

Shining a light on human rights

Mental Health, Mental Capacity and Human Rights:

A practitioner's guide

The British Institute of **Human Rights**

bihr.org.uk



About this booklet

This booklet is about human rights in services supporting people with mental health and/or mental capacity issues. It is aimed at practitioners working in those settings. We use the term ‘practitioner’ throughout to include anyone working in these settings (e.g. qualified and unqualified workers). Lots of information in the booklet may also be useful for people using services, their family, carers or advocates (BIHR has also produced a range of resources aimed at people using mental health/capacity services, see page 26).

This booklet was written by the British Institute of Human Rights (BIHR) as part of our project **‘Delivering Compassionate Care: Connecting Human Rights to the Frontline’**. This booklet is the introductory resource and sits alongside our seven issue-specific resources:

Dementia and Human Rights:

A practitioner’s guide (produced with Bristol Dementia Wellbeing Service).

Learning Disability and Human Rights:

A practitioner’s guide (produced with Mersey Care NHS Foundation Trust).

Mental Health Care for Children and Young People and Human Rights: A practitioner’s guide (produced with The St Aubyn’s Centre).

Mental Health Early Intervention and Human Rights: A practitioner’s guide (produced with Tees, Esk and Wear Valleys NHS Foundation Trust).

Mental Health Accommodation Support and Human Rights: A practitioner’s guide (produced with St Martin of Tours Housing Association).

Rehabilitation and Human Rights:

A practitioner’s guide (produced with Avon and Wiltshire Mental Health Partnership NHS Trust).

Social Care Intervention and Human Rights:

A practitioner’s guide (produced with Bristol City Council).








BIHR’s ‘Delivering Compassionate Care’ project aims to place human rights at the heart of mental health services, helping to ensure frontline staff have the knowledge and skills to fulfil the vital role they can play in upholding the dignity and human rights of the people using their service. The project is funded by the Department of Health, therefore the information in this booklet focuses on English law and bodies.

BIHR would like to thank the hundreds of practitioners at our seven ‘pilot’ services for their engagement with this project and their help producing our set of resources, particularly the Human Rights Leads for their ideas, advice and guidance.

BIHR’s information resources aim to empower people to deliver rights-respecting services. If this booklet has helped you to deliver rights-respecting care we would love to hear from you. Please email examples of positive changes to your practice to info@bihr.org.uk

This booklet is for information purposes only. It is not intended, and should not be used, as legal advice or guidance.

Finding your way around

What are human rights?	Page 4
Human rights and your work	Page 5
How does the Human Rights Act work?	Page 6
Who has human rights?	Page 8
Who has duties?	Page 8
What are my duties?	Page 9
Which human rights are relevant to my work?	Page 9
 Right to life	Page 10
 Right to be free from inhuman and degrading treatment	Page 12
 Right to liberty	Page 15
 Right to respect for private and family life, home and correspondence	Page 17
 Right to be free from discrimination	Page 20
 Right to freedom of thought, conscience and religion	Page 21
 Right to peaceful enjoyment of possessions	Page 21
Using human rights: flowchart for identifying a human rights issue	Page 22
Where can I get more information?	Page 26
Where can I get more support?	Page 27

What are human rights?

Human rights are the basic freedoms and protections that **every person has simply because they are human**. Human rights are about people being treated with dignity, respect and fairness, having a say over their lives and participating in decisions that are made about their care and treatment.

Human rights provide a set of **minimum standards**. **This idea came out of the horrors of World War II when the global community came together to set down in law rules** for how governments should treat people. **Our law, the Human Rights Act 1998 (HRA), guarantees these minimum standards across public services, including in mental health and mental capacity settings.**

“human rights are a set of recognisable principles on which public authorities can base their everyday work”

Nicky, public authority manager

“human rights are basic rights to humane dignified treatment and things I should have access to simply because I am a human being”

Cath, mental health service user

Mental Health

We use this term to include anyone who may be covered by mental health law. Under the Mental Health Act 1983 (as amended), this means “any disorder or disability of mind”. This can include depression, dementia, eating disorders, autistic-spectrum disorders, behaviour changes caused by brain damage and personality disorders.

Mental Capacity

This is about people’s everyday ability to make decisions about what happens to them, including about their care and treatment. Under the Mental Capacity Act 2005, capacity can be impaired for a number of reasons, such as mental illness, learning disability, dementia, brain damage or intoxication. The important point is that when a specific decision needs to be made (e.g. about treatment options) a person is able to understand, remember and weigh up the pros and cons and communicate their decision. A person also has the right to make unwise decisions (see page 18).

Human rights and your work

Human rights are not ‘new’ or an ‘add on’ for mental health or mental capacity services. Human rights will underpin many of the situations you come across in your day-to-day work.

The **Human Rights Act (HRA)** is designed as a **framework to help negotiate better outcomes at a practice level, outside of courts**. As a practitioner you can:

- Use the HRA framework as a **practical tool** to help **inform your practice**. Being able to identify the human rights involved and the impact a particular decision, policy or action will have on a person’s human rights will help you to deliver **good quality care** that is person-centered and assist with making **defensible decisions**. This includes being able to review and change decisions internally with colleagues and in your interaction with other services.
- Work with service users, their advocates, families or carers when they raise concerns about the service not respecting or protecting their rights through **everyday discussions and negotiations**.

The Care Quality Commission’s human rights approach to regulation:

In September 2014 the CQC launched a new approach to regulation which focuses on human rights. Following a whole-staff training programme (delivered by BIHR), the CQC is now rolling out this approach. This is an additional reason for ensuring staff in mental health and mental capacity services have the knowledge and confidence to use human rights in their work.

“In our safeguarding meetings I have been able to use the human rights framework, including the language of dignity and respect, to give a sharper, harder edge to our concerns around issues of neglect.”

Practitioner on BIHR’s Delivering Compassionate Care project

How does the Human Rights Act work?

