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The human rights information in this guide covers the UK; references to mental health law, policy, practice and institutions refer to England.

ABOUT THIS GUIDE

This guide is written by the British Institute of Human Rights, as part of its Human Rights in Healthcare project. Funded by the Department of Health, the project has worked with 20 voluntary and community sector organisations in England over three years to explore how human rights can assist with the provision of better health and social care services. This guide is written in partnership with several organisations on that project, who work on mental health, including Mind in Brighton and Hove, Wish and NSUN.

The guide is designed to assist **advocates** working with service users with mental health problems. Much of the information will also be directly relevant to **service users**, in particular the sections 'How the Human Rights Act works' on page 7 and 'Key human rights relevant to mental health' on page 9. Opposite is a cut-out page specifically for service users. The guide is mostly written directly to service users, ie your rights and your health.

No **knowledge** of human rights or the Human Rights Act (HRA) is assumed. But it should also be of use to those with some human rights knowledge, in particular the practical sections towards the end of the guide. It is designed to allow readers to '**dip in and out**'. If you don't have time to read the whole guide, see the contents page for the parts most relevant to you.

We have used the term '**public authority**' throughout the guide, as a short-hand for bodies who have duties under UK human rights laws. However, it is not just public authorities that have those duties. Anybody carrying out a 'public function' will also have duties (see page 7).

The guide also contains **real life examples** of how advocates have used human rights to secure better treatment for people with mental health problems. Often raising an issue in human rights terms, as a legal right, can help resolve problems. However, human rights are not a magic wand. Sometimes a problem cannot be resolved on a local advocacy level, and some issues are too complex or serious to be resolved in this way. The Human Rights Act in the UK offers the backup of the law, as a last resort.

We use the term '**mental health**' throughout the guide to include anyone who may be covered by mental health law. Under the Mental Health Act, this means "any disorder or disability of mind". This can include eating disorders, depression, autistic-spectrum disorder, dementia, behaviour changes caused by brain damage, and personality disorders. It can also include learning disabilities if these are associated with abnormally aggressive or seriously irresponsible behaviour.

FIVE THINGS EVERYONE SHOULD KNOW ABOUT HUMAN RIGHTS

1

Human rights are the basic rights and freedoms that belong to all people. They cannot be taken away (but some can sometimes be restricted). They include the right to life, to be free from inhuman and degrading treatment, the right to liberty and to respect for private and family life.

2

Human rights are legally enforceable in the UK under the Human Rights Act (HRA). This means public authorities (like mental health hospitals) are legally required to respect your rights in everything that they do, and in some cases they must take positive action to protect your rights when they are known to be at risk.

3

Most rights in the HRA can be restricted in certain circumstances. A public authority can restrict your rights if they have a legitimate aim, for example if they are concerned about your safety, or to protect the wider community from harm.

4

Any restriction on your rights must be proportionate. This means a public authority must have a legitimate aim, and the restriction on your rights must be the least possible restriction in the circumstances.

5

For something to be a violation of your human rights it needs to have had a serious impact on you. Your individual circumstances are important, for example your health, gender, age and personal circumstances may all contribute to how a particular action or decision has affected you personally.



This cut-out page has been designed specifically for service users. If you are an advocate you could cut this page out for your client.

THE RIGHTS CONTAINED IN THE HUMAN RIGHTS ACT ARE:

Article 2: Right to life

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

Article 4: Right to be free from slavery or forced labour

Article 5: Right to liberty

Article 6: Right to a fair trial

Article 7: Right not to be punished for something which wasn't against the law at the time

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

Article 9: Right to freedom of thought, conscience and religion

Article 10: Right to freedom of expression

Article 11: Right to freedom of assembly and association

Article 12: Right to marry and found a family

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

Article 1, Protocol 1: Right to peaceful enjoyment of possessions

Article 2, Protocol 1: Right to education

Article 3, Protocol 1: Right to free elections

Article 1, Protocol 13: Abolition of the death penalty

RIGHTS IN THE HUMAN RIGHTS ACT PARTICULARLY RELEVANT TO MENTAL HEALTH

Right to life. Example issue: placing a Do Not Resuscitate notice on your file, without your consent

Right to be free from inhuman and degrading treatment. Example issue: malnutrition and dehydration in hospital

Right to liberty. Example issue: restraining you for long periods and for no good reason

Right to respect for private and family life. Example issue: not giving you information about your treatment or care

Right to be free from discrimination. Example issue: refusing to treat a patient because of their mental health

1. WHY HUMAN RIGHTS ARE IMPORTANT IN MENTAL HEALTH ADVOCACY

Our human rights are the basic rights and freedoms we have because we are human. They provide a set of minimum standards, outlined in law such as the UK Human Rights Act (HRA), for how the government should treat us as individuals.

