



Older People's Commissioner for Wales
Comisiynydd Pobl Hŷn Cymru

Making Human Rights Real for Older People

A guide for public authorities in Wales

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The Older People's Commissioner for Wales

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

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

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Abbreviations

The following abbreviations are used in this guide:

ECHR	European Convention on Human Rights
HRA 1998	Human Rights Act 1998
SSWBA 2014	Social Services and Well-being (Wales) Act 2014
OPRA	Older People's Rights Approach
UN	United Nations

Introduction

Abuse, maltreatment and discrimination against older people present challenges for any society or organisation that values human dignity. Older people are too often treated in ways that violate their human rights, such as the right to life, to physical or mental integrity, to an adequate standard of living, to be treated equally, or to participate in decisions that affect them.

Public authorities are uniquely placed to protect and make human rights real through the services they deliver. Adopting human rights as part of the framework for planning and delivery of services can make a meaningful contribution to improving the lives of older people in Wales.

This guide will support leaders in the public sector to embed the human rights of older people in public services.

Using this guide

For ease of use the guide is in four parts with one appendix.

Part 1 is about human rights. It explains the human rights framework which applies in the UK and in Wales, and describes the human rights duties that apply to all public authorities.

Part 2 highlights two human rights mechanisms: the Human Rights Act 1998 (HRA 1998) and the United Nations Principles for Older Persons² (UN Principles). The HRA 1998 governs the conduct of all public authorities, whilst the UN Principles have a particular significance for public services in Wales because of the Social Services and Well-being (Wales) Act 2014 (SSWBA 2014).

Part 3 sets out an Older People's Rights Approach (OPRA) as a way of working to safeguard and promote older people's human rights in public services planning and delivery in Wales.

Part 4 makes connections between an Older Person's Rights Approach and duties under the SSWBA 2014. It includes a technical briefing on the meaning of 'due regard' to the UN Principles under section 7 of the SSWBA 2014, as well as practical suggestions to help meet the due regard duty.

The appendix sets out worked examples and case studies.

² <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx>

Part 1: About Human Rights

Human rights are universal guarantees of basic freedoms and entitlements that enable individuals to live with dignity. Human rights meet fundamental needs, they are not luxuries.

Human rights available to everyone in the UK are found in human rights documents (covenants, conventions or treaties) published by the United Nations (UN), as well as the European Convention on Human Rights (ECHR). Older people have the same human rights as all adults. Older age is not a reason to deny anyone their human rights.

Human rights are especially important for individuals of any age who may be vulnerable due to physical or mental incapacity, or economic or other disadvantage (such as membership of a minority social group).

Human rights provide safeguards against abuse, exploitation, discrimination or marginalisation of older people, and guarantee services that enable older people to have the maximum level of independence, to maintain their individual dignity, and to enjoy physical and mental well-being.

Public authorities are well placed to facilitate older people's access to human rights through public services. Appropriate and accessible public services are vital to making rights real for older people.

Human rights duties

The UK government, devolved governments and public authorities have a shared responsibility to make older people's human rights real. Public authorities should:

- **Respect rights** ... by not doing anything that interferes with the enjoyment of human rights. Public authorities should do everything in their power to avoid violating human rights.

For example, public authorities should not deny an individual their human rights because they have reached a certain age, or because they are unable to resist or protest where their rights are violated.

- **Protect rights** ... by ensuring, as far as possible, that others do not infringe or prevent access to older people's human rights. This will be especially important where older people are living in care homes in the private sector.

For example, public authorities should take action where there is evidence that older people are subjected to abuse, exploitation, or discrimination in private care home settings.

- **Promote (or fulfill) rights ...** by taking action to facilitate the enjoyment or better enjoyment of human rights.

For example, public authorities should take action to make older people and others aware of their rights, and to ensure that older people can access quality services, including by providing adequate resources.

Part 2: Human Rights Mechanisms

This part discusses two significant sources of human rights for older people in Wales, the HRA 1998 and the UN Principles. However, public authorities should be aware that older people are entitled to the full set of human rights available to all adults in international law (in documents published by the UN²).

Human Rights Act 1998

Section 6 of the HRA 1998 imposes a duty on public authorities not to act in a way that is incompatible with many of the rights set out in the ECHR. There are some limited exceptions, but in general public authorities such as government departments, Local Authorities, the police and NHS hospitals are under a duty to fully respect older people's rights as guaranteed by the ECHR.