The Human Rights Act (HRA) is the main way human rights are protected in the UK. There are three things you need know about how the Human Rights Act works:

one

Everyday practice: The HRA places a **legal duty on public officials** to respect, protect and fulfil human rights (section 6 HRA). This includes those working in mental health and capacity services (see page 8). This legal duty can be **helpful for practitioners**: you can use it to **underpin your decisions**, to **challenge practice internally**, and to **drive positive change** to deliver rights-respecting services.

“I was recently able to challenge poor practice around planning the care pathway of a client using a human rights approach. The client’s own wishes to live in her own home were not given appropriate weight and getting people to think about the range of human rights involved meant she was given a much more dignified, respectful pathway to be supported to live in her own home.”

Lisa, Senior Dementia Practitioner, from BIHR’s Delivering Compassionate Care project.

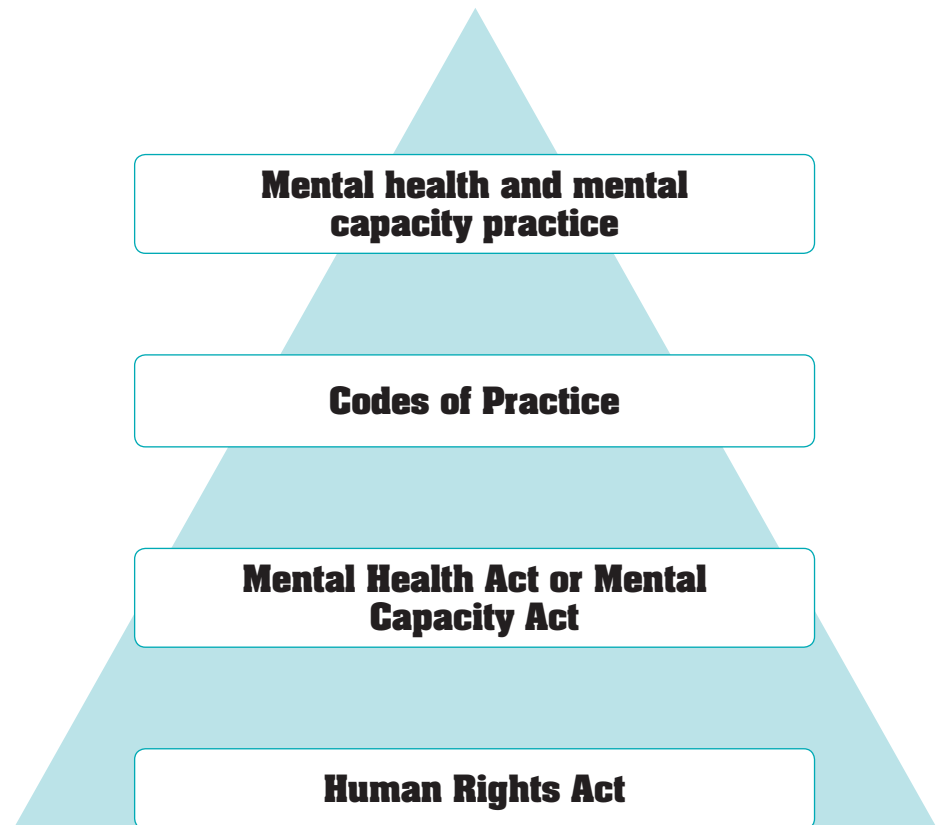
two

Legal accountability: Anyone in the UK can **now ask a court or tribunal** (including mental health tribunals) to **look at whether their human rights have been risked or breached**. This could be because of the decisions, actions or omissions of a service, or it could be to challenge provisions of mental health or capacity law which are not compatible with human rights (as in point 2 above). The legal cases referred to in this booklet were made possible through using this part of the HRA.

Understanding how laws fit together

three

Foundation law: All other legislation, including health and social care law and guidance, should be compatible with human rights or ‘human rights compliant’ (section 3 HRA). The HRA is the foundation on which other laws should be built or applied (whether they were passed before or after the HRA). In practice this means the laws that are relevant to your practice should be implemented in a way that respects, protects and fulfils human rights.



In real life:

Making our laws compatible with rights

Sally is in a long-term relationship with another woman. When she was diagnosed with paranoid schizophrenia and depression her local authority made her estranged mother her “nearest relative”, not her partner. This was because of what mental health law said at the time. The right to respect for

private and family life in the HRA enabled Sally to challenge this in court and it was decided that the word “relative” under the Mental Health Act should include same sex partners. (R (SG) v Liverpool City Council, 2002. We have made up the name).

Who has human rights?

Everyone has human rights. They are 'universal', which means they belong to everyone – **no matter who they are, where they are from or other characteristics.** We are all born with human rights and, although they can sometimes be limited or restricted, our rights cannot be taken away from us.

Frontline practitioners have a crucial role to play in upholding the human rights of people using their service. Whilst sometimes breaches of human rights do occur, knowing that people have human rights and what this means for practitioners enables you to address breaches and try to prevent them. And of course staff also have human rights themselves.

“Human rights are premised on the inherent dignity of all human beings whatever their frailty or flaws.”

Lady Hale, Deputy President of the Supreme Court in the ‘Cheshire West’ case.

Who has duties?

Only public authorities or bodies exercising public functions have legal duties under the Human Rights Act (HRA). This includes:

- NHS organisations and staff
- outsourced NHS services provided by the private or voluntary sector
- regulated health and care services provided by the private or voluntary sector arranged or paid for in whole or part by a local authority*
- local authorities and their staff, e.g. social services, housing, children’s services
- regulators of services (see page 5)

The duty applies throughout services, from the actions of frontline practitioners to the senior management team.