The HRA guarantees these minimum standards in two ways. Firstly it places a duty on public officials (including mental health services) to uphold these minimum standards by respecting our human rights in everything that they do. Secondly human rights law provides a foundation for all other law, including mental health law. All legislation should be 'human rights compliant', meaning it should be designed and applied in a way that respects, protects and fulfils our human rights.

The HRA has been particularly influential in the area of mental health. Here are some examples of human rights challenges made to mental health law which have resulted in improvements.

Mental Health Act 2007

The Mental Health Act 1983 allows you to be detained and treated if you have a mental health disorder. Following a number of successful legal challenges using human rights laws, the Mental Health Act 2007 (MHA) was passed. The Act updated existing mental health legislation and made it more human rights compliant. For example, the MHA now places a duty on the authority to make reasonable arrangements for 'qualifying patients' to have access to an Independent Mental Health Advocate (IMHA). An IMHA can provide a range of support including helping people access information about their rights or any conditions or restrictions they have been placed under, and any medical treatment they are being given.

Mental Capacity Act 2005

The Mental Capacity Act (MCA) was designed to protect you if you cannot make decisions for yourself. The MCA is underpinned by human rights principles that aim to ensure its provisions are applied in a way that respects our human rights. Guiding principles of the MCA include:

- **Presumption of capacity:** this recognises that everyone has the right to make their own decisions if they have the capacity to do so.
- **Maximising decision making capacity:** people should be supported and empowered to be able to make their own decisions.
- **Right to make unwise decisions:** people have the right to make decisions that others might think are unwise.
- **Best interests:** any decision or action carried out on someone's behalf must be in their best interests.
- **Least restrictive option:** any decision or action carried out on someone's behalf must be the least restrictive on a person's rights or freedoms (this is called proportionality).

These important principles are designed to ensure that any decisions about your capacity are made in a way that respects, protects and fulfils your human rights.

Deprivation of Liberty Safeguards (DOLS) and the 'Bournewood Gap'

The Deprivation of Liberty Safeguards (DOLS) are part of the Mental Capacity Act. They are intended to offer additional safeguards for people who lack capacity to ensure they do not have their freedom restricted more than is absolutely necessary, and that any restriction is in their best interests. The DOLS were created as a result of a legal case using human rights to challenge mental health law. An autistic man had been deprived of his liberty whilst receiving treatment at Bournewood Hospital, however he was not formally detained ("sectioned").

There were no specific guidelines or safeguards for adults without capacity who are deprived of their liberty in hospitals and care homes whilst voluntary patients. The Court found that the detention of the man had been unlawful, and identified a gap in mental health law. The DOLS were designed to plug this gap by requiring an authority that wishes to deprive an adult who lacks capacity of their liberty to do so in a way that respects their human rights. In practice this is the purpose for which DOLS should be used.

Introducing human rights law and mental health practice

Why human rights are important for mental health advocates

These examples show the important role human rights can play in striving for better practice in mental health services. First and foremost human rights are a valuable tool for mental health advocacy. The legal duty that applies to most health services under the HRA means that human rights provide another way to challenge poor decision making by public authorities and for ensuring service users receive the care they are entitled to. In this way human rights provides a language which moves away from need or ethical arguments to one based on rights supported by law.

Human rights can also help improve the mental health system more widely. When the HRA became law, one of its aims was to help create a 'culture of respect for human rights' in the UK. This is where public services are delivered in ways that respect, protect and fulfil our human rights. Whilst there are some examples of excellent practice within mental health there is still a way to go in ensuring that services are delivered in a rights respecting way. Mental health advocates have a key role, alongside health services and others, in helping to drive up standards of mental health care and human rights are an important tool in helping to do this.

HUMAN RIGHTS ARE...

