Equality and human rights in the essential standards of quality and safety:

An overview

Guidance for compliance inspectors and registration assessors
Introduction

This guidance acts as a flexible resource from the Equality and Human Rights Commission (EHRC) and the Care Quality Commission (CQC) for inspectors who would like clarification of equality and human rights issues when monitoring compliance of health and adult social care services under the Health and Social Care Act 2008.

It is primarily to support inspectors, but it will be useful for other CQC staff carrying out the regulation of health and social care providers, for example in registration, enforcement and methodology development.

This guidance (referred to as the overview guidance) provides you with:

- An overview of human rights and equality legislation and how such legislation impacts upon CQC’s regulatory role.
- Information about CQC’s approach to equality and human rights.
- Information about what you should do if you have a concern that a provider may be in breach of equality or human rights law.

The overview guidance also refers to guidance and codes of practice produced by the EHRC covering a range of issues relating to equality and human rights legislation such as the public sector equality duty, and information for employers and service providers.

It should be noted that, at the time of publication, the new public sector equality duty has been in force since April 2011. Proposals for the additional specific duty requirements on public authorities are being consulted on. These aim to enable better performance against the public sector equality duty. This has been taken into account in producing the guidance and the implications explained below, but you should aim to remain up to date on developments. Information can be accessed through the websites of the Government Equalities Office (GEO) at http://homeoffice.gov.uk/equalities and the EHRC at www.equalityhumanrights.com.

You should use this overview guidance flexibly as reference material, especially when you need to check:

- Your understanding of:
  - What is meant by equality or human rights
  - CQC’s approach to equality and human rights
  - The overview of equality and human rights law, and
  - How this law applies to both health and social care providers and to CQC.

- What to do if you think a provider may be in breach of equality or human rights law.
You should read this overview guidance in conjunction with:

- **Equality and human rights in the essential standards of quality and safety: equality and human rights in outcomes**, which will enable you to check how best to include the equality and human rights aspects of the essential standards when monitoring compliance. For example, when you are carrying out a responsive review, you can check the sections of this guidance relating to the outcomes that you are focusing on in the review. This guidance can be used at various stages of the compliance monitoring process.

- **Appendix of charts mapping the essential standards to protected characteristics under the Equality Act 2010 and to the Human Rights Act 1998**. You can use this Appendix if you wish to see more detail of how equality and human rights is included in the text of the *Guidance about Compliance: Essential Standards of Quality and Safety* published by CQC (March 2010) for providers of health and adult social care services. However, it is not necessary to use the Appendix in order to use the rest of the guidance.

- **Top 10 things you need to know about equality and human rights in CQC’s regulatory role in health and social care**, which is a reminder of our overall approach to equality and human rights in monitoring compliance and registration.

CQC also intends to publish supplementary notes about how we promote the rights of people whatever their sexual orientation or gender identity (forthcoming), however all prompts about sexual orientation and gender identity are included in the equality and human rights in outcomes guidance. Issues about equality for carers are covered by a supporting note on carers and the essential standards (forthcoming).

Both this overview guidance and the guidance on equality and human rights in outcomes will support you when you are checking compliance, so you know what to look for and are clear about the role you have to play. It is therefore complementary to the *Guidance about compliance: Essential standards of quality and safety*.

We recognise that there is wide variation in inspectors' knowledge and experience around different aspects of equality and human rights. Some of the points may already be very familiar to you from your current practice, others will be new. We want the guidance to be useful to all inspectors and assessors, so we do not assume any level of previous knowledge. You should familiarise yourself with this overview guidance and layout of the equality and human rights in outcomes guidance and then use the guidance flexibly, as and when you require it, to support your work.

The guidance is not enforceable in law by CQC under the Health and Social Care Act 2008 or by EHRC under equality or human rights law, but it will be helpful in the monitoring of compliance. The guidance is intended to show how equality and human rights issues are intrinsic to the quality and safety of services that you are monitoring. Where these issues are neglected, there may be real questions as to whether the overall standards are those that CQC would wish to endorse. They go to the heart of deciding whether CQC’s essential standards have indeed been met. We have used plain English wherever we can, stayed within the scope of the regulations, and applied the government’s principles for better regulation.
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1. When should the guidance be used?

All inspectors and assessors should read this overview guidance so that they are familiar with the overall approach of CQC to equality and human rights and the relationship between equality law and the work of CQC. You should then refer to the guidance if you need to in your work.

In monitoring compliance, you should use the *Equality and human rights in the essential standards: Equality and human rights in outcomes* guidance in the registration cycle including:

- **Information analysis** – when carrying out reviews of compliance and site visits to ensure all necessary information about equality and human rights is captured.
- **Judgments on risk** – using equality and human rights perspectives can help you decide the impact on people using the service and therefore the level of concern. Dignity, experience, human rights and accessibility are all factors listed in the judgment framework when determining impact.
- **Regulatory judgment** – deciding on the equality and human rights content of regulatory, compliance or enforcement actions.
- **Publishing judgments** – ensuring equality and human rights feature in compliance review reports.

This guidance is applicable to both health and social care providers. Where the guidance relates to only certain types of providers, for example public sector providers, this is clearly indicated.

2. How does equality and human rights relate to the essential standards of quality and safety?

Even though the Health and Social Care Act 2008 is not primarily a piece of human rights or equality legislation, many of the regulations, and therefore the essential standards of quality and safety, have equality or human rights dimensions. These are laid out in detail in the charts in the guidance about equality and human rights for each key section of the essential standards.

The *Guidance about compliance: Essential standards of quality and safety* (page 32) says that providers should, in every aspect of their work, consider the needs of each person using a service against six key strands of diversity:

- Race
- Age
- Gender
- Disability
- Sexual orientation
- Religion or belief.
When the essential standards were agreed, equality legislation on 'gender' covered gender reassignment, which is now recognised as a separate protected characteristic in the Equality Act 2010. As CQC also needs to comply with this Act, including the prohibition on discrimination and the public sector equality duty, CQC inspectors should also check that providers consider the needs of transgender people.

This part of the guidance about compliance is based on a requirement in Regulation 17 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2009 that 'the registered person must take care to ensure that care and treatment is provided to service users with due regard to their age, sex, religious persuasion, sexual orientation, racial origin, cultural and linguistic background and any disability they may have'.

3. What is CQC’s approach to equality?

CQC has adopted a 'social model' approach to equality. This means that we view equality as being about removing barriers faced by people from different groups, so that they can achieve equal outcomes. These barriers may be caused by negative attitudes or by lack of access or support. While the 'social model' was originally developed in relation to disability, it is also applicable to other equality characteristics such as race, gender sexual orientation, age, religion and belief, or gender reassignment.

In relation to care and support, equality can be understood in three ways: equality of access to care and support; equality of outcomes from care and support; and the contribution care and support can make to people's equality of opportunity to participate and contribute fully in society.

Using a 'social model' approach to checking compliance means that you are looking for evidence that the provider is addressing barriers to equality, whether these are:

- Access barriers, such as access to buildings or information
- Barriers caused by attitudes or behaviours of staff, and
- Assistance barriers, such as the provision of interpreters.

You should use this guidance flexibly. For example, if you are monitoring compliance for a care home for people with dementia, you may wish to think about disability equality particularly in relation to access, attitudes and assistance for people with dementia. However, you will also need to be aware that people with dementia using the service may have other impairments; for example, a person may also have a hearing impairment.
We have not added guidance and prompts in the section by section guidance that relate to specific health conditions because this would be impossible to do comprehensively and we would be moving away from a social model, where we are considering barriers to equality, towards a more medical model. However, we have added some prompts that relate to wider groups of people who face similar barriers where this is necessary for clarification: for example, ‘people with cognitive impairments’ or ‘people with communication impairments’.

### 4. What is CQC’s approach to human rights?

CQC is committed to promoting human rights. This means that we observe and promote the core human rights principles of fairness, respect, equality, dignity, autonomy and participation for all.

Such a ‘human rights approach’ is consistent with our values. It emphasises the specific rights that everyone has, while still recognising their unique identities. We want to empower people, to treat them with the dignity that is their right, and to place them at the very centre of what we do. We emphasise people’s rights and entitlements, rather than their needs and requirements.

We want people who use services to exercise choice and control over the services they receive.