* This was clarified by the Care Act 2014. This includes commissioned services that are provided under contract to a local authority, and services obtained through local authority direct payments, if delivered by a regulated service provider (Care Act 2014 section 73). However, even in situations outside of this, remember that other public authorities such as the local council, police and the regulator (CQC) will have human rights duties. If your service risks people’s human rights this could trigger enforcement measures by the regulator and/or safeguarding protocols.

What are my duties?

If you work for a public authority, you will have human rights duties in everything that you do. If you work for a non-statutory body you will have duties when you are performing a public function (see page 8).

Your legal duties are to:

Respect

This means ensuring you respect people's rights. This can help you to **avoid interfering with someone's rights, unless it is a right you can restrict and you have followed the correct legal process for doing this** (explained in the following chapters). This is sometimes called a 'negative' duty.

Protect

This requires **action to protect people's human rights in certain circumstances**. This can include protecting a person known to be at risk of serious harm. This is sometimes called a 'positive' duty or obligation.

Fulfil

This means taking steps to strengthen access to and realisation of human rights. It includes having **systems in place to prevent or investigate human rights abuses**. This is sometimes called a 'procedural' duty.

Which human rights are relevant to my work?

There are 16 rights (called 'Articles') protected by the Human Rights Act. You can find a full list of these on the back page of this booklet. This section provides information about the key rights which are most likely to be relevant to your practice in mental health and/or mental capacity settings.

These are:



Right to life
(Article 2)



Right not to be tortured or treated in an inhuman or degrading way
(Article 3)



Right to liberty
(Article 5)



Right to respect for private and family life, home and correspondence
(Article 8)



Right not to be discriminated against in relation to any of the human rights listed here
(Article 14)

We've also included some information about:



Right to freedom of thought, conscience and religion
(Article 9)



Right to peaceful enjoyment of possessions
(Article 1, Protocol 1)



Right to life

(protected by Article 2 in the Human Rights Act)

How might I encounter this in my work?

- Where a person's life may be at risk - including from themselves or from other people
- Where decisions are being made about withdrawing life sustaining treatment or not resuscitating a person
- If people with mental health/capacity issues have their physical health needs ignored which could risk their life

Practitioner duties

- **Respect:** As a health/care practitioner you cannot deliberately take away someone's life (for information on withdrawing care see BIHR's resource 'Nursing and Human Rights: A practitioner's guide, page 15')
- **Protect:** If you know that someone's life is at immediate risk, you must take reasonable steps to protect it. This does not mean providing treatment at all costs (see opposite).
- **Fulfil:** There needs to be an independent investigation into a death where your organisation may be implicated or involved.

Can I restrict the right to life?

No, as a health/care professional it would be unlawful to deliberately take away someone's right to life.

Note: there are very limited circumstances where it may be possible for public officials to justify a use of force which results in someone losing their life, e.g. when defending someone from violence. Such a use of force must be absolutely necessary. This will usually only apply to law enforcement and armed forces personnel.

What does my duty to 'take reasonable steps' to protect life involve?

Practitioners will have a duty to take reasonable steps to protect life where:

- You know, or ought to know (for example, because it has been reported to you), that there is a real, immediate and identifiable risk to someone's life

and

- There are reasonable steps, within the scope of your powers, you could take to avoid that risk

(Legal case: *Osman v UK*, 2002)

The courts have set out what 'reasonable steps' to protect life might include. These are not steps which put an impossible or disproportionate burden on the public authority, but could include:

- Obtaining access to additional information to help you make a decision
- Undertaking risk assessments or mental health assessments
- Observing a person known to be at risk of taking their life
- Ensuring all public officials involved in the care of a person at risk have access to all relevant information



In real life: right to life

Protecting patients' lives

The positive obligation on hospitals to take reasonable steps to protect a patient's life when there is a real and immediate risk that you know about, or should know about, applies equally to voluntary/informal patients and people who have been detained under the MHA.

(Legal cases: *Savage v South Essex Partnership NHS Foundation Trust*, 2009; *Rabone v Pennine Care NHS Foundation Trust*, 2012)

"I had a client with learning difficulties who needed an operation. I was able to assist the doctors in thinking through all the human rights implications. I was able to show that it was not just about the right to life, but the broader impact of the procedures and the need to treat the patient in a way that respected her dignity. A human rights approach allowed me to open up a dialogue about how to carry out this operation in a less intrusive and less distressing way for the client."

Ged, Community Learning Disability Nurse, from BIHR's Delivering Compassionate Care project.

Safeguarding and human rights

Safeguarding and human rights should not be seen as separate. The first safeguarding policy document, *No Secrets Guidance* (2000), made it clear that "all people have the right to live their lives free from violence and abuse. This is underpinned by the duty on public authorities under the Human Rights Act to protect, respect and fulfil people's basic human rights."

Adult safeguarding has now been put on a statutory footing through the Care Act 2014 and human rights remain an important tool for making safeguarding decisions.



Right to be free from inhuman or degrading treatment

(protected by Article 3 in the Human Rights Act)

How might I encounter this in my work?

- ensuring people's basic needs are being met both in health/care institutions and in the community
- neglect or lack of care leading to serious harm or suffering
- a person presenting a risk of serious self-harm or harming others including staff and others using the service
- administering treatment that may be causing serious harm or suffering
- failing to provide treatment to reduce serious harm experienced by the person

Can I restrict the right to be free from inhuman or degrading treatment?

No. This right is 'absolute' which means there are no circumstances when it is acceptable to restrict or interfere with it.

Practitioner duties

-  **Respect:** You cannot treat someone in an inhuman or degrading way (whether or not this is your intention, the impact is what counts).
-  **Protect:** If you know that somebody is at risk or may be being subjected to such treatment, you must take reasonable steps to protect them (usually called **safeguarding**).
-  **Fulfil:** There needs to be an independent investigation where inhuman or degrading treatment has occurred and where your organisation may be implicated or involved.

This human right covers serious harm, abuse or neglect, including unintentional harm.

What is inhuman treatment?

Includes causing severe mental or physical suffering.

What is degrading treatment?