"about ensuring that staff...take account of all aspects of the person and that we deliver care to a high standard while involving the person in choices about their care, and that we stand up for people when we see inappropriate care or people not being consulted or bullied by services to accept things they don't really want."

Advisor in an NHS Service

Best interests and human rights

If you lack capacity to make a decision then the person who makes it for you should only make decisions that are in your best interests. Your best interests include thinking about your human rights and how they might be affected by a decision. Having a say about what happens to you is protected by your right to respect for private and family life (see pages 12-13). You still have this right even if you lack capacity to make a decision. This means the person deciding what is in your best interests should treat you with dignity and consider your wishes and feelings.

What is capacity?

Capacity is about your everyday ability to make decisions about what happens to you, including decisions about your treatment and care. Having mental health problems does not automatically mean you do not have capacity. The MCA sets out a legal test to decide whether or not you have capacity. The person who is unsure about your capacity needs to show that you cannot make the decision because of impairment of your mind or brain. Impairment could be for a range of reasons, including mental illness, learning disability, dementia, brain damage, or intoxication. The next step is to see if you are able to **understand**, **remember** and **weigh up** the pros and cons of your choices, and **communicate** a decision.

Capacity is 'task-specific'. This means it focuses on the specific decision that needs to be made at the specific time the decision is required. If your incapacity is **temporary** you can ask officials to **delay** the decision until you regain your capacity. They should do this if it is reasonable. If you lack capacity to make one decision this does not mean you lack capacity to make other decisions. If you need to make other decisions your capacity should be looked at again.

HUMAN RIGHTS ARE...

"basic rights to humane dignified treatment and things I should have access to simply because of the fact I am a human being."

Woman who uses mental health services

2. HOW THE HUMAN RIGHTS ACT WORKS

The Human Rights Act (HRA) is one of the main laws protecting your human rights in the UK. It contains a list of 16 rights (called Articles) which belong to all people in the UK, and it outlines several ways that these rights should be protected.

It's YOUR Human Rights Act and you can use it to make a difference: The HRA provides a useful and practical tool which can be used by non-lawyers and non-specialists. Human rights are not about needs, charity or "being nice"; they have legal teeth. The HRA is designed as a framework to help negotiate better outcomes before it gets to court stage (unless it has to). You can hold public authorities to account without necessarily having to go to court, if they appear to act in ways that don't respect your rights. Many individuals have done so, and this guide provides information, tools and tips on how you can too.

In everyday situations: Section 6 of the HRA places a duty on public authorities to behave in ways that comply with our human rights. This means that you have rights and public authorities have legal responsibilities for respecting, protecting and fulfilling human rights. This duty is important in everyday situations because it enables you to challenge poor treatment and to negotiate better solutions, based on a language of rights and duties. Rather than waiting to be challenged, public authorities can also use the HRA proactively to develop and deliver services, policies and practices.

Who has duties under the HRA? Only public authorities or bodies exercising public functions have legal duties under the HRA. This includes:

- The police
- NHS organisations and staff
- Local authorities and their employees, e.g. social services, housing etc
- NHS and private nursing and care homes arranged for out of public funds
- Prison staff
- Courts and tribunals, including Mental Health Tribunals
- Government departments and their employees

When the HRA was being made law it was intended to apply to a wide range of organisations, recognising that lots of public services are now performed by private organisations and charities. The Government also recently said they believe all publicly funded health and care services, including contracted and commissioned services, should consider themselves bound by the HRA.

Individuals and private companies do not have legal duties under the HRA. This means you cannot bring a claim against other individuals like your family or neighbour. However, positive obligations on public authorities mean they sometimes have to step in and protect you from harm from such people; this is explained below.

How human rights duties work: You can think of the duties under the HRA as requiring three types of actions. These are:

- **Respecting your human rights:** this means not doing something which restricts your human rights (it is sometimes called a negative obligation). For example the right to be free from inhuman and degrading treatment (Article 3) means a public authority should not treat you in such a way.
- **Protecting your human rights:** this means public authorities must take action to prevent human rights abuses (this is called a positive obligation). This can sometimes include taking action to prevent non-public officials from harming you. For example, under the right to life, officials should not unlawfully take your life (the negative obligation) but they should also have systems in place to protect life and take action if you are in real and immediate danger (the positive obligation). This includes protecting people from the risk of suicide (see page 9).
- **Fulfil your human rights:** this means public authorities should take steps that strengthen access to and realisation of human rights. It is sometimes called a procedural or process obligation because it includes having systems in place to prevent or investigate human rights abuses. For example, the death of a person detained in a mental health hospital should be investigated (usually an inquest).

