developed to support Article 8, Britain may not be fully meeting its Article 8 obligations in some areas.

The issues raised in this chapter were selected to illustrate how the rights protected under Article 8 can apply to everyone in the case of information privacy; a large minority of the population in the case of older and disabled people; and small minorities that may be socially marginalised, including transsexual people and Gypsies and Travellers.

The current legal and regulatory system is not providing adequate protection for personal information

How Article 8 protects privacy

There are many aspects to privacy. We discuss issues of privacy and media freedom under Article 10, freedom of expression. This chapter focuses on information privacy, which concerns the collection, use, tracking, retention and disclosure of personal information. Subject to limited exceptions, Article 8 protects an individual’s right not to have personal information or data disclosed to third parties without their consent. This means that people generally have the right to determine who has access to personal data about themselves, and what the data will be used for. The legal principle is that: ‘all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit’.

Any data processing and surveillance by the state is likely to engage Article 8. Because Article 8 is a qualified right, however, such activity will not breach Article 8 if it can be justified under one of the requirements listed in Article 8(2). However, the state has a positive obligation under Article 8 to protect individuals from breaches by third parties in some circumstances, for example through domestic laws and regulation.

There are still a number of issues relating to surveillance and information privacy that pose particular challenges for the state in meeting its Article 8 obligations. To some extent, this is due to the complexity of Article 8(2) itself, and the difficulties that the UK courts, the European Court of Justice and the European Court of Human Rights have had in providing clear guidance on the meaning and scope of the terms.

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28 Personal information is data which relates to an individual and from which they can be identified.
Over the last few decades, developments in technology have led to a rapid expansion of surveillance and data collection techniques that enable public authorities and private companies to collect, retain and access and share a huge amount of personal information about people going about their daily lives. In 2011 the Commission published an important report by Charles Raab and Benjamin Goold on information privacy that raised questions about how well our personal information is protected given the extent to which data collection and surveillance permeates the lives of individuals in the UK today. For example, there is an extensive network of at least 1.8 million CCTV cameras trained on everything from roads to schools to shopping centres; an estimated 80 million active mobile phone subscriptions allow companies to collect data on the location of subscribers at any time; and electronic travel passes, such as the Oyster card used in London, collect data on the travel patterns of millions of individuals.

The Joint Committee on Human Rights (JCHR) has pointed out that the collection and sharing of data is not objectionable in itself. There are undoubted benefits to the use of data sharing and surveillance techniques to prevent and fight crime and protect national security. Public authorities are often required to share data (or enable others to do so) for administrative purposes, for example taxation, or in meeting other obligations such as protecting the right to life. Many pieces of legislation permit data to be collected for different purposes. The JCHR reviewed the data protection provisions in 2008. It found that 17 pieces of legislation provided inadequate protection for personal data.

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34 Ibid. Footnote 16. The JCHR refers to the case of Edwards v. the United Kingdom [2002] ECHR 203 46477/99, in which the failure to ensure the police passed information to the prison authorities about the risk posed by a mentally ill detainee contributed to the finding of the European Court of Human Rights that the UK had breached its positive obligation to protect life when that detainee killed his cellmate.
In 2004 the Information Commissioner, Richard Thomas, warned that Britain would ‘sleep-walk into a surveillance society’, in response to the government’s plans to introduce ID cards and an accompanying National Identity Register.\(^{36}\) The scheme, introduced under the Identity Act 2006, has now been scrapped by the Coalition Government as part of its pledge to protect civil liberties.\(^{37}\) However, many changes to the ways in which personal data is collected and shared continue to come about with minimal or no scrutiny, although there are signs that the tide might be turning amid increasing public concern over information privacy issues.\(^{38}\)

In this section of the report, we summarise some central deficiencies in the legal patchwork of protection for information privacy. Further detailed criticisms of the existing system can be found in the recent analysis conducted for the Commission in the research report ‘Protecting Information Privacy’ by Raab and Goold.\(^{39}\)

**Key issues**

1. Britain’s legislation relating to information privacy and surveillance is patchy, and in some areas there is no protection against infringements

UK law protects privacy in a piecemeal fashion. Privacy is protected by various parts of the common law, such as the civil remedy of breach of confidence; the criminal law, for example the Protection from Harassment Act 1997; and legislation including the HRA, the Data Protection Act 1998 and the Regulation of Investigatory Powers Act 2000. However, these three key statutes have significant shortcomings that could allow breaches of Article 8 to occur.

The Data Protection Act (DPA) regulates the use of personal data in the UK and is primarily concerned with data ‘processing’, which is any use, disclosure, retention, storage, holding or collection of personal data. The general protection principles set out in the Act state that any individual or organisation, whether public authority or private company, is required to ensure that all personal data

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are fairly and lawfully processed; processed for limited purposes; adequate, relevant and not excessive; accurate and up to date; not kept for longer than is necessary; processed in line with rights of data subjects under the Act; secure, and not transferred to other countries without adequate protection.\(^40\)

However, not all personal information is considered to be personal data for the purposes of the Act. For example, in relation to the public sector, if personal information is held in the form of manual (paper) files the protection afforded by the Act is usually limited to right of access to the data and correction of inaccuracies. Personal information held manually by private sector companies is not subject to the Act. In addition, data that are being held and processed for the purpose of safeguarding national security is exempt from the general protection principles, and there are also exemptions in relation to issues of health, education and social work, as well as crime and taxation.

The definition of ‘personal data’ (data which relates to an individual and from which they can be identified) is central to the operation of the DPA. However, this definition is not clear. For example, information that is recorded as part of a ‘relevant filing system’ is specifically included in the Act, but it has proved difficult for the courts to ascertain what exactly this means. The Information Commissioner's Office, which regulates and enforces the DPA, defines a relevant filing system as being ‘records relating to individuals (such as personnel records) [that] are held in a sufficiently systematic, structured way as to allow ready access to specific information about those individuals’\(^41\).

A ruling by the Court of Appeal in Durant v. Financial Services Authority\(^42\) in 2003 indicated the shortcomings of the protection offered by the DPA. Mr Durant had requested personal information held about himself by the Financial Services Authority (FSA) in both electronic and manual forms following a dispute between himself and Barclays Bank that he felt the FSA had not investigated satisfactorily. The FSA supplied Mr Durant with the copies of the data in electronic form, but refused to give him access to the manual data, arguing that these were not personal data. The Court of Appeal agreed, finding that the DPA applies only to data recorded as part of a ‘relevant filing system’.\(^43\)

\(^40\) Schedule 1 of the Data Protection Act ‘The Data Protection Principles’.
\(^43\) For a more recent discussion on what constitutes ‘personal data’ see Common Services Agency v. Scottish Information Commissioner (Scotland) [2008] UKHL 47.
There is also some uncertainty over whether biometric data including fingerprints, retina and iris patterns and voice samples would be considered to be personal information, although a ruling in *S and Marper v. the United Kingdom*[^44] found that a DNA sample and any profile created from it was to be considered as such.[^45]

The Regulation of Investigatory Powers Act (RIPA) governs the exercise of covert surveillance powers that are likely to obtain private information by the police and other public bodies. It distinguishes between different types of conduct – intrusive surveillance, directed surveillance, and covert human intelligence sources (informants and undercover police) – and then sets out different requirements for authorisation concerning each type of conduct. It was introduced to bring surveillance techniques used by public authorities into compliance with the HRA, and reflects the requirements of proportionality in Article 8(2) by requiring that when public authorities use surveillance techniques to obtain private information about someone they do so in a way that is ‘necessary, proportionate and compatible with human rights’.[^46] Certain justifications for surveillance are only available to particular organisations and not others; and, depending on the organisation in question and type of surveillance, there are different seniority requirements for authorisation.

