“Taking it on the chin”

Williams, John

Published in:
Journal of Adult Protection

DOI:
10.1108/JAP-09-2020-0042

Publication date:
2021

Citation for published version (APA):
Williams, J. (2021). “Taking it on the chin”: Older people, human rights and COVID-19. *Journal of Adult Protection*, *23*(2), 86-97. https://doi.org/10.1108/JAP-09-2020-0042

‘Taking it on the chin’: Older people, human rights, and Covid-19

John Williams*

‘To deny people of their human rights is to challenge their very humanity.’

Nelson Mandela

Abstract

Governments in England and in Wales faced complex decisions when responding to Covid-19. This article considers the impact of their actions on the human rights of older people. It argues that there is a case to answer of potential breaches the European Convention on Human Rights. Although it is too early to come to firm conclusions as more scientific and medical evidence is required, some actions by governments seem to be based on using age as a basis for decision making. Human rights are complex, and it is important that claims of violations satisfy the Convention, the Human Rights Act 1998, and the jurisprudence of the European Court of Human Rights as well as other international instruments.

Introduction

The Old Age Pension Act 1908 adopted chronological age as opposed to other characteristics to define ‘mature age’. Thus began the social construct of ‘old age’ or ‘older age’. (Thane, 2000, p 225) However, using age to define eligibility is not the result of a rational attempt to define ‘older age’. Rather, it is for pragmatic and opportunistic reasons. (Roebuck, 1979, p 425) Chronological age should mean little when discussing individuals. (Williams, 2003) Ageism’s unfounded assumptions underpin reactions to Covid-19. This ignores diversity and treats older people as one homogeneous group. (Hughes, Ozanne, & Bigby, 2009)

On 11th March 2020, the World Health Organisation declared coronavirus a pandemic. (World Health Organisation, 2020) Age may be a factor in the chances of infection and surviving. However, as AGE Platform Europe emphasise, Covid-19 is not an older person’s disease.

> ‘Picturing older persons as the main group at risk tends to put in the shadow all other groups (younger persons with disabilities, heart disease, lung disease, diabetes, high blood pressure or cancer, among others), who might need specific support measures, such as priority testing.’ (AGE Platform Europe, 2020, p 2)

For people living in their homes, age is not significant, unlike care homes. (Webb, 2020) The Office for National Statistics reported that between 2nd March and the 12th June 2020, Covid-19 accounted for 33.5% of male deaths of care home residents, and 26.6% of deaths of female residents. (Office for National Statistics, 2020b) Data from several European countries suggests up to half of those dying from Covid-19 were residents of care homes. (Comas-Herrera et al., 2020)

The Secretary General of the United Nations issued a Policy Document on the impact of Covid-19 on older people and identifies key areas of concern including life and death, mental health, vulnerability, and abuse and neglect. The document concludes,

* Emeritus Professor of Law, Aberystwyth University

> ‘This pandemic has brought unprecedented challenges to humanity and presents a disproportionate threat to the health, lives, rights and well-being of older persons. It is crucial to minimize these risks by addressing the needs and human rights of older persons in our efforts to fight the pandemic.’(United Nations, 2020, p 16)

Rightly it points out that older people’s human rights have been inadequately protected and overlooked in national programmes before Covid-19. Optimistically, it sees the pandemic as an opportunity to ‘set the stage for a more inclusive, equitable and age friendly society anchored in human rights…’. (p.16)

In England and in Wales the responses by governments to Covid-19 have hit older people hard, as well as other groups. This is particularly so during the early response. It is important that the adverse impact on older people is not overlooked; as the Secretary General points out, Covid-19 brings to the fore shortcomings in governments’ attitudes towards older people.

This article considers the early response to Covid-19 through the lens of human rights. At the time of writing, vaccinations offer some hope. However, many older people have already had their human rights violated. They must not be forgotten as a new spirit of very cautious optimism emerges. Failures must be identified to provide justice and ensure they are never repeated; they also inform the general debate on the rights of older people, including at the international level.

The key human rights

Dignity underpins human rights. McCrudden’s definition of dignity is,

> ‘… that each human being possesses an intrinsic worth that should be respected, that some forms of conduct are inconsistent with respect for this intrinsic worth, and that the state exists for the individual not vice versa.’ (McCrudden, 2008, p 723)

Dignity features nine times in the Convention on the Rights of Persons with Disabilities, which recognises the inherent dignity and worth of all members of the human family. Dignity is included in the UN Principles for Older Persons. The Universal Declaration of Human Rights also recognises the inherent dignity of all people. Although dignity only appears once in the European Convention on Human Rights (ECHR), it is a guiding principle in the dynamic interpretation by the European Court. In Pretty v UK the European Court referred to respect for human dignity as the ‘very essence’ of the ECHR. (2002, para 65) This was reiterated in McDonald v UK. (2014) Several rights in the ECHR are engaged by the responses to Covid-19. The key ones are articles 2, 3, 8,13 and 14.