A human rights approach will:

- Recognise that everyone has the right to be treated with respect and to receive fair and dignified treatment.
- Provide a framework for balancing competing rights and duties and so encourage social responsibility.
- Restrict human rights only where necessary and on specified legal grounds (like public safety and protecting the rights of others).
- Require institutional thinking and systemic implementation (an attitude of mind in decision-making and a code for behaviour throughout the organisation).
- Provide the guiding principles for how decisions should be made, and
- Require constructive engagement and a fair process when staff and individual service users and their advocates challenge practices.

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We want an increasing proportion of people using services to report that they: were able to understand the choices available to them; had their privacy, dignity and independence respected; were involved in the design and delivery of services by providers and commissioners; experienced safe and appropriate care that met their needs and protected their rights; and that safeguarded them from abuse.

5. How should I gather evidence from people who use services about equality and human rights?

The essential standards focus on making judgments about outcomes for people using services rather than processes. For some outcomes, it is possible to make judgments on equality and human rights using existing data or evidence from providers - for example, if there is pre-existing equality monitoring data on the outcomes of treatments or if a provider has already used a robust method to gather the views of people using services about whether they have been treated with dignity.

However, gathering evidence about outcomes relating to equality and human rights will rely greatly on gathering evidence from people using services in a number of ways - whether this is asking people for their views, listening to people’s experiences or direct observation of the care, treatment and support that people receive.

The guidance on equality and human rights for each section in the essential standards does not aim to give specific tools for engaging with people using services, but to identify areas where evidence needs to be collected. It is up to the inspector to decide on the best tool to gather the evidence once the areas have been identified. Some site visit tools designed to get evidence directly from people using services, such as observational tools, include specific equality and human rights elements.

Equality and human rights issues may be very difficult for people using services to disclose and may be variable between different people using the service, so the best way to get this evidence needs careful consideration.

It is important that you try to gather a range of views - including from people who may face barriers to equality. This point is included in CQC’s guidance on semi-structured interviews. This may be easier for some equality characteristics than others - for example, it may be easier to identify Black and minority ethnic people using the service than lesbian, gay or bisexual people.

Suggestions for evidence-gatherers
Suggestions for inspectors and assessors on how to gather people’s experiences about equality and human rights issues on site visits were developed from suggestions given by people who use services: members of CQC eQuality Voices Group, Speak Out Network groups and the Registration Involvement Group.
• Take leaflets, in appropriate formats, to explain who you are and why you are there.

• In some services, for example some mental health wards, if someone sees an inspector in a suit they will assume that the inspector is not there for them. In other services, such as some care homes for older people, people will expect an inspector to be dressed smartly and may not trust that someone casually dressed is an inspector.

• It is important not to make assumptions about individuals. However, some knowledge about people who share protected characteristics can be helpful – for example many refugees and asylum seekers have experienced war, conflict or torture which affects both their health and wellbeing and how confident they may feel about engaging with you as an inspector.

• Try to find out in advance whether some people may need a language or sign language interpreter. You can book one through CQC Accessible Communications. Three weeks’ notice is preferred but in an emergency an interpreter can be found at shorter notice. We must ensure that people are not excluded from direct communication with inspectors because they need support to communicate.

• Visit with an Expert by experience\(^2\) - an expert can mingle with people using the service and put people at ease.

• Plan your time to ensure you spend enough time with people using the service - it’s easy for conversations with professionals to take up a lot of inspection time. Guidance about visiting services recommends spending roughly 30% of your time talking to people using the service, 50% of the time observing care in practice and 20% talking to managers and staff.

• Experts by experience are also experts on what to observe. For example, when you have been a patient in a mental health hospital for a long time you’ve got nothing to do but watch and observe - so you know what to look for. This includes not only the physical environment but sometimes how individual people using the service are feeling, for example, whether someone appears distressed.

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\(^2\) Experts by experience are people who have personal experience of using, or caring for someone who uses, health, mental health and/or social care services. They have special training to help us, and can take part in inspections of services with an inspector.
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<tr>
<td>• Be friendly and spend time with people – ask if it is alright to join them watching the telly, have a cup of tea with people or go outside with people when they are having a break outside. An introductory chat about non-threatening topics can help to break the ice.</td>
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<td>• Ask people what they like to be called – some people prefer their first name, others prefer Mr/Mrs/Ms etc. Never call people by endearments such as ‘love’ or ‘dear’ as many people find this patronising.</td>
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<td>• Think about how you can encourage communication, for example non-verbal feedback, ensuring a private setting, sitting at the same level as the person and making sure that the person can hear you well.</td>
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<td>• Ask people how it is for them. Listen to people carefully - find out information about what the service is like - is it like the person wanted and were they offered alternatives?</td>
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<td>• You could explore with people whether they have experienced any discrimination themselves, or witnessed any towards other people. Be aware that people may have low expectations and may say that they are OK using the service when they are, in fact, experiencing inappropriate support or discrimination, so ask people more detailed questions to encourage them to share experiences.</td>
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<td>• Ask people using the service if they would like to talk - find out if they are worried that talking to you might have consequences for them.</td>
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<td>• If people have family members or friends visiting, it can be useful to talk to these people too.</td>
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<td>• If you have to choose who to speak to, make sure you get to choose - not the provider. Sometimes, it may be useful to ask other people using the service if they know of anyone else who may want to talk to you. If you have carried out some general observation first, try to include people who look like they may be alone or isolated in your selection of people to talk to.</td>
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<td>• Let people know how they can find out about the outcome of the review of compliance. This might include ensuring that compliance reports are produced in a different format (for example, easy read, audio or large print) and are sent to people that request them.</td>
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6. What is the relationship between the NHS Equality Delivery System and CQC regulation?

The Equality Delivery System (EDS) will be implemented in NHS organisations, including NHS trusts, from July 2011 onwards. It has been developed by the NHS Equality and Diversity Council.

The EDS will support NHS commissioners and providers to deliver better outcomes for people who use health services and communities and better working environments for staff that are personal, fair and diverse.

It will help providers to continue to meet CQC’s essential standards of quality and safety. It will help organisations to achieve compliance with the public sector equality duty in a way that also helps them deliver on the NHS Outcomes Framework and NHS Constitution.

The EDS is a tool for both current and emerging NHS organisations – in engaging with people who use services, staff and the public - to review their equality performance and to identify future priorities and actions. It includes local and national reporting and accountability mechanisms.

At the heart of the EDS is a set of 18 outcomes grouped into four objectives. These outcomes focus on the issues of most concern to people who use health services, carers, communities, NHS staff and boards. It is against these outcomes that performance is analysed, graded and action determined.

The four EDS objectives are:

1. Better health outcomes for all.
2. Improved patient access and experience.
3. Empowered, engaged and included staff.
4. Inclusive leadership.

The grades are:

- Excelling – Purple.
- Achieving – Green.
- Developing – Amber.
- Undeveloped – Red.

The role of CQC in the EDS

- CQC can be notified of significant concerns about providers that are highlighted by the EDS. These concerns will be placed on individual providers’ Quality and Risks Profiles. It will then be for CQC to decide what action, if any, it will take.
The notification will be on an exception-reporting basis, and will be made by local interests, possibly HealthWatch, that support organisations to use the EDS. There will be no blanket or automatic reporting. (Please note that, at the local level, LINks and HealthWatch must agree their role in the EDS.)

- **CQC will advise inspectors about the EDS and you will be prompted to ask providers whether or not they are using it.** Where providers are using the EDS, you can ask to see the results, and you may take the results into account in your assessments. Providers will be informed by CQC that they may use the EDS to review the evidence that they have supplied for registration purposes and, if needs be, make necessary improvements. To facilitate this type of review, and in response to concerns from providers about having to respond to two systems (the essential standards and the EDS) with the support of CQC, the Equality and Diversity Council have mapped the EDS outcomes against the essential standards. There are specific prompts about the EDS in relevant outcomes in the guidance: *Equality and human rights in the essential standards of quality and safety: Equality and human rights in outcomes* so that you know which outcomes in the essential standards do map against the EDS.

More information about the EDS can be found at: [http://www.dh.gov.uk/en/Managingyourorganisation/Workforce/Eq ualityanddiversity/index.htm](http://www.dh.gov.uk/en/Managingyourorganisation/Workforce/Equalityanddiversity/index.htm)
### Equality in the provision of health and social care services

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<tr>
<td>It is unlawful to discriminate when providing services and public functions on the grounds of sex, race, disability, gender, sexual orientation, religion or belief, gender reassignment, pregnancy and maternity. These are called ‘protected characteristics’ under the Equality Act 2010.</td>
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Protection from discrimination for marriage and civil partnership does not apply to services and public functions, although a civil partner treated less favourably than a married person can bring a claim for sexual orientation discrimination.