As noted by Raab and Goold, on the face of it RIPA appears to offer considerable protection for information privacy.[^47] However, the regulatory framework it establishes contains many anomalies and exceptions that have resulted in patchy protection that is complex and difficult to understand. The Court of Appeal has described it as a ‘particularly puzzling statute’, and Lord Bingham, in the House of Lords, concurred ‘the House has experienced the same difficulty’ interpreting the provisions of the Act.[^48]

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[^44]: *S. and Marper v. the United Kingdom* [2008] ECHR 1581.
Over the past decade, RIPA has gradually been expanded in order to keep up with developing surveillance methods. The government has argued that RIPA is ‘responsive and robust enough to meet both current and future needs’. However, it has been criticised for being out of date. The Commission’s report on information privacy points out that the legislation has failed to anticipate future developments and has had to respond to ‘rapid and often unexpected changes in both the technological and political landscape of privacy, surveillance, and data sharing’. The legislation also ignored many changes that had already taken place when the legislation was drafted, such as the existence of digital networks operated by mobile phone providers, and the millions people who were already using the internet on a daily basis.

This approach has led to many anomalies within UK law. For example, as Raab and Goold note:

‘It has been held that the unintended monitoring of a mobile phone call by the police – as a result, for example, of that mobile phone coming within range of a covert surveillance device being used for some other purpose – does not constitute an interception provided the call is not recorded. Given that this data would not be personal data under section 1 of the DPA (as it is not ‘recorded’), there is no obvious remedy available to an individual whose privacy has been violated in this way.’

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One high profile example illustrating how RIPA has not provided adequate protection from serious breaches of privacy is that of the secret interception of internet sessions by the telephone communications company BT. In 2006, BT secretly intercepted and profiled the internet sessions of 18,000 of its customers as part of an advertising strategy. The interception was carried out as part of a trial internet advertising platform created by an American company called Phorm, and involved monitoring the online activity of customers without their knowledge or consent, with the aim of delivering targeted web-based advertisements. The details of the secret trial were exposed by the media in 2008, leading to complaints against BT and Phorm.

The City of London Police, the Crown Prosecution Service and the Information Commissioner all investigated the complaints but concluded that the actions and intentions of BT did not constitute a criminal or civil offence under RIPA, because the data collected through the interceptions was intended for market research only, and was anonymised and then destroyed. The European Commission (EC), however, took the issue much more seriously, and in 2009 began legal proceedings against the UK following citizens’ complaints about how the British authorities had handled the issue.

There were three areas in which the EC considered the UK to be in breach of its rules:

- The EC rules define consent as ‘freely given, specific, and informed indication of a person’s wishes’, but under RIPA legislation the person intercepting the communication needed only ‘reasonable grounds for believing’ that consent to do so has been given.
- There was no national independent body to supervise the interception of some communications.
- UK law covered only ‘intentional interceptions’, whereas EU rules require member states to protect individuals from all unlawful interceptions, whether intentional or unintentional.

In October 2009 the EC asked the UK government to amend its rules to comply with EU rules on consent to interception and on enforcement by supervisory authorities in October 2009. By November 2010 the UK government had still taken no action, and was referred by the EC to the European Court of Justice.\textsuperscript{57} In 2011 the government finally made the necessary amendments to RIPA that provide for sanctions and a supervisory mechanism (the Interception of Communications Commissioner) to deal with breaches of the rules.\textsuperscript{58} Acknowledging that there are now provisions in law for the UK to enforce rights to information privacy, the EC has recently dropped its legal action against the UK government.\textsuperscript{59}

However, the Equality and Human Rights Commission has argued that there is a need for wider reform of RIPA, and privacy protections in general.\textsuperscript{60}

2. The regulators and monitors charged with protecting privacy are not equipped to deal with the sheer amount of information being processed and shared

As part of its positive obligations under Article 8, the government must ensure that there are effective regulatory safeguards to protect breaches of the right to private life.\textsuperscript{61} The institutions charged with supervising the implementation of the DPA and RIPA include the courts, the Information Commissioner’s Office, the Investigatory Powers Tribunal, and the Office of the Surveillance Commissioner. Raab and Goold note that ‘the sheer amount of personal information being collected, processed, and shared in the UK now presents a serious challenge to both the existing legislative regime and the regulators charged with administering it’.\textsuperscript{62}

\textsuperscript{57} Ibid.
\textsuperscript{58} Regulation of Investigatory Powers (Monetary Penalty Notices and Consents for Interceptions) Regulations 2011.
\textsuperscript{62} Ibid. Page 13.
The Information Commissioner’s Office (ICO) has responsibility for enforcing the DPA, as well as the Freedom of Information Act 2000, Privacy and Electronic Communications Regulations and Environmental Information Regulations. Its enforcement action powers include criminal prosecution and non-criminal enforcement and audit. It can issue monetary penalties for non-compliance of the DPA of up to £500,000. The ICO also campaigns to raise awareness of information privacy, handles complaints, and upholds information rights in the public interest.63

Until recently, the ICO has had very limited resources, with no auditing or inspection powers. It could recommend that a body change its practices or else face prosecution, but otherwise had no meaningful enforcement powers. It was given its current powers to issue monetary fines for data protection offences in April 2010, but so far these have been extremely sparingly used. The Home Affairs Committee has suggested that the ICO does not have adequate resources or technical expertise to carry out its functions effectively, while Privacy International and JUSTICE have claimed that the ICO is failing to investigate complaints properly.64 Privacy International claims that it has not secured a successful complaint in nearly 20 years, ‘even when colleague commissioners across Europe had supported our position’.65

The Office of Surveillance Commissioners (OSC) monitors the exercise of some elements of RIPA, as well as powers under Part III of the Police Act 1997. It provides information to public authorities who authorise and conduct covert surveillance operations and use covert human intelligence sources (informants and undercover police) on how to carry out their activities in compliance with RIPA. Those who make authorisations under RIPA are subject to review and inspection by the OSC, and are obliged to keep an audit trail of the authorisations.66 The roles of two separate commissioners, the Interception of Communications Commissioner, and the Intelligence Services Commission, include scrutinising and monitoring compliance with RIPA by the security services.

63 See Information Commissioners Office website, at: www.ico.gov.uk.
A series of codes and guidance on various data collection practices have also been developed within the public and private sectors, as well as by the regulators, such as the ICO’s CCTV Code of Practice, 2008. There are also several codes of practice for different surveillance techniques that have been developed under RIPA. For example, under the Covert Surveillance Code of Practice, the police must obtain a surveillance authorisation if they intend to use an existing public area CCTV system as part of a pre-planned surveillance operation. The codes vary in complexity and clarity, and can also be ambiguous about whether legal compliance is required or whether they are simply encouraging good practice.67

Questions have also been raised about whether the system for reviewing authorisation requests made under RIPA is adequate. In evidence to the House of Lords Committee on the Constitution, the Surveillance Commissioner estimated that he reviewed only around 10 per cent of the approximately 30,000 requests for authorisations made per year by public authorities.68 A further issue that has been repeatedly raised in reviews of RIPA and surveillance regulation is the lack of independent judicial oversight.69 Currently, non law-enforcement bodies, such as local authorities or NHS bodies, have their own in-house officer to authorise their covert surveillance requests. The Coalition Government is proposing to limit local authority powers so that they have to seek magistrates’ approval before carrying out any covert surveillance.70


Many significant changes in the way personal data is collected have been introduced with minimal or no scrutiny by the public or by parliament. For example, CCTV and Automatic Number Plate Recognition (ANPR) systems have proliferated in the absence of any specific or bespoke regulatory framework, as the Home Office acknowledges. Although surveillance is popular with the public, research on its effectiveness as a deterrent to crime is inconclusive.