Introducing human rights law and mental health practice

Absolute rights, non-absolute rights and balancing rights:

Some human rights are absolute. This means they cannot be restricted under any circumstances or for any reason. For a decision, policy or action to breach an absolute right it must have a serious impact on you. The right to be free from inhuman and degrading treatment is an absolute right and is discussed on pages 10-11.

Other rights are non-absolute and can sometimes be restricted without being considered a breach of the HRA. The right to liberty is sometimes called a limited right because it can only be restricted in very specific situations. For example being detained on mental health grounds is a lawful interference with your right to liberty; as long as it is done in accordance with mental health law and is proportionate (see pages 11-12).

Other rights like respect for private and family life (see pages 12-13), are sometimes called "qualified rights", which means they can be restricted provided the following **tests** are met:

- Is the restriction **lawful**? This means there must be a law which allows the restriction. For example, in mental health situations, is the restriction allowed under the Mental Capacity Act (MCA) or the Mental Health Act (MHA)?
- Is this restriction for a **legitimate reason**? These are set out in the right, and include reasons such as the need to protect you or others, to consider the rights of others or the wider interests of the community, such as national security or resources.
- Is the restriction **necessary**? This means it must be **proportionate**. A **balancing act** needs to be carefully carried out; public authorities must be able to show that they have taken your rights into account, and that the restriction is as minimal as possible to achieve a legitimate aim. In other words, they shouldn't use a sledgehammer to crack a nut!

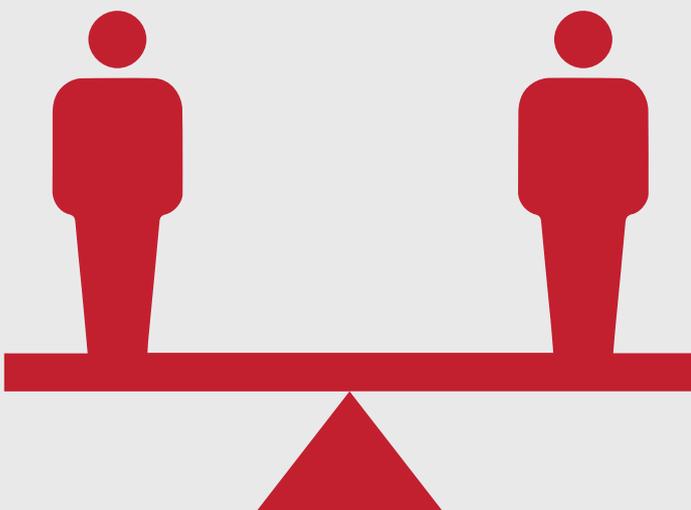
Proportionality in real life:

An action is proportionate if it is appropriate and not excessive in the circumstances. For example, if a care home decided to install CCTV in the bedrooms of all residents this would restrict everyone's right to a private life (see pages 12-13). This **blanket approach** is likely to be a disproportionate restriction. As an alternative, which is likely to be a more proportionate approach, the home could only put CCTV in the rooms of residents who posed a risk to themselves and/or others.

When other laws are involved: Some rights are also protected by other laws, such as the Equality Act or the Mental Capacity Act. However, the HRA operates a bit like a 'higher law', and all other laws should be compatible with it. If a public authority claims to have acted correctly because they have based a decision on the MCA (or some other law), it is still worth questioning the decision if it seems not to comply with the HRA.

In the courts: If things cannot be resolved or if your rights are at risk of serious harm you can also go to court to seek justice (see page 19). Because the HRA is like a higher law, the courts will try and interpret other laws like the MHA in a way that is compatible with human rights. It doesn't matter if the law was passed before the HRA or after it. For example, the courts have interpreted "nearest relative" under the MHA to include same sex partners (R (SG) v Liverpool City Council, 2002). If it is not possible to interpret laws as being compatible with human rights, courts can issue a 'declaration of incompatibility'. This does not invalidate the law (the law remains in force), but it sends a strong message to parliament to change the law. This has led to some important changes in mental health law, as discussed on page 5

Who can bring a human rights legal case? You can only take legal action in the courts if your human rights have been or are about to be breached by the public authority (you must be a **victim**). This can include family members of the direct victim, particularly when a death has occurred. Advocacy groups and other supporters can only take legal action themselves if they meet the 'victim test' (in such cases groups should get more detailed legal advice). There is nothing to stop advocacy groups from supporting you if you are bringing a claim. As well as the steps outlined in this guide, advocacy groups can think about other ways to challenge poor human rights practices in health and social care services, such as a local campaign.