Discrimination in providing services means refusing to provide a service, providing a lower standard of service or offering a service on different terms than you would to other people.

There is no legislation that makes it unlawful to discriminate on the grounds of age when providing services, until the provisions for this under the Equality Act 2010 come into force. This is expected to happen in April 2012. Although you need to note that public authorities and organisations performing public functions have a public sector equality duty that applies to age in relation to advancing equality and fostering good relations, including in service delivery from 5 April 2011 (see question 12).

A service provider is any organisation that provides goods or services to the public, whether paid for or free, no matter how large or small the organisation is. The definition of ‘service provider’ is quite broad: it includes most organisations that deal directly with members of the public.

There are some circumstances in which the responsibilities of a service provider may be different:

- If the service is a public authority listed under Schedule 19 of the Equality Act, or carries out public functions, it will have to comply with additional legal responsibilities under the public sector equality duty (see questions 12-17). If the service provider is carrying out a contract for a public body covered by the equality duty, the procuring public authority will also have a duty to make sure that the services work in a way that meets the aims of the public sector equality duty. |
(7. continued)

- **Reasonable adjustments**: service providers have a legal duty to make ‘reasonable adjustments’ to ensure that people are not prevented from using their services because they are a disabled person, or are disadvantaged substantially in accessing a particular service. When deciding whether an adjustment is reasonable, service providers can consider issues such as the cost of the adjustment, the practicality of making it, health and safety factors, the size of the organisation, and whether it will achieve the desired effect. Adjustments can be in the form of physical changes to a building, providing extra services, or changing a policy or procedure. In considering what is reasonable, providers may take into account factors such as their organisation’s financial resources: generally, more is expected of larger organisations. If making the reasonable adjustments for disabled people would lead to the service breaking a different legal obligation, they may not be required to do it.

- It is also lawful to treat a disabled person more favourably than a non-disabled person. Therefore, service providers may provide services on more favourable terms to a disabled person compared to a non-disabled person.

**Positive action**

- There may be circumstances where it is appropriate to provide a service to certain groups of people, for instance for reasons of disadvantage, to meet particular needs or due to disproportionate low participation in a particular activity. However, the action must be proportionate.

- In such circumstances, a service can be provided in a way that means it is only usually used by people with a shared protected characteristic (such as people of a particular religion or a particular ethnic group) for example, a Jewish care home.

- For public bodies there may be a need to specifically consider such provision in order to meet the public sector equality duty (see more information in question 15).
There are a number of exceptions to these requirements about equality in service provision in the Equality Act 2010. These relate, for example, to the provision of blood services and the refusal of provision of services to pregnant women for health and safety reasons. These are set out in Schedule 3 of the Act.

**Single-sex services** are lawful in certain specified circumstances. The introduction of the public sector equality duty will not change this. Sex discrimination does not apply where services are provided exclusively to one sex, as long as to do so is a proportionate means of achieving a legitimate aim, and at least one of the following conditions applies:

- Only people of that sex need the service. For example, post-natal exercise classes can be provided to women only, since only women need the service.
- Where the service is also provided jointly for both sexes, an additional service exclusively for one sex will be lawful if the joint provision would not be sufficiently effective. For example, a new fathers’ support group is provided by a health trust as there is insufficient attendance by men at the new parents’ support group.
- If a service was provided for men and women jointly it would not be as effective and the level of need for the services makes it not reasonably practicable to provide separate services for each sex. For example, a women-only support unit for women who have experienced domestic or sexual violence can be set up, even if there is no parallel men-only unit because of insufficient demand.
- The service is provided at a hospital or other place where people need special care, supervision or attention. For example, single-sex wards in hospitals and single-sex facilities in mental health units.
- The service is for, or is likely to be used by, more than one person at the same time and a woman might reasonably object to the presence of a man (or vice versa). For example, separate male and female changing rooms or any service involving intimate personal health or hygiene.
- The service is likely to involve physical contact between the person using the service and another person and that other person might reasonably object if the person is of the opposite sex.
8. continued

The objections above must be 'reasonable'. So a low degree of physical contact is unlikely to justify separate provision. For example, the fact that in first aid training there may be some physical contact between women and men in the classes is unlikely to warrant the provision of single-sex sessions. Similarly, where an organisation exercising public functions does anything in relation to the provision of single-sex services this will be lawful provided that one of the above conditions is met, and that such provision is a proportionate means of achieving a legitimate aim. For example, a primary care trust contracting with a voluntary sector organisation to provide counselling for women who have had a mastectomy.

9. How has the Equality Act 2010 changed the responsibilities of health and social care providers?

The Equality Act 2010 aims to review, simplify and modernise discrimination law, including:

**In relation to services:**

- From October 2010, separate legislation about equality in services covering race, gender, disability, sexual orientation and religion and belief has been replaced by one Act, which harmonises some differences in the previous laws.
- Strengthening protection from discrimination for disabled people.
- Clarifying the protection for breastfeeding mothers.
- Rewording the legislation to make it clear that people are protected from 'discrimination by association' with someone with a protected characteristic – giving new legal protection to carers of disabled people, for example.
- From April 2011, extending the previous race, disability and gender equality duties on public authorities to all protected characteristics.
- From April 2012, banning age discrimination in the provision of goods and services and the exercise of public functions.

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3. The Equality Act 2010 also includes the protected characteristics of pregnancy and maternity and marriage and civil partnership; although the latter is exempt from services and public functions; a civil partner who is treated less favourably than a married person could bring a claim of sexual orientation discrimination.

4. The public sector duty now includes the protected characteristics of sexual orientation, religion and belief, age, gender reassignment, pregnancy and maternity, and marriage and civil partnership; although the public sector duty for marriage and civil partnership is limited to the need to have due regard to eliminate discrimination – see question 12.
### In relation to employment:

- From October 2010, protecting carers from discrimination (see above).
- Restricting the circumstances in which employers can ask job applicants questions about their health, to reduce unlawful discrimination against disabled people.
- Strengthening the powers of employment tribunals.
- Extending the scope to use positive action.
- Extending protection for employees from harassment by third parties such as their employer’s service users is currently being considered.

### 10. How can this law be enforced?

Individuals, or someone acting on their behalf, can take legal action against discrimination in relation to services and public functions, or employment, under the Equality Act 2010, and seek compensation from a court or employment tribunal. While the EHRC can offer some advice and support to such individuals, it will only provide representation in the court or tribunal if the case is of strategic significance.

The EHRC has its own powers to enforce against discriminatory practices and will use these powers in accordance with its legal strategy and enforcement and compliance policy.

It will strive to promote compliance as the preferred option, only resorting to enforcement action when attempts to resolve informally have failed. Promoting compliance may include:

- Working with organisations to ensure that remedial or preventative action is taken.
- Giving specific advice or guidance to an organisation.
- Meeting with senior managers and other staff.
- Carrying out desk-based reviews of information provided by organisations and giving them feedback.
- Exchanging relevant information with other law enforcement bodies and regulators (see question 11 below for information-sharing with CQC).

If the EHRC decides to take enforcement action against discriminatory practices, it can do this by conducting a formal investigation and issuing an unlawful act notice, or going to court to seek an injunction. It may also conduct inquiries into matters relating to its own remit, and enter into legally binding agreements.
11. What do I do if I think that a provider may be acting unlawfully under equality law?

CQC can only take legal action to remedy breaches of the Health and Social Care Act 2008. It may be that the unlawful action contributes to a judgment about whether a provider is compliant under the Health and Social Care Act 2008, including decisions about whether enforcement action is needed. We would expect that the majority of equality and human rights issues uncovered through CQC evidence-gathering and analysis would be resolved through action under the Health and Social Care Act.

However, CQC cannot take action under other legislation. There may be circumstances where a breach of equality law is suspected but the issue is outside CQC’s regulatory remit – for example it is a commissioning issue or the information given to CQC relates to a non-regulated provider.

In some circumstances, it may be appropriate to advise people using services or others (such as whistleblowers) to seek legal advice about their rights under equality law, if they have raised the issue.