A joint complaint filed by lobby groups in 2011 drew attention to the ANPR ‘ring of steel’ established round the town of Royston, Hertfordshire, stating that:

‘a network of ANPR cameras has been constructed throughout the UK by the Association of Chief Police Officers – there was no public debate, no Parliamentary debate, no Act of Parliament, not even a Statutory Instrument before this network was constructed.’

The Home Office proposes to introduce a Code of Practice for CCTV, to be monitored by a Surveillance Camera Commissioner, in the Protection of Freedom Bill, with the aim of both CCTV and Auto Number Plate Recognition being properly regulated so that the systems are proportionate, necessary and are used appropriately. However, the Commissioner will not have any enforcement powers, or be able to fine those who don’t comply. The Home Office considers there to be ‘some possibility’ that this lack of enforcement ‘[will] limit the impact and effectiveness of the code’.

3. Public sector organisations continue to make serious errors which put information privacy at risk

A series of major information management mistakes by public sector organisations in recent years have drawn attention to the lack of oversight both within the Ministry of Justice, which has ministerial responsibility for the DPA and RIPA, and by senior civil servants, who have responsibility for ensuring that their departments have policies and procedures in place for handling personal information in a way that meets their obligations under Article 8.

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74 Home Office, 2011. ‘Consultation on a code of practice relating to surveillance cameras. Impact Assessment.’
In November 2007, for example, the government revealed that discs containing personal details from 7.25 million families, or 25 million individuals, claiming child benefit had gone missing in the post between HM Revenue and Customs (HMRC) and the National Audit Office. The information included dates of birth, addresses, bank account numbers and national insurance numbers, ‘opening up the threat of mass identity fraud and theft from personal bank accounts.’

The Minister at the time, Michael Wills, acknowledged that a lack of ‘the right sort of culture’ could undermine the technological apparatus and framework designed to protect information privacy. He told the Joint Committee on Human Rights (JCHR) in response to questions about the incident that ‘there was no question that if people had the idea of the right to privacy burning in the forefront of their minds we would have a far smaller number of these sorts of revelations and these sorts of deplorable breaches’. The JCHR agreed, attributing the errors to ‘the government’s persistent failure to take data protection safeguards sufficiently seriously’, defining the problem as a cultural one that exposed insufficient respect for the right to respect personal data in the public sector.

The JCHR reported in 2008 that the HMRC incident had caused the government to take data protection issues more seriously, and the Information Commissioner’s Office was subsequently given greater powers to monitor and enforce the DPA. However, since then, serious breaches of data protection continue to occur. For example in February 2011, it was revealed that two local authorities had put clients’ privacy at ‘significant risk’ following the theft of two unencrypted laptops containing sensitive personal information. In September 2011, it emerged that during an office move the Eastern and Coastal Kent Primary Care Trust had accidentally sent a CD containing personal information on 1.6 million people to a landfill site.

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77 Ibid.
78 Ibid. Para 38.
4. Retaining the DNA of innocent people on a national database may breach their Article 8 and Article 14 rights

The European Court has found the UK to be in breach of Article 8 with the retention of DNA samples and profiles in its national database. The database, the largest of its kind in the world, was established in 1995 under the Criminal Justice Public Order Act 1994. Its original goal was to assist the detection of serious crime suspects, particularly in cases of sexual assault and burglary, where the chance of discovering forensic evidence at the crime scene is greatest.81

From the late 1990s, a small number of area forces pioneered the practice of taking DNA samples from anyone charged with any recordable offence, and gradually the database expanded. In 2001 under the Criminal Justice and Police Act the scheme was altered to allow for the indefinite retention of the DNA material. This applied regardless of the guilt or innocence of the individual; once the record had been created, it remained. In 2003, the Criminal Justice Act 2003 extended this further to allow the police to take the DNA of those arrested for (but not necessarily charged with) a recordable offence.

By 2006, the national database carried the profiles of over 3 million people in England and Wales, and by January 2012 the number of people whose samples were indefinitely retained had expanded to 5.5 million.82 The retention of the sample and profile raises questions about the protection and use of this personal information in relation to information privacy and the undermining of the presumption of innocence.

In 2008, the failure to remove the profiles of individuals who were acquitted or not charged from the database was challenged in the case of S. and Marper v. the United Kingdom.83 Previously the Court of Appeal had held that indefinite retention was lawful because it was easy to distinguish between those who were innocent and those who were guilty. However, the European Court unanimously ruled that Article 8 had been breached, as the policy was disproportionate and unnecessary.84

81 Non-intimate samples of DNA were legitimately allowed to be taken from those charged, reported, cautioned or convicted for recordable offences under the Criminal Justice Public Order Act 1994.  
83 S. and Marper v. the United Kingdom [2008].  
84 Ibid. Para 125.
The Home Office’s initial proposals for addressing this ruling still involved the indefinite retention of DNA profiles for those convicted of a recordable offence.\textsuperscript{85} The proposals were halted after the Committee of Ministers, the Strasbourg body responsible for overseeing implementation of the European Court’s judgments, concluded that they did not conform to the legal requirement of proportionality, and that they failed to meet the requirements of the judgment with respect to children. The Committee also criticised the poor quality of the evidence provided by the Home Office to underpin its arguments, and the lack of independent oversight.\textsuperscript{86}

The retention of innocent people’s samples on the database also raises questions in relation to Article 14 of the European Convention. Article 14 prohibits discrimination against a wide range of groups in the enjoyment of the rights contained in the European Convention.\textsuperscript{87} Evidence suggests that there are a disproportionate number of black, Asian and young people on the database, compared to the general population.\textsuperscript{88}

In a report on the police and racism in 2009, the Equality and Human Rights Commission argued that, ‘the police service has failed to properly acknowledge or address the race equality impact of the database’.\textsuperscript{89} Non-governmental organisations such as Genewatch (which monitors the human rights implications of genetic technologies), and civil liberties groups such as Liberty and the Runnymede Trust, have repeatedly expressed their concern


\textsuperscript{86} Council of Europe Committee of Ministers, 2009. 1065th meeting (DH), 15 and 16 September 2009. Preliminary list of items for consideration. Available at: https://wcd.coe.int/ViewDoc.jsp?id=1461727&Site=CM. Accessed 27/02/2012.

\textsuperscript{87} It does not, however, provide a free-standing right to equality.

\textsuperscript{88} See http://www.npia.police.uk/en/13852.htm for a breakdown of England and Wales plus British Transport Police subject profiles retained on the NDNAD by ethnic appearance, as at 4 January 2012.

that Asian and black individuals, in particular black men, are over-represented in the database. In *S. and Marper v. the United Kingdom*, the applicants submitted evidence that this could potentially lead to racial profiling in criminal investigations.

The National Policing Improvement Agency (NPIA) recently carried out two equality impact assessments relating to the use of the database. In 2007, it noted the ‘suspicion’ that profiling ‘may affect ethnic minority men disproportionately’ and that this ‘requires evidence’. Its 2009 Equality Impact Assessment also noted the concerns about disproportionality and the impact this could have on the relationship between police and ethnic minority communities. It pledged to produce more robust estimates of the number of black male profiles on the database. These are not yet publicly available.

The Protection of Freedoms Bill, before parliament at the time of writing, contains the latest attempt by the government to address the *S. and Marper* judgment. The bill contains some significant improvements on the current situation. For example, except in very specific circumstances, the DNA samples taken to create DNA profiles will be destroyed, and only the resulting profile will be retained. Also, the DNA profiles of those arrested or charged with a minor offence but not convicted, will be destroyed. This means that many black people

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currently on the database will be removed soon after the bill is passed.\textsuperscript{94} In addition, a person who has been charged with a serious crime but not convicted will have their DNA profile held for three years, with a possible two-year extension with court approval, rather than indefinitely as is currently the case.