Article 2 guarantees that ‘Everyone’s right to life shall be protected by law’. Its positive nature requires states to take measures to protect the lives of those within their jurisdictions. Article 3 states that nobody shall be subject to inhuman or degrading treatment. Article 8 declares,

> ‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

Article 8 may only be qualified by article 8(2). The duty is to *respect* private life which is broadly interpreted and includes physical and personal integrity, and the rights to personal development and autonomy. (Niemietz v. Germany, (1992); Bensaid v. UK (2001); Pretty v UK, (2002)) Article 13 requires that anybody whose rights have been violated has an effective remedy before a national authority. Article 14 prohibits discrimination in the enjoyment of the freedoms in the ECHR. Although older age is not specifically mentioned, it is covered by the term 'other status'.

The human rights framework

Article 15 ECHR allows states to derogate from some Convention rights in emergencies 'to the extent strictly required by the exigencies of the situation'. (see Lawless v Ireland (No 3), 1961) Several states informed the Council of Europe they will exercise this right because of Covid-19. Is this necessary? Some rights are absolute and non-derogable, such as article 3. The derogable rights are qualified ones which can be limited without derogation. Dzehtsiarou argues that non-absolute rights allow action to target the virus; derogation is unnecessary. (2020) The United Kingdom has not sought to derogate; thus, the ECHR applies in full. Interfering with qualified rights (such as article 8) must be ECHR compliant.

Under the Human Rights Act 1998, it is unlawful for a public authority to act incompatibly with an ECHR right. (s.6) Governments, local authorities, the NHS, and many private sector care providers are public authorities. In Wales, s.3 of the Wales Act 2017 says the Senedd does not have competence to pass laws incompatible with the ECHR. The Social Services and Well-being (Wales) Act 2014 requires anybody exercising functions under the Act to have 'due regard' to the United Nations Principles for Older Persons. (General Assembly, 1991) The principles cover independence, participation, care, self-fulfilment, and dignity.

The ECHR is surrounded by myths fostering the belief that human rights are available on demand. (Guardian Legal Network, 2011) This is not the case; human rights involve complex calculations, an essential component of which is balance. In Soering v United Kingdom, the European Court of Human Rights said,

> '… inherent in the whole of the convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.' (1989, para 89)

The implications for the Covid-19 response are clear. Lord Steyn in Brown v Stott (2003) said,

> 'The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights.' (p 707)

Steyn points out that the ECHR Preamble identifies two principal objectives. First, to promote human rights and fundamental freedoms, and second to foster political democracy as a way of creating 'conditions of stability and order under the rule of law, not for its own sake, but as the best way to ensuring the well-being of the inhabitants.' (p 707) In responding to Covid-19 have governments balanced the protection of the public against the individual rights of older people? Is the balance fair?

Central to fair balance is proportionality. The state's ability to interfere in the enjoyment of a right during Covid-19, must be proportionate to the 'legitimate aim pursued.' Proportionality has three strands. According to Lord Clyde in de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing it involves asking if,

1. the legislative aim is sufficiently important to justify limiting a fundamental right;

2. the measure designed to meet the legislative objective are rationally connected to it; and
3. the means used to impair the right or freedom are no more than are necessary to accomplish the aim.

Where interference with a right is substantial, the public interest gain must also be substantial. (Rivers, 2006, p 207)

Two points should be noted. The first is the positive obligation to secure enjoyment of rights and the negative obligation not to violate rights. Positive obligations have been developed by the European Court to ensure the ECHR does not become outmoded and ineffective. (see Mowbray, 2004; Sarıkaya Güler, 2017) Second, the ECHR is a living instrument to be interpreted dynamically and contemporaneously. Lord Bingham said in Reyes v R, courts must 'ensure contemporary protection of [the rights] in the light of evolving standards of decency that mark the progress of a maturing society…' (2002, para 26)

The above provides the framework for testing governments' responses to Covid-19 and their effect on older people. We do not have sight of all the evidence relied on by the governments, but this must not delay identifying questions. Many bodies representing older people argue that rights are being violated. Age UK emphasised the human rights calculation.