The ECHR includes a number of rights of particular relevance to the lives of older people:

- **Article 2: 'Everyone's right to life shall be protected by law.'** This right is especially important when someone's life is at risk through abuse or neglect.
- **Article 3: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'** Abuse or neglect can lead to conditions of living which are inhuman or degrading.
- **Article 5: 'Everyone has the right to liberty and security of person.'** This means that older people cannot be locked up in their bedroom, a hospital ward or a care home. This will be abusive and unlawful, even if the person doing it thinks it is in the older person's 'best interests'. Whilst there may be circumstances where it may be necessary to take away a person's liberty, this must be accompanied by appropriate safeguards.

² The main UN sponsored human rights texts are available by following links from this address: <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>

- **Article 6:** ‘...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.’ Where the outcome of a decision, or a course of action, will affect someone’s life in a significant way there must be access to a tribunal capable of deciding whether this is in accordance with relevant rules and procedures.
- **Article 8:** ‘Everyone has the right to respect for his private and family life, his home and his correspondence.’ This is a wide ranging right, which includes: being able to take decisions, being able to refuse medical treatment, and being able to maintain relations with family.
- **Article 9:** ‘Everyone has the right to freedom of thought, conscience and religion’. This includes the right to manifest or participate in a religion.

These are important guarantees that support dignity and independence for older people.

Absolute rights under the ECHR

Some rights guaranteed by the ECHR are ‘absolute’ rights. This means they cannot be denied or interfered under any circumstance. Importantly, absolute rights include article 3. There are no circumstances in which a public authority can treat older people in a way which is inhuman or degrading.

Qualified rights under the ECHR

Some rights under the ECHR are ‘qualified’ rights. This means they may be limited in very narrow circumstances. For example:

- Article 8 - the right to respect for private and family life
- Article 9 - freedom to manifest a religion or belief (the right to hold a belief is absolute).
- Article 10 - freedom of expression
- Article 11 - freedom of assembly

A public authority contemplating a course of action that may impact on one or more qualified rights should ensure that the following questions are asked and answered:

- Will the proposed decision or action have an adverse impact on any ECHR right?
- Am I acting in pursuit of a ‘legitimate aim’?
- Is the action contemplated proportionate?

Asking these questions, and giving each question meaningful consideration, will help

a public authority to comply with its duty under section 6 of the HRA 1998. Failure to do so could lead to a breach of duty and a violation of older people's human rights.

Adverse impact

A public authority contemplating a course of action likely to have an impact on older people should properly assess the likely outcome(s), and whether this will have an adverse impact on any human right guaranteed to older people under the ECHR. This assessment should be informed by relevant evidence, which should include evidence from older people or their representatives.

If it is determined that a course of action will have an adverse impact on older people's rights, the action will only be permissible if it can be shown to be in pursuit of a legitimate aim.

Legitimate aim

What is a legitimate aim is established by reference to the articles of the ECHR engaged by the proposed course of action. Articles that set out qualified rights will usually be in two parts: the first part sets out the right; the second part sets out the circumstances in which the right may be limited, i.e. the legitimate aims. These include:

- The protection of other people's rights
- National security
- Public safety
- The prevention of crime
- The protection of health

A public authority must be satisfied that it is acting in pursuit of a legitimate aim before taking any action that limits or interferes with the human rights of older people.

Even if a course of action is in pursuit of a legitimate aim it must be proportionate.

Proportionality

Proportionality means that a public authority should do no more than is absolutely necessary to achieve its legitimate aim. Deciding if a course of action is proportionate means asking:

- How serious is the problem which is being addressed?
- Will the course of action reduce or resolve the problem?
- Can the problem be reduced or resolved by an alternative course of action that is less of an interference with the right in question?

- If 'yes' the alternative should be preferred.
- Does the restriction remove the basic entitlement behind the right in question?
- If yes, the course of action will be unlawful.

UN Principles for Older Persons

There are 18 principles grouped under five themes:

Independence

Older people should be able to be independent. They should be guaranteed an income and the right to participate in employment, should have access to the means to live independently, and be able to live in a safe and suitable environment.

Participation

Older people should be able to participate in society and in policy processes that directly affect their well-being.

Care

Older people should be entitled to care to enable them to maintain or regain their optimum level of physical, mental and emotional well-being, to prevent or delay the onset of illness and to enhance autonomy. Older people should enjoy their human rights when living in a care home.

Self-fulfillment

Older people should be able to pursue opportunities for the full development of their potential, including access to educational, cultural, spiritual and recreational resources.

Dignity

Older people should be able to live in dignity and security and be free of exploitation and physical or mental abuse. They should also be treated in a non-discriminatory manner.

The UN Principles are consistent with older people's human rights as set out in international treaties and as guaranteed by the ECHR. Making use of the UN Principles in planning services and delivery will contribute toward compliance with human rights duties.