Less severe than inhuman treatment but still grossly humiliates or causes the person to feel fear, anguish or inferiority.

When does treatment become inhuman or degrading?

This right has a very high threshold. Treatment must have a very serious impact on a person to be considered inhuman or degrading. **Individual circumstances are important. You will need to consider a person's situation and the impact on them to determine whether the harm amounts to inhuman or degrading treatment. Important factors include (but are not limited to) a person's age, health, disability and gender.**



In real life: right to be free from inhuman or degrading treatment

Failing to provide medical attention and treatment

A man was arrested and detained by the police under the Mental Health Act (MHA) and was held for longer than the permitted 72 hours. During this time he repeatedly banged his head on the cell wall, drank from the toilet and smeared himself with faeces before being transferred to a clinic for treatment. The court ruled that the impact of this was inhuman and degrading for him, taking into account that he was in real need of appropriate psychiatric treatment.

(Legal case: *MS v UK*, 2012)

“I was able to use human rights arguments to get appropriate care for a patient who was relapsing in our service. There was a delay in getting him transferred to an appropriate setting due to a disagreement between two Trusts about funding. I was able to point out the delay caused by this disagreement meant that he was being left in circumstances that were degrading. We used human rights arguments to get the matter resolved urgently.”

Paul Holden, Operations Manager, St. Martin of Tours HA Ltd, from BIHR's Delivering Compassionate Care project.

Article 3 in the HRA also protects against torture. Although ‘torture’ is a term people may use to describe their feelings about how they are being treated, under the law torture has a very specific definition. It would very rarely apply to health and care services. Torture is about someone who works for the state deliberately causing severe physical or mental harm to a person for a purpose (such as to obtain information). Inhuman

and degrading treatment, on the other hand, doesn't have to be deliberate or for a purpose – it can be caused by neglect. It is therefore more likely that you will encounter these situations in your work.

What is capacity?

Capacity is about a person's **everyday ability to make decisions** about what happens to them, including decisions about their care and treatment. **You should assume that a person does have capacity to make a decision.**

If you are unsure about a person's capacity because of an **impairment of their mind or brain**, the Mental Capacity Act (MCA) sets out a legal test to assess this. Impairment could be for a number of reasons, such as mental illness, learning disability, dementia, brain damage or intoxication.

You will have to assess the person's ability to **understand, remember and weigh up the pros and cons** of the decision and their ability to **communicate the decision**.

Capacity is 'task-specific'.

This means:

Capacity focuses on the specific decision that needs to be made at the time. If a person's incapacity is temporary (e.g. due to intoxication) you should consider delaying the decision until the person regains their capacity.

and

If a person lacks capacity to make one decision it doesn't mean they lack capacity to make other decisions. A capacity assessment will need to be conducted for each decision a person needs to make, if there are concerns about their ability to do this.

Capacity can also **fluctuate**, so you should keep the situation under review. This can include delaying an assessment to a more appropriate time and re-assessing capacity at later stages to ensure a person who regains capacity can make the decision for themselves.

Capacity and human rights

If a person has been assessed as lacking capacity to make a decision then a practitioner may make a best interests decision on their behalf (see MCA Code of Practice, chapter 5.8). **Thinking about the person's human rights and how they might be affected should be at the centre of any decisions about best interests.**

The right to respect for private life (see page 17) protects a person's ability to have control over their own life and to be involved in decisions about what happens to them. They still have this right even if they lack capacity to make a decision. This means you should consider the person's wishes and feelings and support them to participate in decisions as much as possible.



Right to liberty

(protected by Article 5 in the Human Rights Act)

How might I encounter this in my work?

- where a person has restrictions placed on their movement as part of their care or treatment arrangements
- decisions preventing a person from leaving a place (such as a care home or hospital) and ensuring the correct processes are followed
- when a person requires constant supervision or monitoring and ensuring they have access to the relevant safeguards
- use of restraint techniques and/or medication which limit a person's ability to move about freely
- over-restrictive policies or practices which lead to significant delays in a person being able to challenge restrictions on their liberty

Can I restrict the right to liberty?

Yes. This right can be restricted, but **only in the specific circumstances** set out in the right itself. This includes:

- detaining a person under the Mental Health Act (for a specific and recognised mental disorder and where detention is necessary for their/other people's safety)

or

- depriving a person of their liberty under the Mental Capacity Act either where:

the person is assessed as not having capacity to consent to treatment for a mental health issue,

or

the person is assessed as not having capacity to make the decision about leaving a health/care setting and there is a concern about their safety/well-being.

Even if a restriction of liberty is for a lawful reason, the **procedural safeguards must also be in place**. Without these, the right to liberty may still be breached.

Practitioner duties



Respect: You cannot deprive someone of their liberty apart from in the specific circumstances set out in the right to liberty and when the legal safeguards are followed. See below for more info.



Protect: If it becomes necessary to restrict the right to liberty of a person in your care (see below), you have a legal obligation to apply the **procedural safeguards** by considering the following questions:

- Has the person been informed of the reason for restricting their liberty?

and

- Is the person able to challenge or appeal the decision?

and

- Is the person being given the opportunity to tell their side of the story?

and

- Can the person see and comment on all the relevant documents?

and

- Has the decision been taken within a reasonable period of time?



In real life: right to liberty

Assessments should consider a person's wishes

When Steven, a young man with autism and a severe learning disability, went into a local authority support unit for a few days whilst his father was unwell, it took over a year for him to be returned home, against his and his father's wishes. A legal case decided that his right to liberty had been breached because of the delay in obtaining a Deprivation of Liberty (DoL) order, which also lacked proper review. Additionally, the authority's DoL assessment was flawed, including because it had not taken into account Steven's and his father's wishes.

(Legal case: Hillingdon London Borough Council v Neary, 2011)

"The Human Rights Act saved Steven's life. If we hadn't used the Act, Steven would have faced a life in public care he didn't want or need."