The equivalent Scottish system does not allow retention of DNA when an arrest does not lead to a charge. This system was approved of in the \textit{S. and Marper} case as being compatible with Article 8.\textsuperscript{95} However, in England and Wales, the government proposes to allow retention without charge 'where the circumstances make it particularly pressing ... for the purposes of prevention or detection of crime'.\textsuperscript{96} Exactly what these circumstances will be is not yet known, but the JCHR has expressed concern that they may create a significant risk of incompatibility with Article 8.\textsuperscript{97} Furthermore, the current proposals will allow police to keep the DNA of people deemed to be a risk to national security, even if they have not been convicted of an offence.

Until the bill is enacted, the Association of Chief Police Officers guidance has recommended that Police National Computer records, fingerprints and DNA records should be destroyed only in 'exceptional cases'.\textsuperscript{98} This material and information continues to be routinely retained, although the Supreme Court recently ruled that the ACPO guidelines are in breach of Article 8 and therefore unlawful.\textsuperscript{99}

\begin{footnotesize}
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\item T. May, T. Gyateng and M. Hough, 2010. Differential treatment in the youth justice system. Manchester: Equality and Human Rights Commission. Also, the Home Office has stated that 'levels of disproportionality (in race, age and gender) are highest at the earliest stages of the criminal justice system. The proposed change will remove from the Database the majority of those who have not been convicted of an offence, i.e. those from the early stages of the CJS ... any impact should be positive in these areas by removing large number of such individuals.' See Home Office Crime and Policing Group Impact assessment for the proposal: 'DNA & fingerprints: New framework for their retention and destruction'. Available at: http://www.parliament.uk/documents/impact-assessments/IA12-004C.pdf. Accessed 27/02/2012.
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Not enough is done to protect the dignity and autonomy of people who use health and social care services

How Article 8 protects the dignity and autonomy of people using health and social care services

People using health and social care services have a right to be treated with dignity and respect and to be involved in decisions about their care. The concepts of ‘dignity’ and ‘personal autonomy’ have been developed through case law especially – but not only – in relation to the respect for private and family life under Article 8 of the Convention. Through its judgments, the European Court has made it clear that ‘the very essence of the European Convention is respect for human dignity and freedom’, and that Article 8 is relevant to questions relating to the quality of life.¹⁰⁰

As discussed above, Article 8 rights are often considered alongside Article 3 in cases where ill-treatment violates dignity but does not meet the level of severity demanded by Article 3 to constitute torture, or inhuman or degrading treatment.¹⁰¹

Article 8 also imposes a positive obligation on public authorities to protect and promote the right to respect for dignity and personal autonomy of individuals. This applies to the way they perform all of their powers and duties, and includes taking active steps to prevent breaches, taking measures to effectively deter conduct that would amount to a breach, responding to any breaches, and providing information to individuals to explain the risk to their human rights, where it is clear that this risk exists.

¹⁰¹ S. and Others v. Slovakia [2009], see also the chapter on Article 3.
For example, in *Bernard v. London Borough of Enfield*, Ms Bernard, a severely disabled woman who used a wheelchair, took a case against her local council.\(^{102}\) She claimed that the accommodation provided for her, her husband and their six children was inappropriate and inadequately adapted. She could not use the stairs and so could not access the bathroom and bedrooms. Although Ms Bernard’s care plan stated that she needed assistance to move house, the local authority had not taken steps to move the family to suitably adapted accommodation, even after receiving a court order to re-house her. Although the High Court found that the council’s behaviour did not meet the higher threshold of breaching Article 3, it had breached Article 8. The Court described the council’s failure as showing a ‘singular lack of respect’ for Mrs Bernard’s private and family life and awarded damages of £10,000.\(^{103}\)

In relation to health and social care, Britain’s positive human rights obligations are partly fulfilled by having adequate laws, and effective systems of regulation. Several different pieces of legislation relating to this area uphold Article 8 principles. For example, the Health and Social Care Act 2008 (Regulated Activity) Regulations 2010 explicitly require registered providers of health and social care services to ensure ‘the dignity, privacy and independence of service users’.\(^{104}\) The Mental Capacity Act 2005 supports personal autonomy by starting from a presumption of mental capacity. The NHS constitution, designed to give patients legally enforceable rights, states that ‘you have the right to be treated with dignity and respect, in accordance with your human rights’.\(^{105}\)

There are three regulators of health and social care in England and Wales. In England, the Care Quality Commission (CQC) monitors the quality of care given by all registered providers of health and social care services in the public, private and voluntary sectors. In Wales, the Care and Social Services Inspectorate Wales (CSSIW) regulates social care and local authority care support services, while NHS and independent health care providers are regulated by the Healthcare Inspectorate Wales (HIW).

Despite these protections, there is evidence that Article 8 breaches occur in health and social care settings. In 2007, the Joint Committee on Human Rights (JCHR) published its inquiry into the human rights of older people in health

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103 *R. (Bernard) v. London Borough of Enfield* [2002]. Para 34.
Article 8: The right to respect for private and family life, home and correspondence

care. The inquiry exposed serious human rights concerns, including evidence of treatment which it believed to be in breach of Article 8. This included individuals being treated roughly by staff, being left in their own waste, having their glasses or hearing aids left out of reach, suffering a lack of privacy when changing clothing or using the toilet, being given medication inappropriately to subdue them or being physically restrained.

In 2008, the JCHR found that people with learning disabilities also experienced serious infringements of their dignity and autonomy in health and social care settings. It reported cases of neglect and carelessness, including cases in which people had been made to bathe in cold water, or had been subjected to an inappropriate use of physical restraint. The JCHR concluded that the poor treatment of people with learning disabilities was ‘endemic’ in health and social care settings and highly likely to breach Article 8.

Although it is five years since the JCHR first exposed evidence of human rights abuses in health and social care settings, such treatment continues to be reported. In early 2011, the Parliamentary and Health Service Ombudsman (PHSO) reported the stories of 10 older people from across England who had suffered unnecessary pain, indignity and distress while in the care of the NHS. The poor treatment in all 10 cases is likely to have breached Article 8.

In October 2011, the CQC published its findings from 100 unannounced inspections of NHS acute hospitals. It showed that 20 hospitals had failed to comply with one or both of the essential standards of ‘dignity’ or ‘nutrition’, while a further 35 that did comply still needed to make improvements. Inspectors reported bells being placed out of people’s reach so they could not call for help, patients being ignored for hours at a time, and patients being given no help eating or going to the toilet.

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In November 2011, the Equality and Human Rights Commission conducted its own inquiry into older people’s experience of home-based care. It found that, while many were satisfied with the service, there were also many examples of poor treatment which amounted to breaches of Article 8 rights. The inquiry heard of cases where people were put to bed against their wishes in the early afternoon, strip-washed while people talked over them, or roughly handled by carers.112 The inquiry report also noted that ‘many home care packages cover only the most basic needs necessary for physical wellbeing. Any failure to follow the care plan can cause neglect of the older person and is also likely to be in breach of the right to respect for private life under Article 8’.113

**Key issues**

1. People who are receiving health and social care from private and voluntary sector providers do not have the same guaranteed level of direct protection under the Human Rights Act as those receiving it from public providers

As explained in more detail under Article 3, the HRA applies to both public authorities and to other organisations when they are performing functions of a public nature. This is important in social care settings because most care homes are owned by private or voluntary sector organisations, as are the majority of home-based care services.114 Nearly 90 per cent of home care agencies are privately owned or run by voluntary agencies,115 but it is estimated that 80 per cent of the home care provided by the independent sector is commissioned by local authorities.116

In 2007, the House of Lords ruled that residents of independent care homes had no direct protection under the HRA even if their care was funded by local authorities, because the care homes were not performing a ‘public function’. Legislation has now closed this protection gap.117 However, the House of Lords’ decision also cast doubt on whether the HRA applies to private and voluntary

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sector organisations who are commissioned by local authorities to provide home care. Following the evidence from the Home Care Inquiry, the Commission has argued that this legal loophole should be closed.\textsuperscript{118}

Even this would not, however, address the lack of human rights protection for people who pay for their own residential or domiciliary care. The ageing population and budget constraints mean that the proportion of people funding their own care is likely to grow as many local authorities continue to narrow their eligibility criteria in response. As a result, in future a large proportion of care users will not be able to hold their service providers to account for breaches of human rights.