The SSWBA 2014 places responsibility on public authorities for a range of social services functions in relation to older people. Section 7 of the SSWBA 2014 places a duty on 'a person exercising functions' under the legislation in relation to an adult to have 'due regard' to the UN Principles.

Part 3: An Older People's Rights Approach

There is no universally agreed model of a human rights approach. This guide sets out an Older People's Rights Approach (OPRA). This has been developed with public authorities in Wales in mind.

OPRA principles are:

- Embedding older people's human rights
- Empowering older people
- Non-discrimination and Equality
- Participation
- Accountability

These principles are discussed below. It should be noted that OPRA is intended to provide an overarching framework for human rights for older people real in public services. Inevitably there will be overlap between OPRA principles. Public authorities should bear firmly in mind that the principles are not intended to be applied in any particular order, or individually. Instead, they should be thought about and used simultaneously to inform and guide policy thinking and decision-making processes, as well as actions and service delivery.

Embedding older people's human rights

Human rights available to older people should be placed at the core of planning and service delivery. Human rights standards, as set out in the EHRC and the UN Principles, need to be integrated into every aspect of planning and decision-making, as well as procedures and actions. There needs to be explicit recognition of human rights as a framework for decisions and actions across the full range of public authority services.

This principle is often referred to as 'mainstreaming'. Whether referred to as embedding or mainstreaming it is about approaching all aspects of public services from a perspective that is sensitive to older people's human rights. These should be given equal priority with other interests that a public authority will take into account when decisions are made and actions are taken. Policy, procedures, programmes and budgets should all be developed taking account of their impact on older people and the rights they possess.

This principle also means raising awareness, knowledge and understanding of human rights and their implications amongst leaders and decision-makers, as well as amongst staff involved directly or indirectly in services for older people.

Empowering older people

Human rights should empower older people. It must be understood that human rights are entitlements available for the benefit of older people: they are not discretionary, nor are they based on charity.

Empowerment means providing resources to establish services for older people and to ensure that older people can use these services. This implies raising awareness of human rights amongst older people, and removing barriers whilst increasing incentives to take advantage of rights by providing resources and opportunities that allow individuals to be independent, to be healthy and to live with dignity.

Empowerment also means supporting older people to become involved in decision making, and to influence decisions-makers and hold them to account. This includes directing older people to sources of advice and representation.

Non-discrimination and equality

Older people should not be discriminated against, whether as individuals or as a group. Non-discrimination means that benefits, services and human rights should be available to all older people irrespective of age and irrespective of their race, ethnicity, sex, religion or abilities. No-one should suffer discrimination that places them at a disadvantage because of their age.

Equality is about ensuring that older people have the equal opportunity to enjoy their lives, to express themselves and to realise their talents. Promoting equality means taking action to tackle discrimination against older people and ensuring that they are aware of and able to take advantage of opportunities available to them.

Participation

Older people should be fully involved and their views taken seriously where decisions or actions affect their lives, directly or indirectly. Neither age nor diminished mental capacity should be used as an excuse for discounting a person's opinion, or for giving that viewpoint less attention in decision-making processes. It should be clear and transparent how the views of older people are taken into account in decision making processes.

Participation also means that older people should be able to actively take part in the exercise of their rights. Older people should not have to rely on others to exercise rights on their behalf, but should be given access to information and resources that enable them to exercise choice about whether to rely on their rights directly.

Accountability

Human rights demand accountability. Public authorities should be accountable to older people for decisions and actions that affect the lives of older people. This begins with transparency, by providing information and reasons to help older people understand decision making. It includes establishing procedures for complaint, for challenge and, where appropriate, for redress.

Public authorities, and all staff working for public authorities, should understand that they are accountable to older people for the decisions and actions that affect their lives.

Why OPRA?

Human rights carry strong moral force. They support human values of dignity, independence, equality and security. Violation of older people's human rights is an attack on their dignity and integrity as a person. For these reasons alone, public authorities should respect, protect and promote older people's human rights. OPRA will assist public authorities to meet these expectations.

But there are a number of other principled and pragmatic reasons to adopt an OPRA to planning and delivery of services for older people. Adopting OPRA will:

- Enable a public authority to meet its statutory human rights duties under the HRA 1998 and SSWBA 2014.
- Provide a consistent planning framework across different areas of service provision to promote coherent 'joined up' planning.
- Help raise awareness of issues affecting older people amongst staff. Raising awareness of these issues means that older people are better protected against harm.
- Help public authorities to avoid acting toward older people in ways which deny their independence.
- Draw attention to gaps in service provision affecting older people, as well as promoting thinking on ways to meet any shortfall.
- Guide public authorities to make difficult decisions about resource allocation, e.g. by drawing attention to the impact of service cutbacks on vital aspects of the lives of older people.
- Provide a rationale for existing policy and services, as well as providing impetus for improvement.