Mark Neary, Steven's father, interviewed for BIHR's Human Writes, 2015.

What is a deprivation of liberty? 'Cheshire West'

Practitioners may sometimes need to prevent a person from leaving a place (e.g. where they live or where they are receiving care and treatment) or remove them to another place. Doing this when a person has capacity to make decisions about their care, treatment and residence would be an unlawful deprivation of liberty. The situation for people who lacked capacity to make such decisions was clarified by the Supreme Court in 2014. The court ruled that deciding if a situation is a deprivation of liberty is an objective question. The standard is the same regardless of whether someone has capacity. The court was also clear that a deprivation of liberty may sometimes be necessary, but the legal safeguards must be in place.

There will be a deprivation of liberty if a person is subject to the following:

- under continuous supervision or control
- and
- not free to leave
- and
- public officials are involved in some way, e.g. through the funding, arrangement, planning and/or delivery of the person's care

If this "acid test" is met then the person must have access to the safeguards required by the right to liberty in the Human Rights Act. This could include those set out in the Deprivation of Liberty Safeguards. Outside of a care home or hospital setting you will need to apply to the Court of Protection to authorise a deprivation of liberty.

Remember, the following issues are not relevant when deciding if a situation amounts to a deprivation of liberty:

- × the relative "normality" of the situation
- × a person's lack of objection / compliance
- × the reason or purpose of the placement (including it being in a person's best interests; this is relevant to deciding if liberty should be restricted, not the factual question of if it has been restricted)

(Legal case: Cheshire West and Chester Council v P, 2014)






Right to respect for private and family life, home and correspondence

(protected by Article 8 in the Human Rights Act)

How might I encounter this in my work?

- when you have concerns about a person's capacity to make an informed decision about treatment
- ensuring people are treated with respect and dignity when receiving care or treatment
- where a person in hospital or a care home wishes to return home against the recommendations of the care provider
- where care or treatment decisions are made without involving the person
- when a person's physical or mental well-being is at risk including from self-harm or harm from others such as staff, others using the service or family (see page 11)
- where care or treatment options impact on people's ability to maintain or develop relationships, including with family or friends and sexual relationships

Practitioner duties

-  **Respect:** Not interfering with this right as far as possible (see 3 stage test on page 18).
-  **Protect:** If a person in your care is at risk of having this right breached, you must take reasonable steps to protect this right.
-  **Fulfil:** For decisions that could impact on this right, your organisation must have procedures to ensure fair decision making.

The four parts of this right

Private life covers more than just traditional ideas of privacy. It includes:

- physical and mental well-being
- autonomy: choice, control and participating in decisions about care and treatment
- participation in the community
- relationships, including friendships and sexual relationships
- access to personal information
- respect for private and confidential information, particularly the storing and sharing of such information

Family life includes:

- developing and maintaining family relationships
- on-going contact if a family is split up (including when accessing care and treatment)

Home includes:

- respect for a person's home (not a right to be given a home), which could include long-stay wards or residential homes

Correspondence includes:

- being able to communicate with people, including to receive, send and retain phone calls, letters, emails etc.
- private communication

Can I restrict this right?

Sometimes, yes. The right to respect for private and family life, home and correspondence is not an 'absolute' right. There are specific circumstances where it might be necessary to restrict it, but the following **three stage test must be met:**

Lawful: is there a law or policy which allows this restriction?

and

Legitimate aim: have you got a legitimate reason for restricting this right? These reasons are written out in the right itself and include the need to protect the rights of others or the wider interests of the community (such as public safety).

and

Necessary: are you taking the least restrictive action necessary to achieve the aim? Have you considered all the alternatives? The key principle is **proportionality**.

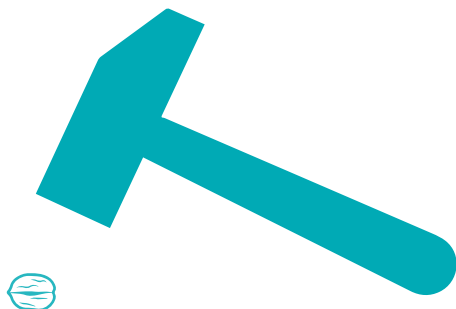
Proportionality in practice

A blanket policy: A nursing home has a policy of placing CCTV in the bedrooms of all residents for safety reasons.

Disproportionate outcome: This restricts the right to respect for private life of all residents.

A proportionate policy: Only residents who pose a risk to themselves / others have CCTV placed in their rooms. This decision is made on a case-by-case basis and is subject to ongoing review.

Proportionate outcome: Some residents have their right to respect for private life restricted for their own safety or the safety of others; other residents do not have their right to respect for private life interfered with.



Autonomy and 'unwise decisions'

The right to respect for private life includes protecting people's autonomy. **People have a right to make decisions about their own lives, care and treatment, including decisions that others might think unwise.** This is explicitly recognised by the Mental Capacity Act (MCA).

As a practitioner in mental health / mental capacity settings you may sometimes have concerns about an unwise choice or decision that a person is making. Your approach to an unwise decision should be guided by the law, not your own moral compass, or what you would do in a similar situation. As a practitioner you can only interfere with someone's decision if you:

- have genuine concerns about the person's capacity to make that decision

and

- have carried out a capacity assessment and found that the person lacks capacity to make decisions about this specific issue

and

- you have evaluated what would be in the person's best interests in line with the MCA (this includes considering their human rights) and found that interfering with a person's decision is in their best interests

Once you have decided to interfere with a person's decision, a human rights approach and the requirements of the MCA establish that:

- the person should still be supported to take part in decision-making about that issue as far as possible

and

- any restriction should be explained to them in a language they can understand

and

- any restriction must be compatible with the person's human rights

Practitioners should also remember that capacity to make decisions is issue-specific and may change over time. Any interferences should be regularly reviewed and adjusted in line with a person's wishes and capacity to make decisions on the issue (see page 14).