Private and voluntary sector health providers who are under contract to the NHS may also be operating outside the scope of the HRA,\textsuperscript{119} although this point has not yet been tested in court. The current Health and Social Care Bill will mean more independent providers being commissioned to provide NHS services, leading to a danger that human rights protection will be eroded in this sector.

2. There is a lack of awareness, both within public authorities and among care staff, of how human rights obligations apply in a health and social care setting

When the HRA was enacted, one of the intentions was that it should create a ‘culture of human rights’ in which public authorities would ‘habitually and automatically respond to human rights considerations in all of their policies and practices’.\textsuperscript{120}

A human rights-based approach in health and social care means that the service user is placed at the centre of decision-making. It ensures that qualified rights, like the right to respect for dignity and personal autonomy under Article 8, are only restricted where proportionate and necessary. It can also help providers to decide how to balance competing rights, for example between the staff


and service users. Services which have applied such an approach have seen standards rise.\textsuperscript{121}

For example, Mersey Care NHS Trust has implemented a human rights approach in its specialist mental health and learning disability services for people in Liverpool, Sefton and Kirkby. Service users receive training to enable them to participate fully in the running of the organisation. They help to interview potential recruits, induct new staff, and investigate serious incidents. As a result, both staff and service users say they are more aware of their rights and obligations.\textsuperscript{122}

A human rights-based approach provides an alternative to broad, standardised policies which can be impersonal and inflexible. In some cases, such a lack of flexibility, or a ‘risk-based’ attitude, has lead to breaches of the right to respect for dignity or personal autonomy under Article 8.\textsuperscript{123}

For example, in the case of \textit{R. v. East Sussex County Council}\textsuperscript{124} the local authority had placed a blanket ban on manual lifting, in order to protect the needs of care staff. However, for two sisters who lived in a specially adapted house, the policy meant that they were unable to move or go outside their home. The judgment described the manual lifting ban as ‘unlikely to be lawful because it does not consider a person’s individual circumstances’. The local authority were ordered to find a better balance between the Article 8 rights of the service users and the rights of the carers to a safe working environment.\textsuperscript{125}

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Although it has been 10 years since the HRA was introduced, there is widespread lack of awareness of the benefits of a human rights approach within the health and social care sector. The statutory materials and other official guidance in the sector tend to focus on ‘dignity’, and place emphasis on personal choice and control and person-centred care, without explicitly acknowledging that dignity and autonomy are human rights principles protected by the HRA. The evidence consistently points to staff members not making the link between human rights and the care they are supposed to be giving.

In its 2007 report into older people’s health care, the JCHR concluded that the Department of Health and the Ministry of Justice had failed ‘to give proper leadership and guidance to providers of health and residential care on the implications of the Human Rights Act’. In 2007, an investigation by the PHSO into the deaths of six individuals with learning disabilities found that ‘an underlying culture which values human rights was not in place in the experience of most of the people involved’. Similarly, the former Healthcare Commission attributed some of the abuse and neglect it found within some services to lack of awareness. This underlines the importance of public authorities knowing and understanding what their obligations under the HRA are.


The Department of Health has since collaborated with five NHS organisations and the British Institute of Human Rights to develop guidance, case studies and human rights tools supporting the implementation of a human rights-based approach to the provision of health. However, the Commission’s inquiry into older people and human rights in home care found that in 2011, many local authorities – who commission over 80 per cent of home care to private and voluntary providers – did not take the opportunity to explicitly promote and protect human rights in their commissioning processes. Many authorities showed poor understanding of their obligations under the HRA.

3. Better complaints systems are needed across the health and social care sectors

Under Article 8, the state should have adequate laws, institutions and procedures in place to protect individuals and ensure they are treated with respect for their dignity and autonomy. This includes having systems in place to ensure that breaches of Article 8 in the health and social care sectors are detected and dealt with.

The chapter on Article 3 identifies problems with the Care Quality Commission, namely that the CQC may not effectively investigate potential breaches of human rights, and no longer monitors commissioning practices of local authorities. This is also relevant to Article 8. As well as having a structure for inspecting services, an effective complaints system is also an essential element to protect people against undignified, abusive and inadequate treatment that does not take service users’ wishes into account. A complaints system should allow service users to voice their concerns without fear of their care provision suffering.

Independent providers as well as public authorities must have a system in place for receiving complaints and inform people how to complain. If providers do not provide a satisfactory resolution, complaints relating to health and social care provision in England can also be made to the PHSO and the Local Government Ombudsman respectively. In Wales, the CSSIW, the social care regulator, deals with complaints about social care, while the Public Service Ombudsman for Wales deals with health services complaints.


133 Ibid.
The JCHR reported in 2007 and 2008 that many older people and people who are disabled do not know how to raise concerns, or doubt that anything will change for the better if they do. Many service users and their families do not see poor treatment as a human rights issue and do not realise they can use human rights arguments to improve treatment. The Commission’s inquiry into the human rights of older people in home care has also highlighted institutional and systemic barriers to older people making complaints. Just under a quarter of people who responded to the Commission’s call for evidence said they would not complain, either because they did not know how to, or because they feared repercussions.

Individuals with limited mental capacity may not be able to raise concerns themselves if they receive poor treatment. In this event, they may qualify to use an advocacy service, such as the NHS’s Patient’s Advice and Liaison Service (PALS). However, not all patients will qualify for such help, leaving many people with no one to act on their behalf or to help them speak for themselves. In addition, those who have ‘assisted autonomy’ in the form of an advocate, may find that if their concern is at odds with the view of health and social care professionals, the latter’s views will carry more weight.

These issues were illustrated in Steven Neary v. Hillingdon Borough Council, a case involving a 21-year-old man with childhood autism and a severe learning disability who lives with, and is cared for by, his father, Mr Neary. Steven requires constant support and supervision, and Mr Neary was helped by an extensive care package provided by Hillingdon Council. In 2009 the local authority accepted Steven into respite care for a few days, but subsequently kept him there for a year, despite Mr Neary’s insistence that Steven was best placed with him.

135 Ministry of Justice, 2008; Joint Committee on Human Rights, 2008; British Institute of Human Rights, 2011.
137 Ibid. Page 82.
138 PALS is open to all, and under the Mental Capacity Act those who do not have friends or family to consult with and who lack capacity should be referred to an Independent Mental Capacity Advocate.
139 See http://www.pals.nhs.uk/.
The case judgment focused on the unlawfulness of Steven’s detention under Article 5 (the right to liberty), but also found Hillingdon council to be in breach of the right to respect for family life under Article 8, by failing to consider the human rights implications of keeping Steven away from his family for a long period of time.

One aspect of the Article 8 breach was based on the council’s failure to listen to Mr Neary’s complaints. The court said that ‘Hillingdon’s approach was calculated to prevent proper scrutiny of the situation it had created. In the weeks after Steven’s admission, it successfully overbore Mr Neary’s opposition. It did not seriously listen to his objections and the suggestion that it might withdraw its support for Steven at home was always likely to have a chilling effect. Once Mr Neary’s resistance was tamed, the question of whether Steven was in the right place did not come under any balanced assessment.’