Part 4: Social Services and Well-being Act

The SSWBA 2014 places responsibility for a range of social services functions in relation to older people with public authorities. Section 7 places a duty on 'a person exercising functions' under the legislation to have 'due regard' to the UN Principles. This includes where functions are exercised in relation to an adult in need of care and support, or an adult carer in need of support.

Guidance issued under the SSWBA 2014 states that the having 'due regard' to the UN Principles under section 7 is the same as having 'regard' to specified matters. This guidance is unsatisfactory. The addition of the word 'due' emphasises the quality of the consideration to be given by the person concerned³.

OPRA and due regard

Adopting OPRA will assist public authorities to meet their due regard duty because:

- Explicit reference to the UN Principles will be an aspect of embedding rights (OPRA principle), and will bring these to the attention of any person exercising functions under the SSWBA 2014.
- OPRA principles are consistent with the themes underpinning the UN Principles: both are expressly linked to human rights objectives. Giving effect to older people's human rights through these principles will support progress under all five themes.
- Structures and processes to implement OPRA will help to ensure due regard to the UN Principles, for example, by raising awareness of the UN Principles and their consequences through training or information sharing; through structures which enable older people to participate in decision-making; or by empowering older people and supporting their independence.

Whilst OPRA will contribute toward compliance with the duty of due regard under the SSWBA 2014, having due regard should not be seen as exemplifying a human rights approach to all public services provided by public authorities. Due regard to the UN Principles is mandated only in the case of care and support services provided by persons exercising particular functions under the SSWBA 2014. Older people's human rights are relevant to all public services relevant to older people. Public authorities should apply OPRA to planning and delivery across all their functions, not just those involving care and support under the SSWBA 2014.

³ R (MS) v Oldham Metropolitan Council [2010] EWHC(Admin) 802

Due regard to the UN Principles: Technical briefing

The term 'due regard' is taken from the field of discrimination and equalities legislation. Cases on equalities statutes give guidance on the meaning of due regard, which is directly relevant to interpretation of section 7 of the SSWBA 2014.

The leading authority is *Brown v Secretary of State*⁴ in which the courts set out the test to determine whether the requirement of due regard has been met. Subsequent cases have confirmed the approach.

The component elements of due regard derived from equalities cases are described below. The final section suggests practical steps toward meeting the due regard duty.

Awareness of the duty to have due regard to the UN Principles

The person required to have due regard must be aware of the UN Principles in full. It will not be sufficient to have due regard to the 5 overarching themes, or to a summary or partial version.

The UN Principles must be properly understood

The person required to have due regard should have good knowledge and a proper understanding of the implications of the UN Principles, including as they apply in the context of the decision or action that is contemplated.

Due regard applies at and before the time of the decision or action

Due regard to the UN Principles must be had prior to and at the time of exercise of functions. Due regard cannot be had after a decision or action is implemented, even if the decision or action would not change as a result. Urgency does not remove the requirement of due regard.

Due regard must be exercised in substance, with rigour and an open mind

This is an important component element of due regard. It requires the due regard duty to be integral to the decision-making and implementation process (i.e. in substance). It is not a question of 'ticking boxes'. The person exercising relevant functions must carefully pay attention to the requirements of due regard listed above, and ensure that each of these is properly carried out (i.e. with rigour)⁵.

4 *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158.

5 (Having due regard is not a matter of an exercise of 'formulaic machinery': see, *R(Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062 (Admin)).

They should be prepared to consider different options, and should not pursue a pre-determined particular course of action irrespective of how this impacts on older people (i.e. an open mind).

Good practice means keeping records

This a procedural safeguard. It is good practice to keep an adequate record showing that the person exercising functions actually considered their due regard duty and the UN Principles. Proper record-keeping encourages transparency and will discipline those carrying out the duty to do so conscientiously. If records are not kept it may make it more difficult, evidentially, for a public authority to persuade others that it has fulfilled the duty imposed by section 7.

The duty continues

The due regard duty does not end with the exercise of functions. Outcomes will need to be kept under review to ensure that any prediction of the impact of decisions and actions on older people's human rights is accurate. Where predictions of impact differ from outcomes, consideration should be given to whether any further remedial action is required having due regard to the UN Principles.