In real life: right to respect for private and family life, home and correspondence

Home

A man with mental health issues living in residential accommodation used his right to respect for home and family life to negotiate with his local authority when it wanted to return him to a unit in their area. He had been settled outside of the area for several years in a place he considered home with people supporting him as a 'family unit'. The local authority reconsidered its decision.

(Real life example from BIHR's resource 'The Difference It Makes: Putting Human Rights at the Heart of Health and Social Care')

Correspondence

The St Aubyn Centre, a Tier 4 Child and Adolescent Mental Health Service, re-wrote their e-Safety policy to allow young people in the hospital to access the internet. Staff had concerns about internet grooming and exploitation. Whilst this is a legitimate reason for restricting the young people's right to communicate, following involvement in BIHR's human rights project, the service felt there was a more proportionate way to achieve this aim. The new policy addressed safety concerns on an individual basis directly with young people, allowing them to improve contact with their family/friends.

Private life

"As social workers, we are now challenging 'do not resuscitate' orders when they are made without following proper legal safeguards to protect the right to life and the right to be involved in decisions affecting private life."

Practitioner on BIHR's Delivering Compassionate Care project

Family life

"A social worker challenged a plan for a man discharged from hospital after detention under the Mental Health Act to have four home visits a day to support/monitor his mental health on the basis that it was a disproportionate interference with his right to private and family life. The number of visits was readjusted to reflect this concern and reach the right balance."

Practitioner on BIHR's Delivering Compassionate Care project



Right to be free from discrimination

(protected by Article 14 in the Human Rights Act)

This is a special right, because it is about **not being discriminated against in relation to any of the other rights listed in the Human Rights Act (HRA)**. You can think of it like a “piggy-back” right, because it must connect to (or piggy-back onto) another right. For example, if a practitioner decides not to provide treatment because of a person’s disability, this would engage Article 14 alongside Article 2, the right to life.

Under Article 14, discrimination can be based on a wide range of grounds such as sex, race, language, religion, political opinion, birth or **‘any other status’** (which includes things like carer status).

Discrimination may involve:

- treating someone less favourably than other people in the same situation on the basis of a characteristic or status
- failing to treat someone differently when they are in a significantly different situation to others, for example due to a mental health or capacity issue
- applying blanket policies that have a disproportionately adverse effect on a person and other people who share a particular status.

Not all discrimination is unlawful. If there are objective and reasonable grounds for treating someone differently, this will not breach Article 14. For example, you may need to treat disabled people differently to ensure they have equal access to services.



In real life:

Challenging a refusal of surgery

A young woman in a mental health hospital needed surgery after self-injuring. Her GP, psychiatrist and other staff believed it was in her best interests and the delay was causing her significant distress and pain. The doctor refused to perform the operation, so advocates supported the hospital manager to challenge the decision as an interference with her human rights and her severe mental health needs. As a result she received the surgery.

(Real life example from BIHR’s resource ‘Mental Health Advocacy and Human Rights’, 2013)

Do not resuscitate orders for disabled people

Andrew Waters lived with dementia and Down’s syndrome and had a ‘do not resuscitate’ (DNR) order put on his file whilst in hospital without him or his family being consulted. The reasons given on the form were listed as: ‘Down’s syndrome, unable to swallow... bed bound, learning difficulties’. When Andrew and his family argued this was discrimination and engaged his right to life (Article 2), the NHS Trust apologised.

(Real life example, widely reported in 2015.)



Right to freedom of thought, conscience and religion

(protected by Article 9 in the Human Rights Act)

You may encounter this right when making decisions about issues which impact on a person's strongly held beliefs such as food choices, declining certain treatment, or arrangements which impact on the ability to worship.

For mental health/capacity practitioners it's important to remember that people can think and believe what they want. It is only when they act on (or 'manifest') those thoughts or beliefs that you can justify an interference with this right (following the 3 stage test).

This right has two components:

- 1. Believing what you want:** this part is 'absolute' and cannot be restricted.
- 2. Freedom to manifest your religion or beliefs:** this part can be restricted and balanced against the rights of others and needs of society. The same 3 stage test set out on page 18 will need to be followed to make a defensible decision which restricts this right.



Right to peaceful enjoyment of possessions

(protected by Article 1 of Protocol 1 in the Human Rights Act)

You may encounter this right when making decisions about people's access to, or enjoyment of, their possessions. This could be property, such as their home (e.g. when making decisions affecting people's residence), or other items they own (e.g. their personal belongings and possessions).

A person has the right to use, develop, sell, destroy or deal with their own property. There are specific limited situations when practitioners could justify taking away a person's property or possessions, or imposing restrictions on the way in which they use them. The same 3 stage test set out on page 18 will need to be followed to make a defensible decision which restricts this right. The "legitimate aim" for restricting this right is that it is in the public interest, and the "proportionate" response will need to strike a fair balance between the rights of the person owning the property/possessions and the general public.