3. Increased pressure on health and social care budgets puts the Article 8 rights of service users at risk

Rising costs, an ageing society and recent and ongoing public spending cuts have had an impact on the funding for the care and support of older and disabled people. At a time when resources are constrained, upholding service users’ rights to dignity and autonomy requires additional commitment. Under Article 8(2), public authorities are permitted to balance the right to respect for dignity and autonomy against the ‘economic wellbeing of the country’, as long as any infringement of these rights is proportionate.

For example, in 2011, the Supreme Court found that Kensington and Chelsea Council in London had acted lawfully in cutting costs by substituting a woman’s night time carer who helped her go to the toilet at night with the provision of incontinence pads, even though she was not incontinent. The court ruled that, even if the decision engaged Article 8, it did not amount to a breach of her rights under Article 8, given the demands on the local authority’s limited resources.

Public authorities that commission providers on short-term contracts and prioritise low cost above quality risk driving down standards of care.\textsuperscript{143} Evidence from the CQC’s unannounced spot checks of hospitals in 2011 found evidence linking budget constraints with the failure by some providers to meet the essential standards of ‘dignity’ and ‘nutrition’.\textsuperscript{144} Age UK have argued that older and disabled people who are eligible for publicly-funded care often do not receive enough for them to continue living independently in their homes and maintain a good quality of life.\textsuperscript{145}

The Commission’s inquiry into older people and human rights in home care found evidence of providers ‘cutting corners’, for example through limiting the amount of time staff can spend at a person’s home to as little as 15 minutes per visit, generally as a result of local authority commissioning practices.\textsuperscript{146} Older people who gave evidence to the inquiry described the negative emotional impact of being washed and dressed by a series of different people due to the high turnover of staff at the agency that delivered her care. In one extreme case, a woman had 32 different carers in a two-week period.

If public authorities reduce the quality of care due to budget constraints, they are likely to risk breaches of Article 8.

\textsuperscript{143} Rubery \emph{et al.}, 2011. \textit{The recruitment and retention of a care workforce for older people. Summary report.} London: Department of Health. Pp. 8-9. The report highlights practices such as paying care staff by the hour and only for the time they spent in a person’s home, and not for the travel time between visits.

\textsuperscript{144} Care Quality Commission, 2011. \textit{Dignity and nutrition inspection programme. National overview.}


How does Article 8 protect the right to private and family life for transsexual people?

The right to family life encompasses a wide definition of ‘family life’ that goes beyond formal or traditional relationships. It covers cohabiting couples, same-sex couples, siblings, foster parents and foster children and grandparents and grandchildren. The state also has a positive obligation under Article 8 to ensure that gender reassignment is legally recognised.

The right to gender recognition under Article 8 was established in the case of Christine Goodwin, a post-operative transsexual woman. (A transsexual person is someone whose gender identity and/or gender expression differs from their assigned birth sex, and who intends to undergo, is undergoing or has undergone gender reassignment.) She claimed that the lack of legal recognition of her new gender had resulted in numerous discriminatory experiences which amounted to a breach of Article 8. The European Court concluded that Article


148 The terms ‘trans people’ and ‘transgender people’ are often used as umbrella terms for people whose gender identity and/or gender expression differs from their birth sex. This includes transsexual people, transvestite/cross-dressing people (those who wear clothing traditionally associated with the other gender either occasionally or more regularly), androgyne or polygender people (those who do not identify with male or female identities and do not identify as male or female), and others who define as gender variant.

8 had been breached,\textsuperscript{150} ruling that society could ‘reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost’.\textsuperscript{151}

Following this case, the government introduced the Gender Recognition Act (2004) (GRA) which sets out a process to give legal recognition ‘for all purposes’ to transsexual people in their new gender through the issuing of a gender recognition certificate.\textsuperscript{152} The Act provides an additional layer of privacy for people applying for such a certificate by making it a criminal offence for a person to disclose information about the application that was obtained in an official capacity.\textsuperscript{153} Further protection is afforded by the Equality Act 2010, which prohibits discrimination because of gender reassignment in employment, education, services, functions of the state and housing.

Despite these advances, however, there remain many hardships for people trying to live in their acquired gender. There are no reliable estimates, but in 2000 Press for Change, a campaigning group for trans people, estimated that there were about 5,000 transsexual people in Britain. The estimate was based on Home Office data about numbers of people who had changed their gender on their passports.\textsuperscript{154}

\begin{thebibliography}{9}

\bibitem{152} Protection is provided for people who propose to undergo, are undergoing or have undergone gender reassignment.
\bibitem{153} Such a disclosure could be through word-of-mouth or through uncontrolled access to paper or electronic records, and would constitute a criminal offence liable to a fine of up to £5,000. See \textit{Press for Change} website for more details, at: http://transexuality.co.uk/Privacy.aspx, and http://www.equalityhumanrights.com/advice-and-guidance/your-rights/transgender/transgender-what-the-law-says/#GRA. Accessed 27/02/2012.
\end{thebibliography}
Key issues

1. Transsexual people currently have to divorce or end their civil partnership if they want their gender to be legally recognised

Under the GRA, transsexual people who are married or in a civil partnership and wish to have their new gender legally recognised have to divorce or annul the marriage or partnership. This criteria is set because if a person were permitted to change gender and remain married, it would create a same sex marriage, which is not allowed under UK law. Neither can a person remain in a civil partnership and change gender, as the law does not recognise a different sex partnership.

In many cases, ending the marriage or partnership is against the explicit wish of the couple, especially if they have children. The Gender Identity Research and Education Society reports that this rule ‘can have a range of negative impacts, including those that affect the human rights, emotional and financial wellbeing of other family members, who are affected indirectly’.

In 2009, the Council of Europe’s Commissioner for Human Rights recommended that member states should ‘remove any restrictions on the right of transgender persons to remain in an existing marriage following a recognised change of gender’. He argued that ‘protecting all individuals without exception from state-forced divorce has to be considered of higher importance than the very few instances in which this leads to same-sex marriages’. The Commissioner further noted that in 2006 Austria’s constitutional court granted a transsexual woman the right to change her birth sex to female while remaining married to her wife. Germany’s constitutional court ruled similarly in 2008.

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158 Ibid. Section 3.2.2.

159 Austrian Constitutional Court, BverFG, 1 BvL 1/04 (18 July 2006); German Constitutional Court, BVerfG, 1BvL 10/05 (27 May 2008).
In the case of *Parry v. the United Kingdom* in 2006, the European Court of Human Rights ruled that the UK’s approach in relation to gender recognition and existing marriages was reasonable and proportionate, within the margin of appreciation states are allowed on issues deemed to be highly culturally sensitive.\(^{160}\) The Court found that a fair balance had been struck between the general interest of the community and the interest of the individual, noting that in the UK, civil partnerships offer an alternative contract to marriage, carrying with them almost the same legal rights and obligations. The Court found that the effects of the British system had not been shown to be disproportionate regarding respect for private and family life. The Court also noted that it did not consider it necessary for allowances to be made for a small number of marriages.\(^{161}\)

However, some transsexual people affected by the requirement to dissolve a marriage or civil partnership have reported to the Equality and Human Rights Commission that an annulment is not emotionally acceptable to them.\(^{162}\) They may also face financial hardships by dissolving their marriage as spouses may lose their pension entitlements. Government guidance advises those who are married or in a civil partnership and want to apply for a gender recognition certificate to check the details of the pension schemes they hold, in case divorce or annulment affects their entitlements.\(^{163}\)

For those who choose to remain married and forgo legal gender recognition, the price is a more limited enjoyment of their Article 8 rights to private and family life.\(^{164}\) One transsexual woman reported that she had decided not to seek

\(^{160}\) *Parry v. the United Kingdom* [2006] ECHR 42971/05.