> '…it is vital that older people are given appropriate consideration in current and future plans, and that we take particular care to balance the desire to safeguard the health of those at greatest risk, the impact of wider risk reduction or containment strategies on the older population and the human rights of older people. In getting that balance right, we must guard against unwarranted age-based policy approaches and direct or indirect age discrimination.' (Age UK, 2020, p 2)

The Older People's Commissioner for Wales and the Equality and Human Rights Commission in Wales share 'concerns about significant matters' affecting older people and whether the Welsh Government and public bodies in Wales have met their human rights responsibilities. (Older People's Commissioner for Wales and the Equality and Human Rights Commission in Wales, 2020)

The Coronavirus Act 2020 – social care

The Coronavirus Act 2020 (CA 2020) was introduced into Parliament on the 19th March, receiving Royal Assent six days later. Lord Bethell, Parliamentary Under Secretary of State at the Department of Health and Social Care, conceded it 'was drafted on the hoof, at pace and in quick time.' (Hansard ,2020a, col 1732) The deceptively brief s.15 CA 2020 allows England and Wales to 'modify' local authority social care powers and duties. The Care Act 2014 (CA 2014) and the Social Services and Well-being (Wales) Act 2014 (SSWWA 2014) impose duties on local authorities, in particular assessing a person appearing to need care and support and carers appearing to need support. Older people are the main users of social care. Schedule 12 CA 2020 allows for the following duties to be disapplied.

- assessment of needs;
- financial assessments;
- duty to provide support to meet eligible needs;
- duty to review care and support plans already in place; and
- the duty to provide NHS continuing healthcare.

Commencement orders have been approved in both nations.

Although local authorities cannot withdraw whole services, they must prioritise. The Department of Health guidance in England states,

> 'The Coronavirus Act … enables local authorities to make and apply person-centred decisions about who is most in need of care, and who might need to have care and support temporarily reduced or withdrawn in order to make sure those with highest need are prioritised.' (Department of Health and Social Care, 2020a, Annex A)

Prioritisation is left to local authorities who will 'use their well-established methods of prioritising in most areas.' (Annex C) Welsh guidance states that local authorities have undertaken prioritisation exercises reflecting the distinct needs and services in their immediate and neighbouring areas. Welsh Government does not wish to propose alternative methodologies. (Welsh Government, 2020, Annex C)

Lack of overnight care, no help with toileting, and increased risk of falls affect dignity and autonomy. For older people living with dementia, the lack of a dementia aware carer may accelerate cognitive decline. For older people living with Parkinson's or Multiple Sclerosis, lack of social care may worsen their condition. Withdrawing social care from older people with disabilities is an interference in their right to private life, in particular dignity and autonomy. Can governments rely on article 8(2) to justify this?

Is the interference in accordance with the law? The CA 2020 provides a lawful basis, as do the delegated legislations enacted by Parliament and the Senedd. However, the manner of implementation must be in accordance with the rule of law. In the Sunday Times v UK case, the European Court emphasised the following.

> 'Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.' (1979, para 49)

Are the CA2020 provisions on social care necessary in a democratic society under 8(2)? The obvious categories are protecting health and the rights and freedoms of others. States must respond to crises such as Covid-19 as they are public health emergencies; the rights of all the population should frame the response. Thus, there is scope for using article 8(2).

Is it proportionate? When introducing the Bill at second reading Matt Hancock outlined the goal as,

> '… to protect life and to protect every part of the NHS.' (Hansard, 2020b, Col 5)

This is a legitimate aim under Clyde's test, but is there a rational connection between the aim and measure? If one objective is to protect the NHS, restricting social care may increase pressure on the NHS. Isolation, unmet need, and carer stress place extra demand on the NHS. Mental health is at risk without social care. Marshall et al. report that mental health has worsened substantially during the pandemic. (Marshall, Bibby, & Abbs, 2020) In addition, physical health and well-being are affected if social care is withdrawn or reduced. How does this protect lives, particularly the lives of older people? Clyde's third question is whether the restrictions are no more than necessary to accomplish the aim. Modifying social care duties has a disproportionate effect on older people. It will not save the NHS, although it may hide, until 'normality' is restored, the human cost. The

problem is that priority needs for care and support, and support for carers will be missed if assessments are reduced. Neglect and abuse are also hidden.

In England, the CA 2020 requires local authorities to continue to meet needs for care and support, and the need for support for carers, where necessary to avoid a breach of the person's human rights. (Sched 12, para 4(1)(b) This is redundant as, without derogation, the ECHR rights remain in place in England, as they do in Wales. The problem is how ECHR breaches are identified if the duty to assess is disapplied. Through assessments practitioners identify whether failure to provide social care violates the article 8 right to a private life. Similarly, although under the CA 2014 and the SSWWA 2014 adult safeguarding duties cannot be disapplied, abuse and neglect will be missed if assessments do not take place. This risks violating article 8 and possibly article 3.