3. KEY HUMAN RIGHTS RELEVANT TO MENTAL HEALTH

Any of the rights in the Human Rights Act (HRA) may be relevant to advocacy in mental health situations. A full list of the rights (called "Articles") can be found on the back page of this guide. This section sets out some of the rights that are commonly used by advocates helping people with mental health problems.

THE RIGHT TO LIFE

Article in HRA	Absolute?	Justifications for restriction	Positive obligation to take action?	Procedural obligation to have processes and procedures?
Article 2	Yes, should be considered absolute	Very limited circumstances set out in the right	✓	✓
		The right says taking a life will not breach the right to life, when it is to: <ul style="list-style-type: none"> • Defend someone from unlawful violence • To arrest someone or prevent someone in lawful detention escaping • To stop a riot 	There is a positive duty on public authorities to take reasonable measures to protect your right to life where they know, or should know, that it is at risk from officials or others.	There is a duty to investigate deaths, especially where public officials may be implicated / involved

Potential issues in mental health:

- Suicide in detention, where the person is known to be at risk of suicide
- Abuse or neglect in detention leading to death
- Refusing to give life-saving treatment to you because of your mental health problem
- Deciding not to resuscitate you (unless you have requested this), without consulting you or your family

Cases in the courts:



Duty to take reasonable steps to prevent real and immediate risk of suicide in detention

A woman was detained under the Mental Health Act and committed suicide after absconding from the hospital. The court ruled that the hospital had failed in its duty to protect her right to life (Article 2). The right to life places a positive obligation on hospitals (and other institutions like prisons) to protect life where there is a real and immediate risk of a patient committing suicide that they know about, or should know about. (Savage v South Essex Partnership NHS Foundation Trust, 2009)



Duty to prevent suicide applies even if patient is voluntary

This duty also applies to voluntary patients. A 24 year old woman was admitted to hospital as a voluntary patient following a suicide attempt and then committed suicide whilst on leave. The court ruled that the hospital had not taken reasonable steps to protect her right to life, including by detaining her under the Mental Health Act, to try to prevent her suicide. (Rabone v Pennine Care NHS Foundation Trust, 2012)



Positive obligation to protect life should not be at all costs

The courts have ruled that the positive obligation to protect life under Article 2 should not "impose an impossible or disproportionate burden on the authorities". For a court to find a violation of the positive obligation to protect life, it must be shown that the authorities knew or ought to have known at the time of a real and immediate risk to the life of an identified individual and that they failed to take reasonable measures which might have been expected to avoid that risk. (Osman v UK, 1998)

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THE RIGHT TO BE FREE FROM TORTURE, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT

Article in HRA	Absolute?	Justifications for restriction	Positive obligation to take action?	Procedural obligation to have processes and procedures?
Article 3	✓	x	✓	✓
		Because there is no justification for interfering with this right, treatment must have a very serious impact to be considered inhuman or degrading.	Includes a positive duty on public authorities to take reasonable steps to protect you from such treatment or punishment, where they know, or should know that you are at risk.	Includes a procedural duty to investigate where torture, inhuman or degrading treatment has occurred

Explaining the right

Prohibits 3 types of treatment:

Torture:

- severe physical or mental pain inflicted by state officials with the intention of punishing/persuading

Inhuman treatment or punishment:

- less severe than torture, but still causes intense physical or mental suffering
- does not need to be intentional – neglect or carelessness leading to inhuman treatment could still be a breach of Article 3

Degrading treatment or punishment:

- less severe than inhuman treatment, but causes feelings of fear or anguish, or grossly humiliates
- does not need to be intentional – neglect or carelessness leading to inhuman treatment could still be a breach of Article 3

The idea of dignity is at the heart of this right. If you think you are being treated in an undignified way, you should think about whether this right has been affected and if your right to private and family life is relevant (see pages 12-13).