Practical steps toward due regard

Public authorities can help staff to comply with the due regard duty by:

- Preparing guidance on compliance and the steps to be taken in any decision or action which engages the due regard duty.
- Establishing procedures that explicitly direct attention of any person exercising functions under the SSWAB 2014 to section 7, and to the UN Principles.
- Making the UN Principles visible and accessible in the workplace, on posters, for example, or by providing staff with links to the principles on-line.
- Providing training on the UN Principles as appropriate to staff with different responsibilities, including as an aspect of continuing professional development.
- Giving access to information about the UN Principles and older people's human rights, by making publications from the Older People's Commissioner available in the workplace or on-line, for example.
- Developing internal expertise on older people's human rights, including by the appointment of Older People's Rights Champions.
- Ensuring that staff are aware of sources of internal expertise on the UN Principles and older people's human rights, and how to access this expertise.
- Developing procedures to ensure due regard to the UN Principles in advance

of any decision or action, including proactive, ex ante Impact Assessment to predict the impact of a decision or action on older people's human rights.

- Gathering disaggregated data on issues affecting older people and making this available to staff required to have due regard.
- Taking the views of older people on decisions and actions that affect them and ensuring that this is meaningfully taken into account.
- Requiring staff exercising functions under the SSWBA 2014 to keep proper records of how due regard has been had to the UN Principles (proactive, ex ante impact assessment can provide a mechanism for suitable record keeping).
- Establishing monitoring mechanisms to shed light on the outcomes of decisions and actions affecting older people.
- Carrying out a proper review of decisions and actions affecting older people in the light of data gathered from monitoring outcomes.

OPRA: well-being and overarching duties under the SSWBA 2014

The SSWBA 2014 establishes a number of duties on persons exercising functions under the legislation in relation to adults in need of care and support, or adult carers. Under section 5 the duty is to promote well-being. Well-being under the SSWBA 2014 includes 'securing rights' (see section 2 of the SSWBA 2014). OPRA prioritises giving effect to older people's human rights and will therefore make a significant contribution to meeting the 'well-being' duty.

Under section 6 of the SSWBA 2014 the person exercising functions is required to comply with a number of duties. In summary, these are:

- To promote individual dignity.
- To promote independence.
- To respect a person's characteristics, culture and belief.
- To support individuals to participate in decisions which affect their lives and to take account of their views, wishes and feelings.

These duties are consistent with older people's human rights. The first two listed above are objectives of human rights that are given effect by OPRA. The remaining duties are express principles of OPRA (non-discrimination and participation).

Adopting OPRA will therefore enable a public authority to meet its overarching duties under the SSWBA 2014.

Appendix 1: Case Studies

Alice's story

Alice lives in sheltered housing managed by the Council. Her son became concerned when the Council, without talking to Alice, locked an access gate at the rear of her home because of problems with vandalism. Alice is aged 65 and is reliant on a mobility scooter to get around. Steps at the front of her property make it impossible for her to access her home using her scooter via the front door. Alice is now unable to get to the shops, visit friends, or visit the local GP surgery. The Council's action means Alice has to rely on others to help her whenever she wishes to leave her home.

William's Story

William is aged 76 and a Welsh speaker; he is far more communicative when speaking Welsh. William was placed in a care home by the local social services authority when it became obvious he could no longer look after himself in his housing association flat. Before the placement, he was a regular at his local Welsh-speaking Baptist church, where he worshipped, and socialised with friends. He also took part in a soup kitchen for the homeless organised by the church. Before his discharge from hospital, his son, who lives over 150 miles away, asked that a Welsh-speaking social worker manage his father's case. At the time this was not possible because the situation was urgent. William has now informed his son that he is unhappy because he becomes anxious when unable to speak to the staff in Welsh. William has had to stop attending church because there is no suitable public transport on Sundays. There is no other Welsh congregation nearby. Repeated requests for a Welsh-speaking social worker have been ignored. This has led to William refusing to talk to anyone but his son.

Emily's Story

Emily is 95 and lives in a private care home under an arrangement paid for by her daughter. The home was identified by the local social services authority as a suitable residence, and the authority arranged for Emily to move in. Emily is physically very weak, and has advanced dementia. She has distressed responses that result in verbal and physical aggression and refuses to be bathed. As a result, Emily's personal hygiene is very poor and leads to skin infections. The care home has consulted Emily's family about this and family members have offered to visit the care home to help bathe Emily and to attend to her personal hygiene. Unfortunately, due

to work commitments, Emily's family can only confirm their availability a few hours in advance. The care home has insisted that it needs to carefully plan its care regime to meet the needs of other residents. During one recent visit Emily's niece found her crying and lying on a soiled mattress; Emily had wet herself because no-one had come to take her to the toilet. Another resident tells Emily's niece that this is the third time she has seen Emily in this condition. Emily's family have contacted the social services authority for advice.