In Wales, no authority has used the power. Initially eight authorities in England did so, but as of October 2020 no authority is using it. (Samuel, 2020c, Foster, 2020) A challenge to Derbyshire's decision to use it was based on a lack of evidence to show it was 'no longer reasonably practicable for it to comply with its CA 2014 duties' as required by the CA 2020 – an opaque threshold for activation of the powers. Derbyshire did not meet the requirement in the guidance to communicate the decision to service users and carers. (Samuel, 2020a, 2020b)

The continued ability of local authorities to modify social care duties is disturbing and risks violating the human rights of older people. The recent evidence that predictably the virus has mutated and that there is risk of higher rates of transmission means this power may still be used. (Wise, 2020) A weakened public sector may be tempted to activate the power. However, it is ill conceived, cannot achieve the stated aim and is open to challenge. The Joint Parliamentary Committee on Human Rights in its September 2020 report complained about the powers and concluded,

> If this power (which has barely been used thus far) is to continue beyond the six-month review period, the Government should issue specific guidance about meeting human rights standards in the discharge of obligations under the Care Act 2014 and develop guidance as to the content required of human rights assessments. (Joint Committee on Human Rights, 2020, para 90)

A proportionate response would recognise the importance of the duty of assessment under the social care legislation in England and in Wales. This would at least allow more accurate identification of priority cases. The CA 2020 provisions on social care should be repealed as being anti-human rights and flawed in their assumptions.

Older age as a proxy for frailty – critical care

Early in the pandemic older age became a factor in triaging and prioritising treatment. This informed the Covid-19 discourse. NICE guidance issued on the 20th March 2020 focuses on what practitioners need to stop or start doing during the pandemic. (National Institute for Health and Care Excellence, 2020a) The guidelines (updated 3rd September 2020) require that, when admitted to hospital, adults (irrespective of Covid-19) should be assessed for frailty. (para 1.1) Reference is made to the Clinical Frailty Scale (CFS) as part of a holistic assessment. This is not to be used for younger people, people with long-term disabilities such as cerebral palsy, learning disability or autism. Disability groups argued including them would place them at a disadvantage. They are to be assessed individually (National Institute for Health and Care Excellence, 2020b) No concessions were made for older people. Under the critical care referral algorithm discussions with the critical care team should take place where,

> '…the assessment suggests the person is more frail (for example, a CFS score of 5 or more), there is uncertainty regarding the likely benefit of critical care organ

> support, and critical care advice is needed to help the decision about treatment.' (National Institute for Health and Care Excellence, 2020a para 2.2)

Thus, older people will have their CFS score included as part of accessing critical care decisions. The cut-off point is 5. A score of 5 identifies a 'mildly frail' person; this covers a person who has more evident slowing, may need help in high order instrumental activities of daily living (finance, heavy housework, medications, transportation). Mild frailty 'progressively impairs shopping and walking outside alone, meal preparation and housework.' (National Institute for Health and Care Excellence, 2020a, para 1.1) However, this does not mean lack of capacity or inability to live a full and autonomous life. Frailty may affect how quickly a person recovers, and in extreme cases their ability to do so. However, frailty should not routinely translate into a judgement on the value of a person's life. Chong, Chan et al. express concerns regarding the NICE reference to CFS.

> '…we wish to emphasize that frailty identification should not simply result in a "label" but rather impact management in a meaningful context-appropriate way that is used to make care rational and not to ration care.' (Chong, Chan, Tan, & Lim, 2020)

They argue frailty should not lead to disqualifying fewer frail individuals from critical care. Are the NICE criteria a potential breach of article 8 in relation to older people? More evidence is required, and cases identified. However, the article is engaged. The ECHR does not include a right to health care. However, the European Court has confirmed that signatories have, parallel to their positive obligations under article 2, a positive obligation under article 8 to have in place regulations requiring hospitals to adopt measures for protecting patients' physical integrity. (Jurica V. Croatia, para 84) The Court in the Pretty v UK case said because the patient's personal autonomy, integrity, dignity and quality of life were affected, there was no basis for arguing article 8 was not engaged.

Is the NICE guidance a proportionate response under Lord Clyde's three questions given that it conceded the points raised by disability groups, but not for older people? What matters is the individual's prognosis, not whether they belong to a particular age cohort.

Do not attempt cardiopulmonary resuscitation notices

On the 27th March 2020, a GP in Maesteg sent letters to patients with serious health conditions asking them to complete a do not attempt cardiopulmonary resuscitation (DNACPR) as they were unlikely to be offered hospital admission or a ventilator bed. The stated benefits of signing included enabling hospitals to target ambulance resources at the fit and young, and the person and their family will know not to call 999. The surgery apologised following an outcry on social media and by the Older People's Commissioner for Wales. (Cooper, 2020)

The Court of Appeal in Tracey v Cambridge University Hospital imposed a strong presumption of involving patients in DNACPR notices. (2014) Doctors must not exclude patients because it is likely to cause distress short of physical or psychological harm. Where a doctor's clinical judgement is that resuscitation is futile, patient involvement is not required, but the futility of CPR must not be based on age, but on the individual prognosis. DNACPR should be discussed sensitively in cases of increased frailty.