Discrimination may also be a safeguarding issue and inspectors and assessors may need to make a safeguarding referral, if appropriate, using CQC safeguarding procedures.

Discrimination can amount, in certain circumstances, to a breach of Article 14 of the European Convention on Human Rights, in conjunction with other Articles such as Articles 3 or 8 (see question 22). CQC is obliged to act in a human rights compliant manner. In some circumstances, evidence of such a breach may require a proactive approach by CQC. Additional information about what to do if you think a provider may be breaching human rights law is given in question 25.

If you have evidence of suspected breaches of equality law, please discuss this with your manager. Under an information-sharing agreement between CQC and the EHRC, we may share information in order for both commissions to better carry out our regulatory roles.

If the inspector and manager are clear that there is an issue of a potential breach of equality law that cannot be resolved through action under the Health and Social Care Act 2008, they report it to the Involvement and Equality, Diversity and Human Rights PoC.
If the manager is uncertain, they can seek advice from their regional equality and human rights lead or the CQC Involvement and EDHR team (email AskRegulatoryDevelopment@cqc.org.uk with ‘equality’ in the subject line).

CQC Involvement and EDHR team may pass the information to the EHRC, if it meets set referral criteria.

The EHRC will consult with its legal team to see if it wishes to take further action.

If EHRC want to take further action, it will inform CQC of the way that the detailed information should be shared, to comply with the Data Protection Act and other requirements. The responsibility for ongoing contact with EHRC from CQC will then lie with the compliance inspector who raised the concern.

The Involvement and EDHR team will maintain a log so that we can monitor this information-sharing across all regions. This log will also contain issues where breach of equality or human rights law may be suspected but the issue did not meet EHRC referral criteria, so that the overall picture of potential breaches of equality and human rights law can be reviewed from time to time.

Further information about the Memorandum of Understanding between CQC and EHRC to enable information exchange can be obtained from the Involvement and EDHR team: Involvement.EDHR@cqc.org.uk.

Note the above email address is only for CQC staff. Others with enquiries about CQC work on equality and human rights should use: involvement.edhr@cqc.org.uk

The EHRC’s helpline is available Monday-Friday 8am-6pm, and is useful for providing advice:

0845 604 6610 (main number)
0845 604 6620 (textphone)
0845 604 6630 (fax)
Email: englandhelpline@equalityhumanrights.com
Additional equality duty for public sector providers and providers performing public functions for public bodies

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<th>12. What is the public sector equality duty?</th>
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<td>The public sector equality duty came into force on 5 April 2011. It replaces the public sector equality duties covering race, gender (including some aspects of gender reassignment) and disability, extending them to cover age, disability, pregnancy and maternity, race, religion or belief, sex, sexual orientation and gender reassignment more comprehensively than before. This is a statutory duty, meaning it is a legal obligation.</td>
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The legislative framework has two main components: the general duty and the specific duties. The general duty is contained in the Equality Act 2010 and sets out the main aims of the duty.

It requires public bodies to have due regard to the need to:

- Eliminate discrimination, harassment or victimisation, or any other conduct prohibited by the Act.
- Advance equality of opportunity between people who share a protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not.

The duty to have due regard to the need to eliminate discrimination also covers marriage and civil partnership.

The broad purpose of the equality duty is to integrate consideration of equality and good relations into the day-to-day business of public authorities. If a public body does not consider how a function can affect different groups in different ways, it is unlikely to have the intended effect. This can contribute to greater inequality and poor outcomes.

The general equality duty therefore requires organisations to consider how they could positively contribute to the advancement of equality and good relations. It requires equality considerations to be reflected into the design of policies and the delivery of services, including internal policies, and for these issues to be kept under review.

Methods adopted by authorities to help meet the general duty include analysis or assessment of equality impact, involvement and consultation with affected groups, gathering and publication of a range of equality information, setting priorities and objectives on key equality concerns and incorporating equality into business planning and reporting. These types of action should provide
12. continued

evidence to help you monitor compliance with the equality dimensions of the essential standards.

A code of practice on the public sector equality duty, which will set out further details on how public authorities meet the general duty, is due to be published for consultation in 2011. A code is a statutory document which can be used as evidence in any legal proceedings.

The Act also gives ministers the power to set out, in regulations, specific requirements on some public bodies to help them to comply with the general duty. These are known as the 'specific duties'. As explained above, proposals for these are currently being consulted on by government.

The current proposals are that public bodies publish information about equality in both employment and service provision to demonstrate compliance with the general duty and prepare and publish objectives every four years. While you will be less interested in the processes used to meet these duties, the information published will be useful evidence to draw on in monitoring compliance with the essential standards.

The EHRC’s guide to the public sector equality duty is an applicable publication for Outcome 1 listed in Appendix C of the essential standards. Non-statutory guidance relating to the new public sector equality duty in England was published by the EHRC in January 2011 (see question 26 for links to more information). This is likely to be updated once the specific duties come into force and up-to-date information will be available on the EHRC website.

13. Which health and social care providers does the public sector equality duty apply to?

There are two ways that a body can be subject to the general duty. Those bodies listed in Schedule 19 of the Equality Act 2010 will be subject to the general duty. This list includes key public authorities like local authorities, health trusts and central government departments.

In addition, any organisation that carries out a public function, as defined by the Human Rights Act, will be subject to the general duty. In this situation, the duty will only apply to the organisation’s public functions, not to any private functions it carries out. So independent and voluntary sector health and social care providers will be subject to the general duty directly if they are carrying out public functions such as detaining patients under the Mental Health Act. More advice on what constitutes a public function is available in the services, public functions and associations and public sector equality duty codes of practice.
Private or voluntary sector bodies under contract from a council or NHS trust may be asked to meet contract conditions such as information collection, to enable the contracting body to meet its own obligations, but responsibility for meeting the duty remains with the contracting body. Where private or voluntary sector bodies are under contract to deliver public functions they are directly subject to the duty in tandem with the public authority, since the contracting authority always remains responsible for meeting its duty.

Multi-agency arrangements through partnerships are not subject to the public sector equality duty in their own right (because they are not legal entities in their own right), but most of their members will be. Members of any partnership such as councils, police forces or primary care trusts need to ensure they also apply the duty in all of their functions that are delivered via the partnership.

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<th>14. Have the public sector providers subject to the equality duty changed under the Equality Act 2010?</th>
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<td>There may be some small changes to the bodies listed under the previous duties. The list can be checked at Schedule 19 of the Equality Act 2010. The Equality Act 2010 gives ministers the power to add bodies to the list under Schedule 19 and they have done so by regulation. Bodies may also be added to the list by statute, for example the proposed Health and Social Care Bill which creates GP Commissioning Consortia amends Schedule 19 to add them to the bodies included. CQC is listed under Schedule 19, so CQC is also subject to the equality duty.</td>
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| 15. How will the public sector equality duty affect services for specific groups of people? | Public bodies have to comply with the duty for all of their functions, including service provision. This means they should pay due regard to the aims of the duty when designing and reviewing services, ensuring that everyone benefits equally.

The general duty specifies that to advance equality includes having due regard to the need to remove or minimise disadvantages connected to a protected characteristic, taking steps to meet the needs of persons who share a protected characteristic and encouraging participation in public life or any other activity in which participation is disproportionately low.

For example, in having due regard to the need to advance equality a service provider should consider whether it needs to take positive action to address any inequalities or particular needs of groups, or whether it should apply any of the exceptions to the Equality Act 2010 (see more information in question 7).

These could include the provision of single sex services, and other specific services for people who share a protected characteristic – such as culturally specific services or services for lesbian, gay and bisexual people or disabled people.

So, in relation to equality for women and men, the duty does not mean that single sex services should be cut, have funding withdrawn or that any new services should not be funded. Neither does it mean that services should necessarily be provided on the same scale for both men and women. For example, because women make up the majority of victims of domestic violence and rape, it may not be appropriate for a local council to fund or provide refuge services on the same basis for men and for women.

Furthermore, in complying with its equality duty a public authority may be able to have due regard to its need to foster good relations by for example taking action to address violence that is targeted at a particular group based on their shared protected characteristic. Further information on this can be found in the EHRC’s guidance on the Equality Act. |
|---|---|
| 16. How is the public sector equality duty enforced? | The EHRC had specific enforcement powers in relation to the previous public sector equality duties and retains these for the new duty. These can be used to enforce the general and specific duties and include the powers to carry out formal assessments, enter into agreements and serve compliance notices.