\(^{162}\) Views expressed to the EHRC in email correspondence and other statements.


\(^{164}\) See above, *Parry v. the United Kingdom* [2006]. Given these difficulties were not resolved, it may be that another case taken to the European Court of Human Rights might go in a different direction.
official gender recognition so she could remain married to her wife. She said this decision ‘has not enabled me to take some of the steps perhaps that I would have wanted to take to free myself from the past’.165

In March 2012, the government plans to start consulting on how legislation could be developed on equal civil marriage rights for same sex couples and be adopted before the end of this parliament in 2015.166


166 See Home Office press release, 26 September 2011. ‘Government to consider options for equal civil marriage for same-sex couples’. Available at: http://www.homeoffice.gov.uk/media-centre/press-releases/equal-civil-marriage-same-sex. Accessed 27/02/2012. This time, however, the consultation appears to be on equal civil marriage only, rather than including equal civil partnership for opposite sex couples as well.
There continues to be a lack of appropriate accommodation for Gypsies and Travellers

How Article 8 relates to accommodation for Gypsies and Travellers

Article 8 protects the right to respect for an individual’s home. The European Court has referred to a ‘home’ as ‘the place, the physically defined area, where private and family life develops’.167 ‘Home’ has been interpreted broadly to include a house or other traditional residence but also business premises168 and a second property.169 It also includes the caravans and sites of Gypsies and Travellers, ethnic groups with a nomadic tradition dating back centuries.170

The right to respect for the home under Article 8(1) does not impose a positive obligation on public authorities to provide homes or sites for Gypsies and Travellers, or for anybody else. However, Article 8(2) prohibits interference with the right to respect for the home except where it is in accordance with the law, fulfils one of the six possible legitimate aims,171 and is proportionate. These rights relate to Gypsies and Travellers in two related ways.

Firstly, in recent decades there has been a shortage of authorised sites on which Gypsies and Travellers are allowed to live in caravans. In 1968 the Caravans Sites Act (CSA) 1968 imposed a duty on County Councils to provide caravan sites for Gypsies resorting to or residing in their area. However, since then, and despite a succession of new laws and initiatives, many local authorities have failed to provide sites in sufficient numbers.

171 That is: it is the interests of national security, public safety or the economic wellbeing 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.
Secondly, and partly as a result, many Gypsies and Travellers live on unauthorised sites.\textsuperscript{172} This exacerbates tensions between them and the settled community, as unauthorised sites may be unsanitary and have inadequate litter collection, for example. It also makes it difficult for Gypsies and Travellers to access services such as schools and health care and contributes to poorer health and educational outcomes.\textsuperscript{173}

Gypsies and Travellers living in unauthorised sites can face eviction, which may threaten their Article 8 right to respect for a home. To comply with Article 8 any eviction must have a legitimate aim, and must be proportionate. This will depend on a number of factors including whether there is a need to protect the environment, and whether there is alternative suitable accommodation available to the Gypsies and Travellers.\textsuperscript{174}

Some Gypsy and Traveller groups and their legal representatives have argued that evictions from unauthorised sites are not lawful as the provision of authorised sites is inadequate.\textsuperscript{175} The lack of suitable alternatives often leaves Gypsies and Travellers with little choice but to live on unauthorised sites. These arguments have been backed by international human rights bodies including the United Nations Special Rapporteur on the Right to Housing\textsuperscript{176} and the United Nations Committee on the Elimination of Racial Discrimination.\textsuperscript{177}

Thus far, these claims have not been upheld in court (see the discussion of the Dale Farm case, below). However, legal advice received by the Commission suggests that there may be grounds to challenge that decision.\textsuperscript{178} In addition, the European Court has recognised that there needs to be special consideration given to the needs and different lifestyle of Gypsies and Travellers in the context of planning decisions, and we expect to see further consideration of this issue over the coming years.\textsuperscript{179}

\begin{itemize}
  \item \textsuperscript{172} Gypsies and Travellers sometimes face eviction from sites either where they are on unauthorised encampments (land not owned by the Gypsies and Travellers), or on unauthorised developments (land which is owned by the Gypsies and Travellers and they develop sites on, but without planning permission).
  \item \textsuperscript{174} \textit{Chapman v. the United Kingdom} [2001]. Paras 98 and 103.
  \item \textsuperscript{175} \textit{R.(McCarthy) v. Basildon DC} [2011] EWHC 2938 (Admin).
  \item \textsuperscript{178} Opinion of Andrew Arden QC to the Equality and Human Rights Commission, 2 August 2011.
  \item \textsuperscript{179} \textit{Chapman v. the United Kingdom} [2001].
\end{itemize}
Key issues

1. To date, the courts have not found a breach of Article 8 in relation to evictions from unauthorised Gypsy and Traveller sites. However, there may be grounds for challenging this precedent.

In October 2011, after a prolonged legal battle, Basildon Council evicted the remaining residents from Dale Farm, an unauthorised Gypsy and Traveller site. Dale Farm was a six-acre plot which, since 1982, had been the subject of green belt controls. In the 1980s the council created an authorised site of 34 pitches called Oak Lane for Gypsies and Travellers. In 2001, an Irish Traveller purchased a portion of the land on the adjoining Dale Farm and began to develop the land to create a site, without planning permission.

Basildon Council rejected the retrospective planning application to develop the site on Dale Farm because the land was subject to green belt controls, although it is widely reported that the land was previously used as a scrap yard. Representatives of the Gypsies and Travellers argued that there had been a breach of their Article 8 rights, as Basildon Council had failed to offer suitable alternative accommodation and to properly consider the rights of the residents who were vulnerable, including children. In October 2011, however, the High Court decided that Basildon Council had acted lawfully in refusing planning permission for the development of a site on Dale Farm, and the evictions went ahead.

Separately, however, the Commission received a legal opinion which indicated that there had been a breach of the Dale Farm residents’ Article 8 rights, because of inadequacies in the particular legal process Basildon had followed to obtain the eviction. This indicates that there may be scope for a further challenge of the High Court’s decision; or at least that similar cases may be decided differently in future.

180 R.(McCarthy) v. Basildon DC [2011].
There are other reasons to believe that Article 8 may have to be reconsidered in future cases regarding evictions from unauthorised Gypsy and Traveller sites. In the case of *Chapman v. the United Kingdom*, a Romany Gypsy woman, Sally Chapman, had bought land in the green belt in Hertfordshire and developed it as a site for her family without planning permission. Her application for planning permission was refused and the local authority issued an enforcement notice. She was then prosecuted for failing to comply with the enforcement notice.

Chapman took her case to the European Court of Human Rights, alleging that the refusal of planning permission and the enforcement measures breached her Article 8 rights. The Court rejected the argument that the absence of alternative sites meant that Chapman’s family should be allowed to remain on the land in continuing breach of planning control. However, the case did establish some important principles:

- the Court observed that ‘an international consensus may be emerging’ among Council of Europe States, ‘recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community’.\(^{184}\)
- the Court recognised that ‘the applicant’s occupation of her caravan is an integral part of her ethnic identity as a Gypsy’.\(^{185}\)
- although Gypsies are subject to the same laws as everybody else, the Court noted that membership of a minority group with a different traditional lifestyle ‘may have an incidence on the manner in which such laws are to be implemented’.\(^{186}\)
- the vulnerable position of Gypsies as a minority means that special consideration must be given to their needs and their different lifestyle.