The GMC guidance supports Tracey. Doctors must ensure healthcare teams, patients, and families understand a DNACPR only applies to CPR and not other treatment. (General Medical Council, 2010, paras 128-46) Despite this, there are reports of pressure to complete DNAPCR alongside suggestions older people or those with disability who contract Covid-19 are unlikely to be admitted to hospital and if they are, will not be offered a ventilator bed. The Queens Nursing Institute found one in ten care homes of 128 surveyed were ordered to introduce DNACR to keep hospital beds free. (Mays,

2020) The British Institute of Human Rights reports district nurses asking care home residents to 'revisit' DNACPR even though patients had previously said they did not want one. (Hosali, 2020)

Inappropriate use of DNACPR engages the article 2 ECHR requiring that the 'right to life shall be protected by law.' Not only must the state refrain from intentionally taking life, but it must also take appropriate steps to safeguard life. States have a duty to make regulations requiring hospitals to implement measures to protect the lives of patients and to ensure the regulatory framework is effective and has not failed. (Vo v France,2004, para 89) Should an unlawful DNACR lead to a person not being resuscitated, an arguable case exists for a breach of article 2 unless the decision was based on a clinical judgement. A line of case law argues article 2 may be engaged even though the person whose right is claimed to have been breached did not die, but a serious threat to life existed. (Selahattin Demirtaş v. Turkey 2018, paras 30-36) The European Court held that article 2 is engaged where a life is put at risk because health care was denied when it is available to the general population. (Hristozov and Others v Bulgaria, 2012, para 105) However, this does not translate into an absolute right to life sustaining treatment as clinical judgements remain important.

Regarding article 8, in Pretty v UK, the Court held when managing end-of-life the Court that article 8 was engaged as the patient's personal autonomy, integrity, dignity, and quality of life were affected.

Care homes

Anger has been directed at the treatment of care home residents, in particular discharging older people from hospital into care homes without testing. Between 28th December 2019 and 12th June 2020 there were 19,394 deaths of care home residents where the actual (84.1%) or suspected (15.9%) cause was Covid-19. (Office for National Statistics, 2020a) Despite the claim in England that the government 'threw a protective ring' around care homes, the Justice Minister admitted that the NHS was prioritised over care homes. (Tolhurst, 2020)

The early policy of both governments was that older people could be discharged into care homes without testing for Covid-19. Government guidance in England and in Wales published in early April 2020 stated 'Negative tests are not required prior to transfers / admissions into the care home.' (Department of Health and Social Care, Public Health England, Care Quality Commission, & NHS, 2020; Public Health Wales, 2020) The advice in the guidance was that,

> 'Care home providers should follow Social distancing measures for everyone in the care home, wherever possible, and the Shielding guidance for the extremely vulnerable group.' (p 4)

This is difficult if not impossible to achieve in a care home setting. Booth observes,

> 'Whether Covid-19 sufferers could be safely treated in care homes lacking clinical expertise and medical equipment was arguable. More certain was that their presence put others at risk in residential homes designed for communal activity, not isolation. With staffing stretched by absences and a chronic lack of protective equipment, infections spiralled upwards.' (Booth, 2020)

In England, from the end of April, all residents and staff in care homes became eligible for testing. Wales was more cautious. On the 29th April 2020 care home residents with symptoms and those discharged from hospital were eligible for testing. On the 16th May Welsh Government announced that all residents and staff, regardless of symptoms, would be tested. (BBC Wales News, 2020)

The Health, Social Care and Sports Committee of the Senedd published a report in July on the impact of Covid-19 on the management of health and social care in Wales. (Welsh Parliament Health, Social Care and Sport Committee, 2020) It reported that,

> ‘It is our view that the Welsh Government’s initial approach to testing in care homes was flawed, and that it was subsequently too slow in responding to the mounting crisis that has seen deaths in care homes account for 28 percent of all coronavirus deaths in Wales.’ (para 148)

Most care home residents are under the care of the state and if it is aware of conditions leading to death, and has unreasonably placed lives at risk, article 2 is violated. For example, in Nencheva and Others v. Bulgaria, a case involving the death of fifteen children with disabilities placed in a care home, the court found a violation of article 2. The state authorities should have known that there was a real risk to the lives of the children but failed to take the action necessary to save their lives. (2013). In discharging or admitting untested patients into care homes, did the governments consider the logistical difficulties of social distancing in care homes? What was the scientific evidence relied on to delay testing until well into the crisis? In responding to claims that the governments’ violated article 2, robust evidence that the delay was justified by medical and scientific evidence is required.