Both the EHRC and affected persons can apply to the High Court for a judicial review in respect of a failure to comply with the general duty. |
The EHRC will use these powers in accordance with its legal strategy and enforcement and compliance policy and may seek to take steps to encourage compliance by a public body before moving to enforcement, where appropriate.

17. What do I do if I think that a health or social care provider is breaching their public sector equality duty?

When you are monitoring compliance, you may come across evidence which suggests that a provider is also breaching their public sector equality duty.

CQC can only take legal action to remedy breaches of the Health and Social Care Act 2008. It may be that the unlawful action contributes to a judgment about whether a provider is compliant under the Health and Social Care Act 2008, including decisions about whether enforcement action is needed. However, CQC cannot take action under other legislation.

In some circumstances, it may be appropriate to advise people using services or others (such as whistleblowers) to seek legal advice about their rights under equality law, if they have raised the issue. EHRC helpline details are given in question 11.

You should also discuss the possible breach with your manager. Under an information-sharing agreement between CQC and the EHRC, we may share information in order for both commissions to better carry out our regulatory roles.

- If the inspector and manager are clear that there is an issue of a potential breach of equality law which cannot be resolved through action under the Health and Social Care Act 2008, they report it to the Involvement and EDHR team at CQC (email AskRegulatoryDevelopment@cqc.org.uk with ‘equality’ in the subject line).
- If the manager is uncertain, they can seek advice from their regional Equality and Human Rights lead or the CQC Involvement and EDHR team (email AskRegulatoryDevelopment@cqc.org.uk with ‘equality’ in the subject line).
- CQC Involvement and EDHR team may pass the information to the EHRC, if it meets set referral criteria.
- The EHRC will consult with its legal team to see if it wishes to take further action.
- If EHRC wants to take further action, it will inform CQC of the way that the detailed information should be shared, to comply with the Data Protection Act and other requirements. The responsibility for ongoing contact with EHRC from CQC will
then lie with the compliance inspector who raised the concern.

- Note the above email address is only for CQC staff. Others with enquiries about CQC work on equality and human rights should use: involvement.edhr@cqc.org.uk

The Involvement and EDHR team will maintain a log so that we can monitor this information-sharing across all regions. This log will also contain issues where breach of equality or human rights law may be suspected but the issue did not meet EHRC referral criteria, so that the overall picture of potential breaches of equality and human rights law can be reviewed from time to time.
18. How are individuals’ human rights protected in UK law?

The most important source of human rights law in the UK is the Human Rights Act 1998 (the HRA 1998), which came into force in 2000 and incorporates most of the rights set out in the European Convention on Human Rights (ECHR) into UK domestic law. (The UK ratified the ECHR in 1951.)

The ECHR includes a wide range of rights that focus on individuals’ civil and political rights, such as: the ‘Right to a fair trial’ (Article 6), ‘Freedom of expression’ (Article 10), ‘Freedom of assembly and association’ (Article 11) and the ‘Right to marry and found a family’ (Article 12). The rights that are likely to be of direct relevance to providers of health and social care are considered in question 22.

The incorporation of the ECHR into UK domestic law is a significant change. This is because with the introduction of the HRA 1998, individuals who consider that their rights under the ECHR have been infringed can now have their claims considered by our national courts. Previously, our national courts could only consider complaints about alleged breaches of ECHR rights in limited situations (such as where the ECHR might help to interpret an ambiguous area of law). Accordingly individuals wishing to pursue complaints under the ECHR had to take their case to the European Court of Human Rights in Strasbourg. This was usually a very lengthy and expensive procedure.

The HRA 1998 has major implications for public services and those involved in regulation. All public authorities, and other organisations performing public functions, must comply with the ECHR. This does not just mean that public bodies must avoid breaching individuals’ rights; there will also be times when public authorities must also take concrete action to promote and protect human rights. Such duties to take action are often referred to as ‘positive obligations’ (see question 19 for further information).

The relevance of other international and European human rights treaties

There is a wide range of international and European human rights instruments addressing different aspects of human rights. For example, within the United Nations, there are nine ‘core’ human rights treaties, in addition to numerous other standards addressing various aspects of human rights.\(^5\) Some treaties protect the rights of specific groups, for example women, children and disabled

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\(^5\) Further details on these human rights treaties can be found at: [www2.ohchr.org/english/law/](http://www2.ohchr.org/english/law/)
people. The existence of these specific treaties does not generally give these groups any additional rights, but recognises the particular discrimination and difficulties they may face in claiming their human rights.

Many of these international treaties contain rights relevant to the health and social care sector. These rights are complementary to the civil and political rights in the ECHR. For example, the UN International Covenant on Economic, Social and Cultural Rights provides for the right of everyone to ‘the enjoyment of the highest attainable standard of physical and mental health’ (Article 12). This right is considered to be ‘indispensable for the exercise of other human rights’. It is included in other major human rights treaties, for example:

- The Convention on the Rights of Persons with Disabilities provides that disabled people have the right to enjoy ‘the highest attainable standard of health without discrimination on the basis of disability’ (Article 25).
- The Convention on Discrimination Against Women requires measures to be taken to eliminate discrimination against women in the field of health care, in order to ensure equal access to health care as between men and women (Article 12).

Further examples of international human rights that are of particular relevance to the provision of health and social care are set out in question 24.

19. What is the purpose of the Human Rights Act 1998?

The main purpose of the HRA 1998 is to ensure that laws, practices and procedures comply with the rights set out in the European Convention on Human Rights (ECHR).

Under the HRA 1998:

- So far as it is possible to do so, all of our legislation must be interpreted and applied in a way that accords with the rights set out in the ECHR. In some cases, where it is not possible to interpret legislation so that it complies with the ECHR, the higher courts (such as the High Court, the Court of Appeal or the Supreme Court) can issue a ‘declaration of incompatibility’. This should lead to the legislation being amended so that it becomes compatible with the ECHR.
- All public authorities must act in a manner which is compatible with the ECHR (unless primary legislation (that is, an Act of Parliament) requires them to act otherwise).

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This means that individuals working for public authorities will need to take into account the rights set out under the ECHR when carrying out their day-to-day tasks.

The term ‘public authority’ includes NHS agencies and local authorities and other organisations or individuals undertaking a public function (see question 20 below for more information).

- Individuals who consider that a public authority has infringed their rights under the ECHR can take legal action in the national courts against that public authority.
- Only ‘victims’ of breaches of ECHR rights can bring proceedings under the HRA 1998. However, relatives may bring a claim on behalf of a person who has died, where the claim relates to the person’s death, or if the person lacks capacity to pursue the claim for him or herself.

There are three broad categories of rights under the ECHR: ‘absolute’, ‘limited’ and ‘qualified’:

- **Absolute rights**: these rights cannot be limited or restricted in any circumstances. The prohibition of torture, inhuman or degrading treatment or punishment (Article 3) and the prohibition of slavery and forced labour (Article 4) are examples of absolute rights.

- **Limited rights**: these rights allow certain limitations to the particular right, but only to the extent specified in the right itself. For example, Article 5 of the ECHR provides for the right to liberty but sets out the circumstances in which individuals might be deprived of their liberty.

- **Qualified rights**: these rights set out the general circumstances in which they may be limited or restricted. However any interference with such rights must be justified. In essence, interference will only be justified if the interference is lawful, its purpose is to address an aim specified in the right itself (for example, ‘for the prevention of disorder or crime’) and it is a proportionate response to the particular concern that is being addressed. (The concept of ‘proportionality’ is considered below.) Articles 8, 9, and Article 1 of Protocol 1 (discussed below) are all qualified rights.

There are also some important concepts relevant to the application of the ECHR. The key concepts of ‘proportionality’, ‘positive obligations’ and the ECHR as a ‘living instrument’ are summarised below:
- **Proportionality**: this is a fundamental principle of the ECHR. It is particularly important when considering whether an interference with a qualified right (discussed above), is justified. It requires that any interference with a right under the ECHR must be no more than necessary to achieve its objective and it must not be arbitrary or unfair. A phrase often used to explain the term ‘proportionality’ is ‘Don’t use a sledgehammer to crack a nut’. For example, if there is a choice between the courses of action that could be taken to meet the identified objective, the option that is likely to be the least intrusive for the individual concerned, should be taken.