The level of suffering has to be very severe to qualify as inhuman and degrading treatment for the purposes of this right. This is because it is an absolute right. If that very high threshold is reached, there are no other factors, such as resources, or national security, which can justify such treatment (most other HRA rights are non-absolute, e.g. see Article 8 see pages 12-13).

Whether treatment is severe enough to reach the high threshold will depend on the particular circumstances and the **impact on you**. Factors such as your age, mental and physical condition, gender and the length of time you are subjected to such treatment are all relevant to assess the impact on you. For example depriving a fit and healthy person of food and water for 24 hours is not appropriate, but the impact on a person who is unwell and frail will be even more serious.

Potential issues in mental health:

- excessive force used to restrain
- physical or verbal abuse of patients
- leaving you in your own bodily waste for long periods
- malnutrition and dehydration

Cases in the courts:



Excessive restraint found to be inhuman and degrading

When a young man with autism and epilepsy jumped into a swimming pool, five police officers tried to restrain him, applying handcuffs and leg restraints. He experienced psychological trauma and increased frequency of his epileptic seizures. The court took into account the duration of the force and restraint, the injury sustained, the age, health and vulnerability of the young man and ruled that his treatment was a breach of the right to be free from inhuman and degrading treatment. (It was also found to be a breach of his right to liberty under Article 5, and his right to respect for private life under Article 8, discussed on pages 11 and 12-13). (ZH v Commissioner of Police for the Metropolis, 2012)



Detention without appropriate psychiatric treatment found to be inhuman and degrading

A man was arrested and detained by the police under the Mental Health Act. He was held in a cell for more than 72 hours, where he repeatedly banged his head on the wall, drank from the toilet and smeared himself with faeces.

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He was then transferred to a clinic for treatment. The court took into account his vulnerability throughout his detention and the fact that he had been in dire need of appropriate psychiatric treatment, and ruled that this had diminished his dignity and breached his right under Article 3. (MS v UK, 2012)

Recognition of equal access to justice

A man (B) with a history of mental health problems, diagnosed with schizophrenia, was seriously assaulted by another man, during which part of his ear was bitten off. Despite reporting that he knew his attacker and was willing to testify, the Crown Prosecution Service (CPS) decided to drop the prosecution because of concerns that B would be an unreliable witness. This was based on a brief medical report which concluded that he suffered from a mental condition which might affect his perception and recollection of events. The court ruled that the CPS conclusion was either a misreading of the medical report or "an unfounded stereotyping of B as someone who was not to be regarded as credible on any matter because of his history of mental problems". Article 3 includes a positive obligation on the state to provide protection through its legal system against a person suffering ill-treatment at the hands of others. The nature and manner of the CPS's abandonment of the prosecution increased B's sense of vulnerability and his sense of being beyond the protection of the law. The CPS decision amounted to inhuman and degrading treatment and B was awarded damages of £8000. (FB v DPP, 2009)

Medical treatment without consent potentially a breach of people's rights

Imposing medical treatment on a protesting patient without consent could potentially be inhuman and degrading treatment (or violate the right to respect for private and family life, see pages 12-13). Doctors will have to show that the treatment is a 'medical necessity'. The courts have ruled that "the position of inferiority and powerlessness which is typical of patients confined in psychiatric hospitals calls for increased vigilance in reviewing whether [their rights have] been complied with". But **as a general rule, a measure which is a therapeutic necessity will not be regarded as inhuman or degrading.** (Herczegfalvy v Austria, 1992)

THE RIGHT TO LIBERTY

Article in HRA	Absolute?	Justifications for restriction	Positive obligation to take action?	Procedural obligation to have processes and procedures?
Article 5	x	As set out in the right.	x	✓
		This is a limited right, which can be interfered with in certain defined circumstances, including detention of those with a mental disorder.		Procedural safeguards are written into the text of this right, to ensure anyone detained can challenge the lawfulness of their detention.

Explaining the right

Your right to liberty can be limited where necessary, including being detained if you have a mental health problem. However, detention cannot be arbitrary (unjustified); you must have a specific and recognised mental disorder. Detention under mental health law does not in itself breach the right to liberty, unless it is unlawful. Detention must be necessary in the interests of your health or safety, or for the protection of others.