It is interesting to speculate whether care home residents placed in isolation have been subject to a DoLS authorisation. The DoLS safeguards remain in force in care homes and elsewhere because of article 5 ECHR during Covid-19. Guidance has been issued by the Department of Health. (Department of Health and Social Care, 2020b) Also the isolation of residents from family and friends will have a negative impact. June Andrews argues that there is no scientific evidence of visitors impact on infections; national and local restrictions can be loosened with individual risk assessments. This could, she argues, save lives. (Andrews, 2020)

Conclusion

The above summarises some of the human rights issues arising from Covid-19 as they affect older people. It identifies questions to be addressed if claims of violation are to be rebutted. Other articles are relevant, such as the article 5 (the right not to be unlawfully deprived of liberty) and should be explored.

There is a growing awareness of the need to promote and protect the human rights of older people. In his policy review, the UN Secretary General, even before Covid-19, recognised their human rights were overlooked by states; the pandemic has, with drastic consequences, confirmed this. One consequence of the pandemic was the postponement of the Eleventh Session of the Open-Ended Working Group on Ageing. When it reconvenes, the experience of older people during Covid-19 will provide a case study highlighting the failures to protect their human rights.

There is a strong case to answer that older people have been discriminated against and their rights violated. Age has become a proxy for decision making. Decisions have been made based often on ageist assumptions. It is now crucial to expose policies, guidance and law to an in-depth human rights analysis. Ageist attitudes have misinformed reactions to the pandemic; this may be intended, unintended, or misplaced paternalism. Whichever it is, it is wrong; it is abuse. Lessons must be learnt. The International Longevity Centre Global Alliance in its policy statement said,

> ‘This pandemic has highlighted issues of age discrimination, abuse, and neglect that for far too long have gone unaddressed. As the world comes out of this pandemic, the ILC GA believe there is a real opportunity to confront ageism and abuse of older people. Central to this is the principle that older people are adults, who have the same human rights as all other adults.’ (International Longevity Centre Global Alliance, 2020)

The difficulties facing governments and other decision makers cannot be underestimated. However, leaving older people to ‘take it on the chin’ is unacceptable and a violation of their human rights.

References

AGE Platform Europe. (2011). COVID-19 and human rights concerns for older persons. *The Guardian*. Retrieved from https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25746&LangID=E

Age UK. (2020). *COVID-19: the impact on the human rights of older people*. Retrieved from www.ageuk.org.uk

Alain Tolhurst. (2020). Coronavirus: Cabinet minister admits Government chose to prioritise testing in NHS over care homes. Retrieved August 27, 2020, from Politics Home, website: https://www.politicshome.com/news/article/coronavirus-cabinet-minister-admits-government-chose-to-prioritise-testing-in-nhs-over-care-homes

Andrews, J. (2020, November 14). Irrational restrictions. *New Scientist*, p. 23.

BBC Wales News. (2020). Coronavirus: Welsh care homes "badly let down." Retrieved August 28, 2020, from https://www.bbc.co.uk/news/uk-wales-53323776

Booth, R. (2020). Why did so many people die of Covid-19 in the UK's care homes? | Society | The Guardian. *Guardian*. Retrieved from https://www.theguardian.com/society/2020/may/28/why-did-so-many-people-die-of-covid-19-in-the-uks-care-homes

Chong, E., Chan, M., Tan, H. N., & Lim, W. S. (2020). <scp>COVID</scp> -19: Use of the Clinical Frailty Scale for Critical Care Decisions. *Journal of the American Geriatrics Society*, *68*(6), E30–E32. https://doi.org/10.1111/jgs.16528

Comas-Herrera, A., Zalakaín, J., Lemmon, E., Henderson, D., Litwin, C., Hsu, A. T., … Fernández, J.-L. (2020). *Mortality associated with COVID-19 outbreaks in care homes Mortality associated with COVID-19 in care homes: international evidence*. Retrieved from https://read.oecd-ilibrary.org/view/?ref=129_129658-l62d7lr66u&title=Testing-for-COVID-19-A-way-to-lift-confinement-

Cooper, J. (2020, April 3). Surgery asks sickest patients to sign "do not attempt CPR" form if they get Covid-19 - Wales Online. *Wales Online,*. Retrieved from https://www.walesonline.co.uk/news/wales-news/coronavirus-covid-19-surgery-patients-18012444