- **Positive obligations**: although the wording of the rights under the ECHR focus on protecting individuals from arbitrary interferences with their rights (referred to as ‘negative obligations’), the European Court of Human Rights considers that these rights can also give rise to positive obligations. This is because specific measures will sometimes be required to achieve the effective protection of individuals’ rights. Thus it might be necessary to: introduce laws to prohibit individuals from infringing other people’s rights, take specific action to ensure that people can exercise their rights (such as effective policing to allow people to demonstrate peacefully) and/or provide information to people whose rights are at risk. For example, a positive obligation will arise under Article 2 (the right to life) where a public authority is made aware that there is a real or imminent danger to a person’s life – in such cases, the public authority will be required to take action to protect that person.

- **The ECHR is a ‘living instrument’**: this term is used to illustrate that the European Court of Human Rights interprets the ECHR in the light of present day conditions and will be influenced by developments in commonly accepted standards. This means that whereas a claim that an ECHR right had been breached may have failed in the past, it might be upheld in the future.

### 20. When will the Human Rights Act 1998 apply to health and social care providers?

The HRA 1998 applies only to individuals and organisations considered to be a ‘public authority’ and this will depend on whether they are exercising ‘functions of a public nature’. (No precise definition of the term ‘public authority’ is given in the HRA 1998.)

Statutory bodies such as NHS agencies and local authorities are public authorities as they are exercising public functions. Organisations and individuals performing specific public functions will also be considered to be public authorities when undertaking those functions. For example, a nurse will be considered to be a
‘public authority’ when carrying out functions specified under the Mental Health Act 1983. Given the lack of precise definition, the circumstances in which organisations and individuals are considered to be a ‘public authority’ for the purpose of the HRA 1998 is an area that is likely to be further defined by the courts.

In 2008, following a series of court decisions which highlighted the lack of clarity in this area, Parliament legislated to confirm that independent care homes providing residential care to individuals are performing a ‘public function’ if such care has been arranged by a local authority.

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<th>21. What legal requirements do health and social care providers have to respect the human rights of people using their services?</th>
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| Health and social care providers that fall within the definition of ‘public authority’ will be required to comply with the HRA 1998. They must not act incompatibly with the ECHR and the individuals to whom they provide services can bring proceedings against them under the HRA 1998 if such individuals consider that their rights under the ECHR have been breached.

With regard to other private and charitable organisations operating in this sector, the CQC considers that the best approach would be for all services to be designed and delivered to standards required by the HRA 1998.

It should also be noted that the essential standards apply to all health and social care providers if they are carrying out regulated activities – regardless of ownership or funding. So if, for example, a private care home with no publicly funded placements is non-compliant with an essential standard that has a HRA 1998 implication, then CQC can take action under the Health and Social Care Act 2008 just the same as for other care homes. The only difference is that action could not be taken under the HRA (which an individual person living in the care home would have to take anyway).

Inspectors can link the concerns to non-compliance under essential standards rather than the HRA 1998. This reflects the wider approach taken by CQC based on protecting people’s rights, using human rights principles. It is important that inspectors and assessors look ‘through the lens’ of whether people are having their basic human rights protected, even if the mechanism for doing this is the Health and Social Care Act 2008 rather than the HRA 1998 - as this will promote better outcomes for people.
22. What human rights will be of particular relevance to individuals receiving health and/or social care?

The ECHR rights introduced by the HRA 1998 apply to everyone (including children). They will therefore all be of relevance to health and social care providers because the availability and organisation of health and social care services will be important factors in ensuring that people receiving health and social care are able to enjoy these rights.

While all ECHR rights are of equal importance, the following rights are likely to be of direct relevance to individuals receiving health and social care\(^7\). These rights are referred to in the separate guidance: *Equality and human rights in the essential standards: Equality and human rights in outcomes guidance*. Article 8 is considered first given that numerous aspects of the provision of health and social care will engage this right.

**Article 8**: provides that everyone has the **right to respect for private and family life, home and correspondence** (referred to in the rest of this guidance as ‘the right to private and family life’).

- Article 8 has a very wide scope. For example, it covers key issues relating to dignity and autonomy such as the right of individuals to choose how to live their lives (where they live and who with, their sexual identity, how they dress); making decisions about health and personal welfare (including the right to refuse medical treatment) as well as freedom from intrusion from the media, and the right to have personal information kept confidential. It also includes the right for a family to live together and enjoy each other’s company, developing and maintaining relations with others (including one’s own family), not being harassed or abused and the right to continue occupying one’s own home.

- In addition to the right to protection from unjustified interferences, Article 8 may also require positive action to be taken to protect a person’s right to private and family life. For example, in the context of health and social care, the right to private and family life could include providing support to enable people to maintain ordinary family relationships, such as supporting disabled parents and therefore protecting children from becoming their primary carers. It might also include ensuring that lesbian, gay or bisexual people living in residential care do not face discrimination in maintaining their relationships and friendships.

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\(^7\) For a full list of ECHR articles included in the Human Rights Act, with notes on each, see: [http://www.equalityhumanrights.com/human-rights/what-are-human-rights/the-human-rights-act/]
The right to private and family life under Article 8 of the ECHR is a qualified right. An interference of this right can only be justified if it is based on one of the grounds set out under Article 8(2): ‘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’. Thus, there may be circumstances in which an individual’s right to private and family life will need to be restricted in order to protect other people’s rights.

For example, if a person living in a residential care home becomes distressed and agitated, staff may decide to lawfully restrain that person to prevent him/her from harming other residents and staff, as well as from harming him/herself (see also question 23 below). As highlighted in question 19 above, any interference with Article 8 will only be justified if the interference is lawful, its purpose is to address a legitimate aim and is a proportionate response to the concern that is being addressed.

**Article 2:** provides that everyone has the right to life. Article 2 also requires positive steps to be taken by public authorities to safeguard the lives of people in their care. For example hospitals and care homes must take action to ensure that all people using their services receive adequate hydration and nutrition and proper administration of medical care. In certain circumstances the right to life will also require an official investigation into an individual’s death, such as where the death has resulted from a failure on the part of the public authority to protect the person’s life.

**Article 3:** is an absolute right. It provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment.

- There is no precise definition of what might amount to a violation of Article 3. The ill treatment must ‘attain a minimum level of severity’ to fall within the scope of Article 3 and the threshold of severity tends to be high (although the threshold for ‘inhuman and degrading treatment or punishment’ is lower than ‘torture’). The question whether this right has been breached will depend on a range of factors such as the nature, seriousness and duration of the treatment, its physical and mental impact, as well as the age and state of health of the individual concerned.
Public authorities are under a positive obligation to safeguard individuals whose rights under Article 3 may be violated, such as children and adults who may be vulnerable to abuse. For example, on becoming aware that an older person is being subjected to severe abuse or violence by an individual who purports to be providing that person with care, social services would be required to take action to protect the older person and prevent further abuse.

Where there is credible evidence that a person suffered abuse while in the care of a public authority, the failure to investigate an allegation of ill treatment may amount to a breach of Article 3.

**Article 5:** is a limited right. It provides that everyone has the right to liberty and security and no one shall be deprived of their liberty save for one of the six specific circumstances set out in Article 5. Article 5 is often used in relation to criminal and immigration matters but is also relevant to health and social care:

- Any deprivation of liberty must be in accordance with the law. Those who are detained have the right to take legal proceedings to challenge the lawfulness of their detention.
- The circumstances in which individuals can be deprived of their liberty include ‘the lawful detention of persons … of unsound mind’. In relation to health and social care, this right will be relevant for those detained under the Mental Health Act 1983 and people who are deprived of their liberty while lacking mental capacity.

**Article 6:** provides that everyone has the right to a fair trial, which means that individuals have the right to a fair and public hearing before an independent and impartial tribunal and within a reasonable time.