The judges in the Chapman case were split, with seven out of 17 arguing that eviction in the absence of other culturally appropriate accommodation was a breach of Article 8. The seven judges argued that:

\(^{183}\) *Chapman v. the United Kingdom* [2001].
\(^{184}\) Ibid. Para 93.
\(^{185}\) Ibid. Para 73.
\(^{186}\) Ibid. Para 96.
The Government is already well aware that the legislative and policy framework does not provide in practice for the needs of the Gypsy minority and that their policy of leaving it to local authorities to make provision for Gypsies has been of limited effectiveness it is in our opinion disproportionate to take steps to evict a Gypsy family from their home on their own land in circumstances where there has not been shown to be any other lawful, alternative site reasonably open to them. It would accordingly be for the authorities to adopt such measures as they consider appropriate to ensure that the planning system affords effective respect for the home, private life and family life of Gypsies such as the applicant.\textsuperscript{187}

It is therefore possible that the European Court may take a different approach in the future. This is supported by several factors, including the strong minority view in Chapman, as well as the growing recognition in recent years of the importance of protecting the rights of Roma and Gypsies and Travellers in the European Court of Human Rights\textsuperscript{188} and under the Framework Convention for the Protection of National Minorities. For example, the last report by the Council of Europe on the UK government’s performance under the Convention highlighted inadequate site provision as a major concern.\textsuperscript{189}

In other situations concerning the tenancy rights of Gypsies and Travellers the courts have found breaches of Article 8. In Connors v. the United Kingdom\textsuperscript{190} a local authority sought to evict a family of Gypsy tenants from a site that the local authority owned and ran. The grounds for this were antisocial behaviour by the children and visitors of the family. The central issue in this case was the fact that tenants on local authority sites for Gypsies and Travellers did not have the same security of tenure as non-Gypsy tenants on local authority sites or in caravans on privately owned residential sites.\textsuperscript{191} The court found that the local authority had breached Article 8. The government has since responded to the judgment by


\textsuperscript{188} See for example DH v. Czech Republic [2007] ECHR 922 57325/00, on Roma rights and education.

\textsuperscript{189} Advisory Committee on the Framework Convention of the Protection of National Minorities, 2nd opinion on the UK government, 6 June 2007, ACFC/OP/II(2007)003.

\textsuperscript{190} Connors v. the United Kingdom [2004] ECHR 66746/01.

2. There continues to be a shortage of authorised Gypsy and Traveller sites, increasing the likelihood of further evictions from unauthorised sites

The most recent Gypsy and Traveller caravan count, undertaken biannually for the Department of Communities and Local Government (DCLG) was published in June 2011. The count indicates that in January 2011, there were 18,383 caravans counted in England, of which 17 per cent were on unauthorised land:

- 6,942 (38 per cent) were on socially rented sites
- 8,332 (45 per cent) were on private sites with planning permission
- 2,200 (12 per cent) were on land owned by Gypsies and Travellers without planning permission (unauthorised developments)
- 909 (5 per cent) were on unauthorised encampments.

Gypsies and Travellers living in caravans on unauthorised land in England currently have nowhere lawful to station them and so are homeless for the purposes of the Housing Act (1996). Many authorised sites only have temporary planning permission and are therefore not sustainable in the longer term. Data on the existence of sites does not reveal details about suitability of location or state of repair of sites.

The Equality and Human Rights Commission recently reviewed the progress made by local authorities in England and Wales in meeting their targets for site provision under the planning system in force up to 2010. The report indicated that there has been some progress in making legal sites available for Gypsies and Travellers in England, as there were 15 per cent more pitches available

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in 2009 than there were in 2006.\textsuperscript{195} There were also 1,835 more caravans on authorised sites in 2009 than in 2006. Data for Wales show a reduction of one caravan on authorised sites between January 2007 and January 2009.\textsuperscript{196}

The report estimated that an additional 5,821 residential pitches were required in England in the first five years after a local needs assessment was completed.\textsuperscript{197} Taking into account all pitch changes between 2006 and 2009, it would take 16 years to meet those requirements at the current rate of progress – and 27 years if temporary permissions were excluded.\textsuperscript{198} Although the planning system changed in 2010, there is no indication at present that the revised approach will result in a faster rate of progress. The government has set aside £60 million to help local authorities and other registered providers with the cost of providing new sites as part of the Homes and Communities Agency’s Affordable Homes Programme.\textsuperscript{199} However, some evidence suggests that some authorities are reworking their earlier accommodation assessments and developing Development Plan Documents which require fewer pitches than previously estimated.\textsuperscript{200}

\textsuperscript{195} Ibid., 2010. Page 14.
\textsuperscript{198} Ibid. Page 109.
Furthermore, there is evidence that the planning system may not be fair towards Gypsies and Travellers. Department for Communities and Local Government figures from April 2009 to December 2010 show that only half of applications for new sites are successful in England, compared with around 70 per cent of residential applications. The Commission’s report attributes this low success rate to very few local authorities having identified suitable land for site development, which means that ‘plan-led’ development cannot operate in the same way as for residential applicants.\(^{201}\) In addition, the survey of local authorities carried out for the Commission report showed that between 2006 and 2009, 40 per cent of the applications for new sites in England were granted only on appeal, and half of the ‘successful’ applications for new sites only received temporary permissions.\(^{202}\) As these will expire at some point in the future they are not sustainable.


\(^{202}\) Ibid. Page 35.
“I first had treatment for cancer in 2006 and it was a really daunting experience. I recall arriving at the hospital feeling very alone and frightened as I had no idea what to expect. I felt like I was heading into the abyss,” says Ciaran Henderson, a 38-year-old cancer patient.

Ciaran is now involved in a pioneering programme developed by Macmillan Cancer Support, which puts human rights at the centre of cancer care. “I’ve just started chemotherapy treatment for the third time and after the results of my scan I received a letter which explained what would happen to me, whom I should ask for, where I should go and information about the possibility of delays,” she says. “This was in stark contrast to 2006 when little information was offered ... What a difference that letter made. It was like an invitation. It’s a tiny little thing but the little things matter hugely if you are suffering from cancer.”

The Macmillan Values Based Standard aims to support these types of small but significant changes, as they can have a high impact on patient experience. Ciaran now sits on a ‘patient experience board’ at University College London Hospital, which provides feedback from patients to the hospital authorities. This is part of a drive by the hospital to improve how patients feel about their care. Ciaran says it has ‘empowered’ her at a particularly traumatic time in her life. This new approach was developed by Macmillan in response to a number of reports about poor standards of care within the NHS. For more than three years, the organisation has been working with health organisations, cancer patients, their carers and healthcare professionals to identify practical ways in which staff can improve the experience of cancer care for patients.
As a result of these consultations, the organisation has developed the ‘Macmillan Values Based Standard’. This sets out eight different practical ways in which staff can apply the human rights principles of dignity and respect. These range from making sure that they have asked the patient how they would like to be addressed; talking to them about their broader personal circumstances, for example whether they have childcare issues which may be worrying them; prioritising making them comfortable; keeping them involved in decisions about their treatment and care; and acknowledging when they are in need.

Macmillan is working with various institutions to implement the new approach. At the University Hospitals Birmingham NHS Foundation Trust, where the project was piloted in 2011, Macmillan conducted training workshops with over 60 members of staff, in which they were encouraged to discuss the Macmillan Values Based Standard and how it might apply to their everyday work.

According to Macmillan’s project manager, Hana Ibrahim, the workshops encouraged staff to think about ways in which their current practice may not be meeting the standard. “For example, one nurse talked about a hospital rule that patients should be given only one pillow. In fact, there were plenty of pillows and no reason why patients shouldn’t be given more if necessary. Nevertheless, she had never felt that she could question this rule before.

“The Standard is really about giving staff the power and the opportunity to meet their vocation, and to remember why they got into the job in the first place.” Macmillan Cancer Support is now working to implement the approach across England during 2012.