Department of Health and Social Care. (2020a). Care Act easements: guidance for local authorities. Retrieved August 14, 2020, from https://www.gov.uk/government/publications/coronavirus-covid-19-changes-to-the-care-act-2014/care-act-easements-guidance-for-local-authorities#annex-c-prioritisation-process

Department of Health and Social Care. (2020b). The Mental Capacity Act (2005) (MCA) and deprivation of liberty safeguards (DoLS) during the coronavirus (COVID-19) pandemic - GOV.UK. Retrieved August 31, 2020, from https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity/the-mental-capacity-act-2005-mca-and-deprivation-of-liberty-safeguards-dols-during-the-coronavirus-covid-19-pandemic

Department of Health and Social Care, Public Health England, Care Quality Commission, & NHS. (2020). *Admission and Care of Residents during COVID-19 Incident in a Care Home*.

Dzehtsiarou, K. (2020). COVID-19 and the European Convention on Human Rights | Strasbourg Observers. Retrieved July 24, 2020, from https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/

Foster, D. (n.d.). *Coronavirus: Local authorities' adult social care duties (the Care Act easements)*.

Retrieved from https://commonslibrary.parliament.uk/research-briefings/cbp-8889/

General Assembly resolution 46/91 of 16 December 1991. (1991). *United Nations Principles for Older Persons*. Retrieved from http://www.ohchr.org/EN/ProfessionalInterest/Pages/OlderPersons.aspx

General Medical Council. (2010). Treatment and care towards the end of life. Retrieved August 7, 2020, from Ethical Guidance for Doctors, website: https://www.gmc-uk.org/ethical-guidance/ethical-guidance-for-doctors/treatment-and-care-towards-the-end-of-life

Guardian Legal Network. (2011, October 4). Catgate: another myth used to trash human rights. *The Guardian*. Retrieved from https://www.theguardian.com/law/2011/oct/04/theresa-may-wrong-cat-deportation

Hosali, S. (2020). The fight against Covid-19: Whose life counts? Retrieved August 7, 2020, from British Institute of Human Rights website: https://www.bihr.org.uk/blog/the-fight-against-covid-19-whose-life-counts

Hughes, M., Ozanne, E., & Bigby, C. (2009). Editorial: Diversity and ageing. *Australian Social Work*, Vol. 62, pp. 127–131. https://doi.org/10.1080/03124070902840022

International Longevity Centre Global Alliance. (2020, May 20). Position Statement on isolation and abuse of older persons during the COVID-19 pandemic. Retrieved December 31, 2020, from https://www.ilc-alliance.org/wp-content/uploads/2020/12/ILC-GA-Position-Statement-on-isolation-and-abuse-of-older-persons-during-CV19.pdf

Joint Committee on Human Rights. (2020). The Government's response to COVID-19: human rights implications. Retrieved December 23, 2020, from https://publications.parliament.uk/pa/jt5801/jtselect/jtrights/265/26507.htm#_idTextAnchor047

Marshall, L., Bibby, J., & Abbs, I. (2020). Emerging evidence on COVID-19's impact on mental health and health inequalities | The Health Foundation. Retrieved August 25, 2020, from The Health Foundation website: https://www.health.org.uk/news-and-comment/blogs/emerging-evidence-on-covid-19s-impact-on-mental-health-and-health

Mays, H. (2020, August 24). Care homes "ordered not resuscitate" as coronavirus pandemic took hold. *The Times*.

McCrudden, C. (2008). Human Dignity and Judicial Interpretation of Human Rights. *The European Journal of International Law*, *19*(4), 655–724. https://doi.org/10.1093/ejil/chn043

Mowbray, A. (2004). The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights. In *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*. https://doi.org/10.5040/9781472562920

National Institute for Health and Care Excellence. (2020a). Covid-19 rapid guidelines: critical care in adults. In *NICE Guidelines*. Retrieved from https://www.nice.org.uk/guidance/ng159/chapter/2-Admission-to-critical-care

National Institute for Health and Care Excellence. (2020b). NICE updates rapid COVID-19 guideline on critical care. Retrieved August 12, 2020, from NICE Guidelines website: https://www.nice.org.uk/news/article/nice-updates-rapid-covid-19-guideline-on-critical-care

Office for National Statistics. (2020a). Deaths involving COVID-19 in the care sector, England and Wales -. Retrieved August 27, 2020, from https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/

articles/deathsinvolvingcovid19inthecaresectorenglandandwales/deathsoccurringupto12june2020andregisteredupto20june2020provisional

Office for National Statistics. (2020b). Deaths registered weekly in England and Wales, provisional. Retrieved July 22, 2020, from People, population and community website: https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/datasets/weeklyprovisionalfiguresondeathsregisteredinenglandandwales

Older People's Commissioner for Wales and the Equality and Human Rights Commission in Wales. (2020). Joint Statement by the Older People's Commissioner for Wales and Equality and Human Rights Commission in Wales. Retrieved July 29, 2020, from Older People' s Commissioner for Wales - News website: https://www.olderpeoplewales.com/en/news/news/20-07-21/Joint_Statement_by_the_Older_People_s_Commissioner_for_Wales_and_Equality_and_Human_Rights_Commission_in_Wales.asp

Public Health Wales. (2020). *Admission and Care of Residents during COVID-19 Incident in a Residential Care Setting in Wales Admission and Care of Residents during COVID-19 Incident in a Residential Care Setting*. Retrieved from https://www.gov.uk/government/news/coronavirus-testing.