- This right relates to both criminal and civil proceedings. Not all civil cases are covered by this right, but it can include non-financial claims relating to ECHR rights such as private and family life, the right to liberty and freedom of association. For example, Article 6 has been held to be relevant to the decision to place a child into care and restricting the contact of prisoners with their families (both of which engage Article 8, the right to private and family life).
- Internal complaints procedures are not expected to satisfy Article 6. However, if the complainant is not satisfied with the outcome of the complaint, s/he will usually be able to pursue legal action through the court system, in which case Article 6 will apply (and court procedures normally satisfy this article).
Article 9: provides that everyone has the right to freedom of thought, conscience and religion but sets out the circumstances in which individuals’ freedom to manifest their religion or beliefs can be limited (such as ‘for the protection, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others’). In relation to health and social care, Article 9 will be particularly relevant where individuals are being accommodated (including those who are detained). Policies and practices will need to be developed to ensure that they do not interfere with individuals’ right to manifest their religion or beliefs, for example religious observance such as prayer, diet or the opportunity to participate in religious festivals.

Article 14: protects individuals from discrimination in relation to the other rights guaranteed under the ECHR (thus providing an equality dimension to human rights law).

- The areas of potential discrimination covered by Article 14 are broad: ‘any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status’. The final category ‘other status’ covers personal characteristics such as age and disability and could therefore potentially cover other protected characteristics: sexual orientation, gender reassignment, pregnancy/maternity and marriage/civil partnership status.

- However, Article 14 is not a free-standing right. To rely on this right, individuals must show that another ECHR right has been engaged and that they have been discriminated against in respect of their enjoyment of this right. For example, if people from one faith were given access to a room for prayer while in hospital, but this access was denied to people from another faith, this could be in breach of both Article 9 and Article 14. In relation to Article 14, those responsible for the management of the hospital would need to show that there was a good reason for this decision (that is, it was in order to achieve a ‘legitimate aim’) and that the action taken was proportionate to that aim.

- In practice, many of the situations which give rise to a potential breach of Article 14 (which as stated above can only be considered if it engages another ECHR right) will be covered by Part 3 of the Equality Act 2010. However, given the broad category of ‘any other status’ under Article 14, this right has the potential to protect individuals who are not covered by the ‘protected characteristics’ as defined by the Equality Act 2010, such as people having a particular political opinion or another personal attribute.
Article 1 of Protocol 1: provides that individuals have the right to peaceful enjoyment of their possessions, such as a house, car, book and pension. It can also include welfare benefits to which a person has an entitlement. As with other qualified rights, this right can be limited but only in circumstances (in the public interest) and if it is lawful and the interference can be justified.

The ECHR rights, especially those rights summarised above, are at the core of what good care and support should mean at a day-to-day level. While they may sometimes appear abstract, they are really about such mundane things as eating a meal when you are hungry rather than when a service wants to provide it; having a bath in privacy and comfort; being able to play with your children or go to a place of worship or socialise freely in the pub in the same way as everyone else.

See question 22 for some examples of human rights in practice. There are further examples in the equality and human rights guidance for each of the key sections.

23. Are some ECHR articles more important than others?

No. There is no hierarchy between human rights. All human rights are indivisible, inter-related and interdependent – restricting one right has a negative impact on other rights, while taking steps to fulfil a right facilitates the enjoyment of other rights.

Sometimes the rights of one individual or a group of people have to be balanced against the rights of others. For example:

- If someone writes a hate speech inciting murder against an ethnic group, their freedom of expression may be limited to ensure the safety of others.

- On the basis of evidence that a child is being abused by her parents, social services conclude that it is necessary to remove the child from her home and place her in care. Such action will interfere with the right of both the child and her parents to respect for family life under Article 8. However, social services must also consider their duty to safeguard the child’s right to private life (which is also part of Article 8) and her right to freedom from torture and inhuman or degrading treatment or punishment (Article 3). In some cases the child’s right to life (Article 2) may also be relevant and social services would have to take action to protect her right to life.

In some cases a range of rights might be relevant. For example:

- As highlighted in the case of the child being taken into care, referred to above, Articles 8 as well as Articles 2 and 3 might be relevant.
• Where a person has been admitted to hospital on the basis that he is known to be at risk of taking his own life, the care plan will need to be developed to safeguard the person’s life (the right to life, Article 2). However consideration must be given on how to ensure that the steps taken to prevent the person’s suicide only interfere with his private and family life to the level necessary to achieve this aim (Article 8 – right to private and family life).

• Where a person has been subjected to restraint, Article 8 (the right to private and family life) will be engaged. Consideration will need to be given as to whether the action taken was justified under Article 8 (that is that the reason for using the restraint falls within the grounds set out in Article 8, for example, for the protection of the person’s health and that the action taken was necessary to achieve this aim and was proportionate to that particular situation). There may be cases where the restraint used does not comply with the requirements under Article 8. It may also amount to a deprivation of liberty, thereby engaging Article 5 (right to liberty). In some cases the circumstances in which the restraint was used (such as the level of force used, its duration and impact on the person concerned and the age, disability or state of health of the person) may give rise to a breach of Article 3 (freedom from torture and inhuman or degrading treatment or punishment).

24. What other rights might be relevant to health and social care providers?

As discussed in question 18, although only the European Convention on Human Rights (ECHR) is incorporated into UK domestic law, other international and European human rights treaties can help to influence UK law and practice. By ratifying these treaties, the UK government has undertaken to comply with the rights set out in them. Thus, although not part of our domestic law, these treaties can influence UK law and practice. For example:

• Each of the nine core human rights treaties of the United Nations (UN) requires States to submit periodic reports to the UN Committee responsible for overseeing the implementation of that treaty. These Committees consider each State’s report and then inform that State of any concerns and recommendations on how to address such concerns (which may involve a change in law and/or practice).

• The European Court of Human Rights and our domestic courts may refer to the other international and European human rights treaties when considering the purpose and meaning of rights under the ECHR. For example the European Court of Human rights has referred to the UN Convention on the Rights of the Child in relation to the rights of children and the UN Convention on the Rights of Persons with Disabilities in relation to the rights of disabled people.
International and European human rights treaties may be referred to in government guidance and policy documents. For example, the code of practice to the Mental Health Act 1983 states that those responsible for the care of children in hospital should be familiar with the UN Convention on the Rights of the Child.

Two UN human rights treaties that are of particular relevance to the health and social care sector are the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). The UK government ratified the CRC in 1991 and the CRPD in 2009.

Set out below are some of the rights from these two treaties that complement the rights under the ECHR. Reference to these rights will be included in the equality and human rights key sections guidance where they provide more detail and/or may in the future guide the interpretation of the ECHR rights.

Summaries of relevant Convention on the Rights of the Child (CRC) rights:

- **Article 3 (best interests of the child)** provides that the best interests of children shall be a ‘primary consideration’ in all actions concerning them. This is one of the general principles of the CRC. Governments are required to take appropriate measures to protect children and must ensure that all agencies responsible for the care or protection of children conform to established standards ‘particularly in the areas of safety, health, in the number and suitability of staff, as well as competent supervision’.

- **Article 12 (respect for the views of the child)** provides that children who are capable of forming their own views have the right to express those views freely in all matters affecting them and that their views are given ‘due weight in accordance with the age and maturity of the child’. Paragraph 12(2) refers to the rights of children to be heard in any judicial or administrative proceedings affecting them. The Committee on the CRC considers that there is no age limit on the right of the child to express his or her views.

- **Article 37 (torture, degrading treatment and deprivation of liberty)** provides that children shall be protected from torture or other cruel, inhuman or degrading treatment or punishment, capital punishment and arbitrary detention. Article 37(c) also provides that children deprived of their liberty shall be treated with humanity and respect, in a manner which takes into account the needs of persons of their age. In addition, such children shall be separated from adults unless it is not in their
best interests to do so. They shall also have the right to maintain contact with their family (save in exceptional circumstances).

Summaries of relevant Convention on the Rights of People with Disabilities (CRPD) rights:

- It should be noted that while age in itself does not fall within the term ‘disability’, older people will be covered by the CRPD if they have ‘long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’ (see Article 1 of the CRPD).

- **Article 12 (equal recognition before the law)** provides that disabled people have the right to equal recognition as people before the law and have the right to make their own decisions in all areas of life, on the same basis as other people. Its emphasis is on enabling people to exercise their right to make decisions for themselves. For example governments are required to take steps to provide disabled people with access to the support that they might need to make their own decisions. It also requires safeguards to be put in place to protect disabled people from abuse (although not explicit, this is likely to be where there are questions about the person’s ability to make decisions for themselves). Such safeguards include ensuring that the person’s rights and preferences are respected, the steps taken must be tailored to the person's personal circumstances, apply for the shortest possible time and be subject to regular and independent review.