Using human rights: flowchart for identifying a human rights issue

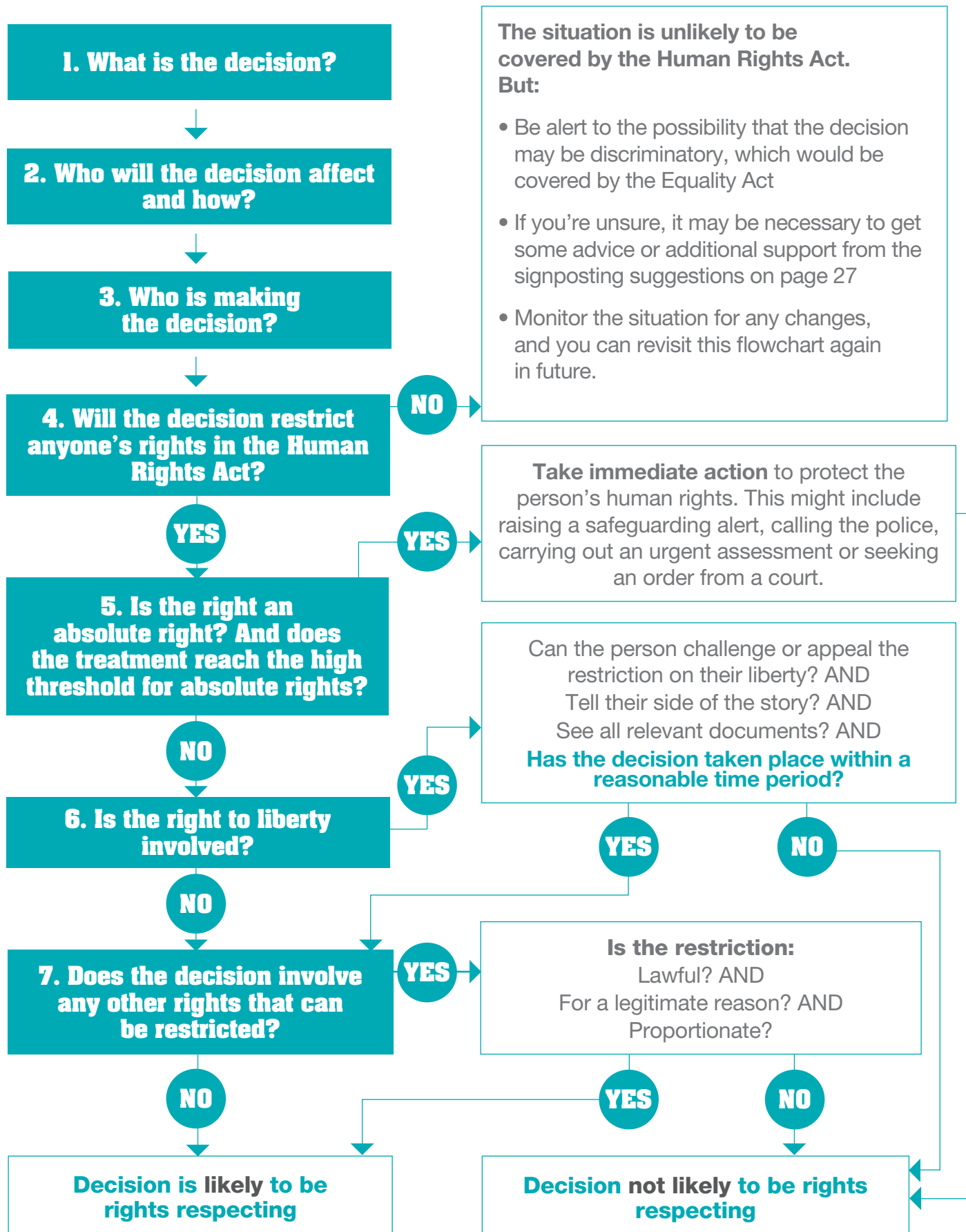
Many situations in your work are likely to engage human rights in some form. As a practitioner you will be making decisions that are likely to impact on the rights of **the people you are supporting and caring for** and their **families** and **carers**. You may also be making decisions that impact on the rights of your **colleagues**, and **your own rights**.

The following decision-making flowchart will help you identify when human rights may be an issue in your work. This compliments the issue specific flow-charts in the seven other practitioner toolkits in this set of resources (see page 2).

The British Institute of Human Rights

bihr.org.uk







Explaining the steps in the flowchart

Step 1

Who made the decision?

Tip: is it a decision/action/inaction or a whole practice or policy you are concerned about?

Be clear about the details and consider:

- What is happening, when and where?
- What is it you are concerned about? Is it the way a person is being treated or something that has affected you, your colleagues, families or carers?
- Is it a specific decision or action or a policy affecting a number of people?

Step 2

Who will the decision affect and how?

Consider:

- Will the decision affect one person or a number of people?
- How will it affect the person or people involved? Think about the impact, and include any information about relevant personal circumstances or characteristics, e.g. age, health, gender.

Step 3

Who is making the decision?

Tip: the Human Rights Act covers public authorities and those carrying out a “public function”.

Remember:

- When care is provided by public authorities (e.g. NHS, local authorities) or those carrying out a “public function”, this is covered by the duties in the Human Rights Act (HRA). For more information see page 8.
- If you know a person’s rights are at risk because of someone else (e.g. a family member) you may have a positive obligation under the HRA to take reasonable steps to protect their rights. For more information see pages 10 and 12.

Step 4

Will the decision restrict anyone’s rights in the Human Rights Act?

Tip: check the list of the rights on the back page

Consider:

- Which human rights are affected? Remember it may be more than one. Be as specific as possible. All the rights in the HRA are on the back page of this booklet.
- Think about whether the decision in question has restricted the human right(s) in some way.



Step 5

Is the right an absolute right?

Tip: The impact of the decision must be serious to engage an absolute right.

This includes the right to life, (see page 10), the right to be free from inhuman and degrading treatment (see page 12) and the right to think and believe what you want (see page 21).

Consider:

- There is **no justification** for breaching an absolute human right, no matter the reason (including resources).
- Will the impact of the decision be so serious as to reach the high threshold to breach this type of right?

Step 6

Is the right to liberty involved?

Remember this right has two parts:

1) Is liberty being restricted for a permissible reason?

and

2) Are the safeguards in place, meaning can the person:

- Challenge or appeal the decision?

and

- Tell their side of the story?

and

- See and comment on all relevant documents?

and

- Has the decision taken place within a reasonable period of time?

Both parts of this right must be met for a restriction on liberty to be lawful. See page 15.

Step 7

Does the decision involve any other rights that can be restricted?

This includes the right to private and family life, home and correspondence (page 17), the right to peaceful enjoyment of possessions (page 21) and right to manifest thoughts and religious/other beliefs (page 21).