Rivers, J. (2006). Proportionality and Variable Intensity of Review. In *Source: The Cambridge Law Journal* (Vol. 65).

Roebuck, J. (1979). When does "Old age begin?": The evolution of the English definition. *Journal of Social History*, *12*(3), 416–428.

Samuel, M. (2020a). Council faces legal challenge for suspending Care Act duties | Community Care. Retrieved August 25, 2020, from Community Care website: https://www.communitycare.co.uk/2020/05/07/council-faces-legal-challenge-suspending-care-act-duties/

Samuel, M. (2020b). Council says it has "learned lessons" after Care Act legal challenge dropped. Retrieved August 25, 2020, from Community Care website: https://www.communitycare.co.uk/2020/06/05/council-says-learned-lessons-care-act-legal-challenge-dropped/

Samuel, M. (2020c). Eight councils have triggered Care Act duty moratorium in month since emergency law came into force. Retrieved August 25, 2020, from Community Care website: https://www.communitycare.co.uk/2020/04/30/eight-councils-triggered-care-act-duty-moratorium-month-since-emergency-law-came-force/

Sarıkaya Güler, T. (2017). "Positive Obligations" Doctrine of the European Court of Human Rights: Is it Cogent or Obscure? *European Journal of Multidisciplinary Studies*, *6*(1), 358–364.

Thane, P. (2000). *Old age in English history : past experiences, present issues*. Retrieved from http://magik.gmu.edu/cgi-bin/Pwebrecon.cgi?DB=local&FT=%22%28OCoLC%29ocm42726175%22&CNT=25+records+per+page

United Nations. (2020). *Policy Brief: The Impact of COVID-19 on older persons* . Retrieved from https://apps.who.int/iris/handle/10665/186463

Webb, E. (2020). Coronavirus risk for older people: the updated picture | Discover | Age UK. Retrieved July 22, 2020, from Discover website: https://www.ageuk.org.uk/discover/2020/06/coronavirus-risk-for-older-people-updated/

Welsh Government. (2020). Adult social services during the COVID-19 pandemic: guidance | GOV.WALES. Retrieved August 14, 2020, from https://gov.wales/adult-social-services-during-covid-19-pandemic-html#section-40790

Welsh Parliament Health Social Care and Sport Committee. (2020). *Welsh Parliament Health, Social Care and Sport Committee Inquiry into the impact of the Covid-19 outbreak, and its management, on health and social care in Wales: Report 1*. Retrieved from www.senedd.wales

Williams, J. (2003). When I'm sixty-four: Lawyers, Law and "Old Age." *Cambrian Law Review*, *34*, 103–119.

Wise, J. (2020). Covid-19: New coronavirus variant is identified in UK. *British Medical Journal*, *371*(m4857). Retrieved from https://www.bmj.com/content/371/bmj.m4857

World Health Organisation. (2020). WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020. Retrieved July 21, 2020, from https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020

Bensaid v. the United Kingdom, no. 44599/98

Brown v Stott [2003] AC 681

De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 A.C. 69

Jurica V. Croatia (2017) Application no. 30376/13

Lawless v Ireland (No 3) [1961] ECHR 2

McDonald v. the United Kingdom ECHR 141 (2014)

Nencheva and others v. Bulgaria (2013) Application no. 48609/06

Niemietz v. Germany, 16 December 1992, § 29, Series A no. 251-B

Pretty v. the United Kingdom,(2002) Application no. 2346/02

R (on the application of Brown) v Secretary of State for Work and Pensions [2008] EWHC 3158

Reyes v R [2002] UKPC 11

Hristozov and others v. Bulgaria (2012) Applications nos. 47039/11 and 358/12

Selahattin Demirtaş v. Turkey (2018), Application no. 14305/17

Soering v. The United Kingdom (1989) Application No. 14038/88

Sunday Times v UK (1979) Application no. 6538/74

Tracey v Cambridge University Hospital NHS Foundation Trust, [2014] EWCA Civ 822

Vo v France (2004) Application no. 53924/00