- **Article 19 (living independently and being included in the community)** provides that disabled people have an equal right to live in and take part in the community with the right to the same choice and control as non-disabled people. Governments should do everything they can to ensure disabled people enjoy these rights, in particular they should ensure that disabled people have the right to choose where, and with whom, they live; have access to a wide range of support services (at home and in the community) including personal assistance to prevent isolation and support inclusion, and can access the same community services as everyone else.

- **Article 21 (freedom of expression and opinion, and access to information)** requires governments to take steps to ensure that disabled people can express their views freely and access information on an equal basis to everyone else. It also includes complaints procedures. For example, if a deaf person wants to make a complaint in British Sign Language, then that should be possible.
**Article 27 (work and employment)** states that disabled people have the right to earn a living through work that they freely choose and in workplaces that are accessible and inclusive. Governments should take a range of steps to promote this right to work, for example by ensuring that disabled people are protected against discrimination in employment and are entitled to reasonable adjustments. This is not a right to employment, but a duty on government to create conditions which promote the equal opportunities for disabled people to start earning a living through work. It is also a protection against being forced to work, and it gives disabled people right to access and non-discrimination in work.

The UK is also a signatory to the **Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment** (OPCAT).

- The objective of the Protocol is to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.
- CQC is designated as one of the UK’s national bodies to undertake such visits. These national bodies are collectively called the National Preventive Mechanism (NPM), and are guaranteed rights of access to information on and about persons who are deprived of their liberty by the state.
- Such persons relevant to the role of CQC include those who are detained in hospital under the Mental Health Act 1983 in England, and those who are or may be deprived of liberty (whether this is recognised under the Deprivation of Liberty Safeguards or not) in any health or social care establishment falling within our overall regulatory remit in England.

### 25. What do I do if I think that a health or social care provider is breaching human rights law?

- Only the individual concerned or someone acting on their behalf can take action under the Human Rights Act. This is an individual remedy and not the role of an inspector or assessor in relation to the service as a whole.
- It may be that you will be able to resolve the problem without the person taking legal action: there are a range of other steps to consider. There is no one single way of dealing with a potential human rights violation: it depends on the context and particular circumstances. It may be that the problem is not actually a human rights concern, or that it is a combined human rights and discrimination issue, or that it relates to a different part of the law entirely.
We would expect that the majority of human rights issues uncovered through CQC evidence gathering and analysis would be resolved through action under the Health and Social Care Act 2008.

Using our judgment framework, human rights is an area of consideration when deciding the impact on people who use services and therefore the level of concern about an issue of non-compliance (see Guidance about compliance: Judgment framework).

Breach of human rights may also be a safeguarding issue and inspectors and assessors may need to make a safeguarding referral, if appropriate, using CQC safeguarding procedures. Where human rights abuses, or serious risks to human rights, are suspected this is more than a safeguarding matter however.

In some circumstances, it may be appropriate to advise people using services or others (such as whistleblowers) to seek legal advice about their rights under human rights law, if they have raised the issue. EHRC helpline details are given in question 11.

You should also discuss the possible breach with your manager. Under an information sharing agreement between CQC and the EHRC, we may share information in order for both commissions to better carry out our regulatory roles.

If the inspector and manager are clear that there is an issue of a potential breach of human rights law that cannot be resolved through action under the Health and Social Care Act 2008, they report it to the Involvement and EDHR team at CQC. (email AskRegulatoryDevelopment@cqc.org.uk with ‘human rights’ in the subject line)

If the manager is uncertain, they can seek advice from their regional equality and human rights lead or the CQC Involvement and EDHR team. (email AskRegulatoryDevelopment@cqc.org.uk with ‘human rights’ in the subject line)

CQC Involvement and EDHR team may pass the information to the EHRC, if it meets set referral criteria.

The EHRC will consult with its legal team to see if it wishes to take further action.

If EHRC want to take further action, it will inform CQC of the way that the detailed information should be shared, to comply with the Data Protection Act and other requirements. The responsibility for ongoing contact with EHRC from CQC will then lie with the compliance inspector who raised the concern.

The Involvement and EDHR team will maintain a log on the Y drive so that we can monitor this information sharing across all
regions. This log will also contain issues where breach of equality or human rights law may be suspected but the issue did not meet EHRC referral criteria, so that the overall picture of potential breaches of equality and human rights law can be reviewed from time to time.

- Note the above email address is only for CQC staff. Others with enquiries about CQC work on equality and human rights should use: involvement.edhr@cqc.org.uk

- Unless there is an equality dimension to the case, the EHRC does not have the power to give legal assistance to individuals on human rights grounds. However, the EHRC does have the power to hold formal inquiries or to take judicial review proceedings to prevent breaches of the Human Rights Act. The EHRC can also join in with proceedings taken by others, intervening to promote human rights. In all cases, there are time limits. These can be complicated but can mean a person may have to actually 'issue proceedings' in courts in some cases within three months.

### 26. What resources should I use for more information?

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Equality Act 2010: What do I need to know?

Main Equality Act page on EHRC website:

Guidance about Equality Act in service provision:

Codes of practice:

Public sector equality duties (note that the specific equality duty is currently under review)

General guidance:

PoC 100567 1.0 Equality and human rights in the essential standards of quality and safety: An overview

(26. continued)

sector-duties/new-public-sector-equality-duty-guidance/

Codes of practice:

Human Rights Act

Department of Health: Human rights in Healthcare – a framework for local action

Convention on the Rights of Persons with Disabilities

EHRC human rights observatory (provides a range of guidance including guidance specific to health and social care sectors)

- If you cannot find the answer, the EDHR enquiry mailbox provides CQC staff with additional expertise on equality, diversity and human rights issues. (email AskRegulatoryDevelopment@cqc.org.uk with ‘equality’ or ‘human rights’ in the subject line)
- Note the above email address is only for CQC staff. Others with enquiries about CQC work on equality and human rights should use: involvement.edhr@cqc.org.uk
27. Are there any examples of how human rights affect people using health and social care services?

The following stories illustrate an approach to care and support based on equality and human rights, and the difference it can make. There are further examples in the equality and human rights guidance for each of the key sections of the essential standards.

**Tea without sugar (Article 8)**

"Placing my mum, who had severe dementia, into a care home was one of the most difficult decisions of my life. I was desperate to make sure the staff treated her as the person I knew – my mum. I remember the day I moved her in, telling the manager all the things my mum liked and disliked. She especially disliked sugar in her tea. The first time I visited, the staff were serving afternoon tea. I noticed they put two sugars in every cup. I said to the member of staff, “My mum doesn’t take sugar”, to which she replied, “It doesn’t matter – she won’t know anyway”.

The absence of dignity and respect in the above example is in stark contrast with the following example, in which the preferences of a woman in a care home were sensitively noted so that her care was exactly as she wanted:

"I wear a light nightdress. I like a cup of tea before bed and when in bed please close the door. I would prefer to be washed and dressed by a female carer."

**Coming out (Article 8 and Article 14)**

When Richard decided he wanted to talk to someone about being gay, he realised there was nobody to whom he could turn. Living with a learning disability and in supported accommodation, the conversations he had with his support worker only ever revolved around cooking, money and personal hygiene. He had no idea how to broach a discussion about his sexual orientation, but eventually built up the confidence to do it.

"I said to my support worker and my key worker, “I’m gay and this is how I feel.” At that point, you could almost hear a pin drop. Then they started talking about cooking and my health again."

Later, his support worker asked him if this was a phase he was going through. What happened next shocked him. He was assigned a social worker and a psychiatrist even though, as he says, "I had never had a mental health issue in my life", and was given a risk assessment.

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Things are different now. Richard lives in his own flat with an in-control budget. When he wants, he spends some of it on visiting a nightclub or with a dating agency, meeting other gay people. As he says: "I'm in control now. I asked for literature on being gay, where to meet people, how to have safe sex. It didn't happen. I was stuck in a place where I couldn't express how I felt and I couldn't talk to staff about how I felt. I was just seen as a risk to myself and the organisation."

Thank you to the following groups and organisations of people who use services who helped us with the guidance:

Birmingham Lesbian, Gay, Bisexual and Transgender Forum
CQC eQuality Voices
CQC Registration Involvement Group
Harrow Association of Somali Voluntary Organisations
Kent Refugee Help
Vegetarian for Life