The right to liberty says that an independent court or tribunal must have the power to review decisions to detain you. The Mental Health Tribunal fulfils this function for mental health patients in England. This review must be carried out 'speedily' and delays or cancellations in hearings may be challenged under the right to liberty.

The right to liberty also means that, if you are detained, you:

- must have the opportunity to have your side of the story represented at a tribunal hearing (either by you or your representative)
- have a right to legal representation
- must have an opportunity to see and challenge the report and other evidence which led to the decision to detain you.

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Potential issues in mental health:

- Excessive restraint for prolonged periods
- Detention in an inappropriate place due to overcrowding in mental health hospitals, such as in a prison, when no prison term has been sentenced by a court
- Significant delays or cancellations of hearings to review detention

Cases in the courts



Right to have detention reviewed 'speedily'

A man who had schizophrenia and was detained under s3 of the MHA, applied for a tribunal hearing and was given a date 8 weeks after his initial application. The court ruled that this was a breach of his right to liberty and to have the lawfulness of his detention reviewed 'speedily'. The court said tribunal hearings should be held as soon as is reasonably possible. (R v Mental Health Review Tribunal London South, 2000).



Safeguards introduced for informal mental health patients who lack capacity

An autistic man, who did not have the capacity to consent or object to medical treatment, was admitted as an informal patient in a mental health hospital. He was later detained under the MHA, but challenged his time spent in the hospital as an informal patient as a deprivation of his right to liberty. The court ruled that his right to liberty had been violated because UK law lacked the necessary procedural safeguards and guidelines on detaining adults without capacity. As a result of this case, the Deprivation of Liberty Safeguards (DOLS) were introduced – see page 5. (HL v UK, 2004)



Authorisations for Deprivation of Liberty Safeguards must be adequately assessed

A young man with a severe learning disability went into a local authority support unit for a couple of weeks when his father was ill. The local authority then kept him there for almost a year, against his and his father's wishes. When he attempted to leave the unit after several months, the authority signed a Deprivation of Liberty authorisation and later said they were trying to place him in a long-term residential unit. The court ruled that his was a breach of his right to liberty; the DOLS assessment was deeply flawed because the man's wishes, and those of his father, had not been taken into account. (The court also found a breach of his and his father's right to respect for family life, see opposite.) (Hillingdon London Borough Council v Neary, 2011)

THE RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE, HOME AND CORRESPONDENCE

Article in HRA	Absolute?	Justifications for restriction	Positive obligation to take action?	Procedural obligation to have processes and procedures?
Article 8	x	✓	✓	✓
		This is a qualified right which can be restricted where necessary, and has to be balanced against the rights of others, or the wider interests of society, such as national security, public safety, the prevention of crime or the economic wellbeing of the country.	Includes a positive duty on public authorities to take reasonable steps to protect your right where they know, or should know, that it is at risk.	Includes a procedural duty to ensure fair decision making processes when considering issues that are protected by this right.

Explaining the right

This right protects four interests, much of which is very relevant to situation(s) you may experience:

Family life includes the right to:

- develop "ordinary" family relationships
- on-going contact if your family is split up

Private life includes the right to:

- physical and psychological integrity. This means having control over your own body and life and includes consent to medical treatment, or support from an independent advocate if you lack capacity to make such decisions. (Except where a health professional can show that the treatment is a medical necessity).
- participate in the life of the community
- have personal information which is part of your private life kept confidential
- have access to information about your own private life

Introducing human rights law and mental health practice

The right to respect for home is not a general right to housing, but respect for the home you already have. This might include a hospital ward or a residential home, e.g. if you have been living there for a significant period of time and established a connection with that particular place.

The right to respect for correspondence includes the right to uninterrupted, uncensored communication with others. This is particularly relevant to the reading of letters.

Dignity is important to this right. If something does not meet the tests of inhuman and degrading treatment (see page 10), it might still be unlawful under the right to respect for private and family life.