Remember:

- A careful balancing act must be applied to make sure any restriction of a qualified right is **lawful**, for a **legitimate reason** and **proportionate**.
- In practice this means there should be a good reason for restricting this right and any restriction should be the **least restrictive option available** and **proportionate** in the circumstances.
- Consider whether there are other less restrictive alternatives that could be explored.



Where can I get more information?

Remember this is the introductory booklet of our set of resources for people working in mental health and/or capacity services. For more information see our issue specific resources:

Dementia and Human Rights:

A practitioner's guide

Learning Disability and Human Rights:

A practitioner's guide

Mental Health Care for Children and Young People and Human Rights:

A practitioner's guide

Mental Health Early Intervention

and Human Rights: A practitioner's guide

Mental Health Accommodation Support and Human Rights:

A practitioner's guide

Rehabilitation and Human Rights:

A practitioner's guide

Social Care Intervention and Human Rights:

A practitioner's guide

Other BIHR resources which might be relevant include:

Mental Health, Mental Capacity:

My human rights (aimed at people who use services and includes an accessible version)

Mental Health, Mental Capacity:

Raising a human rights issue (aimed at people who use services and advocates)


Nursing and Human Rights:


A practitioner's guide


End of Life Care and Human Rights:

A practitioner's guide

The British Institute of Human Rights (BIHR) is an independent charity working to bring human rights to life here at home. We empower people to:

 know what human rights are

 use them in practice achieve positive change in everyday life without resorting to the courts

 make sure those in power respect and progress our human rights laws and systems.

At the heart of everything we do is a commitment to making sure the international promise of the Universal Declaration of Human Rights, developed after the horrors of World War II, is made real here at home. Our innovative work seeks to achieve a society where human rights are respected as the cornerstone of our democracy and enable each of us to live well in communities that value the equal dignity of each person.

BIHR has been working on human rights in healthcare for over 15 years, making the links between human rights and health and helping organisations in the public and voluntary sectors to use the Human Rights Act to promote better health and social care. We have trained thousands of individuals from NHS trusts, social services, and voluntary organisations; raising awareness and building the capacity of individuals and organisations to use human rights to make a difference.



Where can I get more support?

If you need further support, advice or information about human rights in your work, here are some organisations who may be able to assist:

The British Institute of Human Rights

BIHR produces a number of resources for practitioners, advocates and people using services to help them better understand their human rights and how these can be used in everyday life to achieve better outcomes. Please visit our website to find out more about our Guides and Factsheets. www.bihhr.org.uk

Care Quality Commission

The CQC has a disclosure line for reporting concerns in all the services they inspect (including mental health and mental capacity services). www.cqc.org.uk
03000 616161

Equality Advisory Support Service

Free helpline and website providing information and advice for people with equality and human rights questions. www.equalityadvisoryservice.com
0808 800 0082 (Freephone)
0808 800 0084 (Text phone)

Equality and Human Rights Commission

The statutory body responsible for equality and human rights. www.equalityhumanrights.com

Health Ombudsman

Includes a complaints procedure for when internal service processes have been exhausted.
0345 015 4033

Healthwatch England

Local Healthwatch groups can help with raising local issues and complaints. www.healthwatch.co.uk

Liberty

Human rights and civil liberties organisation Liberty run a public helpline on Monday and Thursday evening (6.30-8.30pm) and Wednesday afternoon (12.30-2.30pm). www.yourrights.org.uk
0845 123 2307 or 020 3145 0461

NHS and Social Care Whistleblowing Helpline

For advice on the whistleblowing process within the NHS and to raise concerns.
08000 724 725

Public Concern at Work

A whistleblowing helpline providing independent advice for workers who are unsure whether to raise a public interest concern. whistle@pcaw.org.uk
020 7404 6609

Royal College of Nursing

Offers comprehensive guidance about raising concerns for its members, and advice for managers approached about a matter of concern. www.rcn.org.uk
0345 772 6100

British Association of Social Workers

Provides an Advice & Representation Service and a range of resources and publications on social work. www.basw.co.uk
0121 622 3911

The rights protected by our Human Rights Act:



Right to life
(Article 2)



Right not to be
tortured or treated in an
inhuman or degrading way
(Article 3)



Right to be free
from slavery or
forced labour
(Article 4)



Right to liberty
(Article 5)



Right to a fair trial
(Article 6)



Right not to be punished
for something which
wasn't against the law
(Article 7)



Right to respect for private
and family life, home and
correspondence
(Article 8)



Right to freedom of
thought, conscience
and religion
(Article 9)



Right to freedom
of expression
(Article 10)



Right to freedom of
assembly and association
(Article 11)



Right to marry
and found a family
(Article 12)



Right not to be discriminated
against in relation to any of
the rights contained in the
Human Rights Act:
(Article 14)



Right to peaceful
enjoyment of possessions
(Article 1, Protocol 1)



Right to
education
(Article 2, Protocol 1)



Right to
free elections
(Article 3, Protocol 1)



Abolition of the
death penalty
(Article 1, Protocol 13)

This booklet has been produced for staff delivering health and care services. If it has helped you to deliver rights-respecting care BIHR would love to hear your examples. You can email your real life examples of positive changes to your practice on info@bihr.org.uk.

**The British Institute
of Human Rights**
School of Law
Queen Mary University
London
Mile End Road
London E1 4NS

Tel: 0207 882 5850
Email: info@bihr.org.uk
Web: www.bihr.org.uk
Follow us on Twitter:
[@BIHRhumanrights](https://twitter.com/BIHRhumanrights)

Copyright © 2016 The British Institute of Human Rights

If you would like to use the content of this publication for purposes other than your own individual practice in delivering health and/or care, we kindly request that you discuss this with BIHR, via our contact details opposite.

The British Institute of Human Rights is a registered charity (1101575) and registered company (4978121)

Registered office, opposite.