This is not an absolute right, which means it **can be restricted in certain circumstances**. However, restrictions cannot be arbitrary; they must meet the following tests

- Lawful – there must be a law which allows the restriction
- Legitimate – there must be a legitimate aim or purpose for the restriction, which is set out in the right
- Necessary – the restriction must be **proportionate** (These tests are discussed in more detail on page 8)

Potential issues in mental health:

Remember this is not an absolute right so some restrictions may be allowed if they meet the tests of being lawful, for a legitimate reason, necessary and proportionate:

- Being removed from your care home when you have been promised it is your 'home for life'
- Being placed in a residential unit a long distance from your family
- When you have been detained, having your mail stopped and read. (However, section 134 of the MHA allows your mail to be withheld and inspected if it is necessary and a proportionate response to meet the aim of making sure you are safe or for the security of the hospital.)
- Abuse or neglect causing pain and suffering which is not severe enough to meet the threshold of being inhuman and degrading treatment (Article 3, discussed on pages 10-11)
- Keeping you secluded, alone in a room and supervising you, without good reasons that consider your rights.
- If you have been detained, preventing you from developing family/other relationships, or controlling your choice of partner.

- Refusing to allow family visits or contact when you are in hospital/other institutions.
- Removal of personal possessions whilst in hospital/other institutions

Cases in the courts



Consent required for medical treatment

A severely physically and mentally disabled child was admitted to hospital. The doctors gave him a course of medical treatment (morphine) which his mother objected to, and a Do Not Resuscitate order was placed on his notes, without consulting the family. The court ruled that this was a breach of the right to respect for private and family life. The hospital should have asked the court to authorise the treatment, and its failure to do so was a breach of the child's right to physical integrity under the rights protected by Article 8. (*Glass v UK*, 2004)



Medical treatment without consent potentially a breach of people's rights

A 69 year old patient detained at a high-security psychiatric unit was classified as suffering from a psychopathic disorder. His responsible medical officer decided that he needed to be treated with antipsychotic medication, which the patient 'vigorously opposed'. He was forcibly injected with the drugs and had to be physically restrained. The court ruled that the decision to impose treatment on a protesting patient without consent could potentially be inhuman and degrading treatment (Article 3, discussed on pages 10-11) or the right to respect for private and family life. The court said the patient was entitled to a full hearing where the Unit would have to show that the treatment was a 'medical necessity'. This means it must have a substantial benefit for the patient. (*R (Wilkinson) v Broadmoor Hospital*, 2001)

However, where a patient with capacity to consent to medical treatment was given antipsychotic drugs against his will and it was against his religious beliefs, the court decided that this did not reach the high threshold needed to be considered inhuman and degrading treatment (Article 3, discussed on pages 10-11). The court also decided that it was not a breach of his right to respect for private and family life because it was considered to be a proportionate response for the protection of his health. (*R (PS) v Responsible Medical Officer (Dr G)*, 2003)



Introducing human rights law and mental health practice

THE RIGHT TO NON-DISCRIMINATION

Article in HRA	Absolute?	Justifications for restriction	Positive obligation to take action?	Procedural obligation to have processes and procedures?
Article 14	x	✓	x	x
		Not all discrimination is unlawful. To be lawful there must be strong and objectively justifiable reasons.	But sometimes it is necessary to treat people differently, precisely because their situation is different.	

Explaining the right

This is not a stand-alone right to non-discrimination or equality. It prohibits discriminating against you in relation to your other rights in the HRA. It is sometimes called a 'piggy-back' right because it must be attached or linked to one of the other rights in the HRA. For example if you are in hospital and think you are being denied contact with your family because of your mental health problem, you could argue that your right to non-discrimination is being breached (Article 14) in conjunction with or "piggy-backing" with your right to respect for private and family life (Article 8).

Unlike the Equality Act which prohibits discrimination on certain grounds, or 'protected characteristics' (such as gender, age etc), the prohibition on discrimination in the HRA is open-ended and can include discrimination on a wide range of grounds. This includes on grounds of mental health.

Not all differences in the way you are treated will be discrimination. The public authority must be able to objectively and reasonably justify any differences.

Particularly strong reasons are needed to discriminate on the grounds of disability. Discrimination is likely to happen when a public authority has no justifiable reason to:

- Treat you less favourably than other people in the same situation on the basis on your mental health.
- Fail to treat you differently when you are in a significantly different situation to others, for example because of your mental health and/or a disability.
- Apply policies that have a disproportionately adverse effect on you or other people who share a particular status, such as those with mental health problems or lack of capacity.

Potential issues in mental health:

- Bullying or harassment
- Giving you a lower standard of care than people without a mental health problem
- Making assumptions about whether you should live in an institution based on discriminatory attitudes about mental health

Cases in the courts



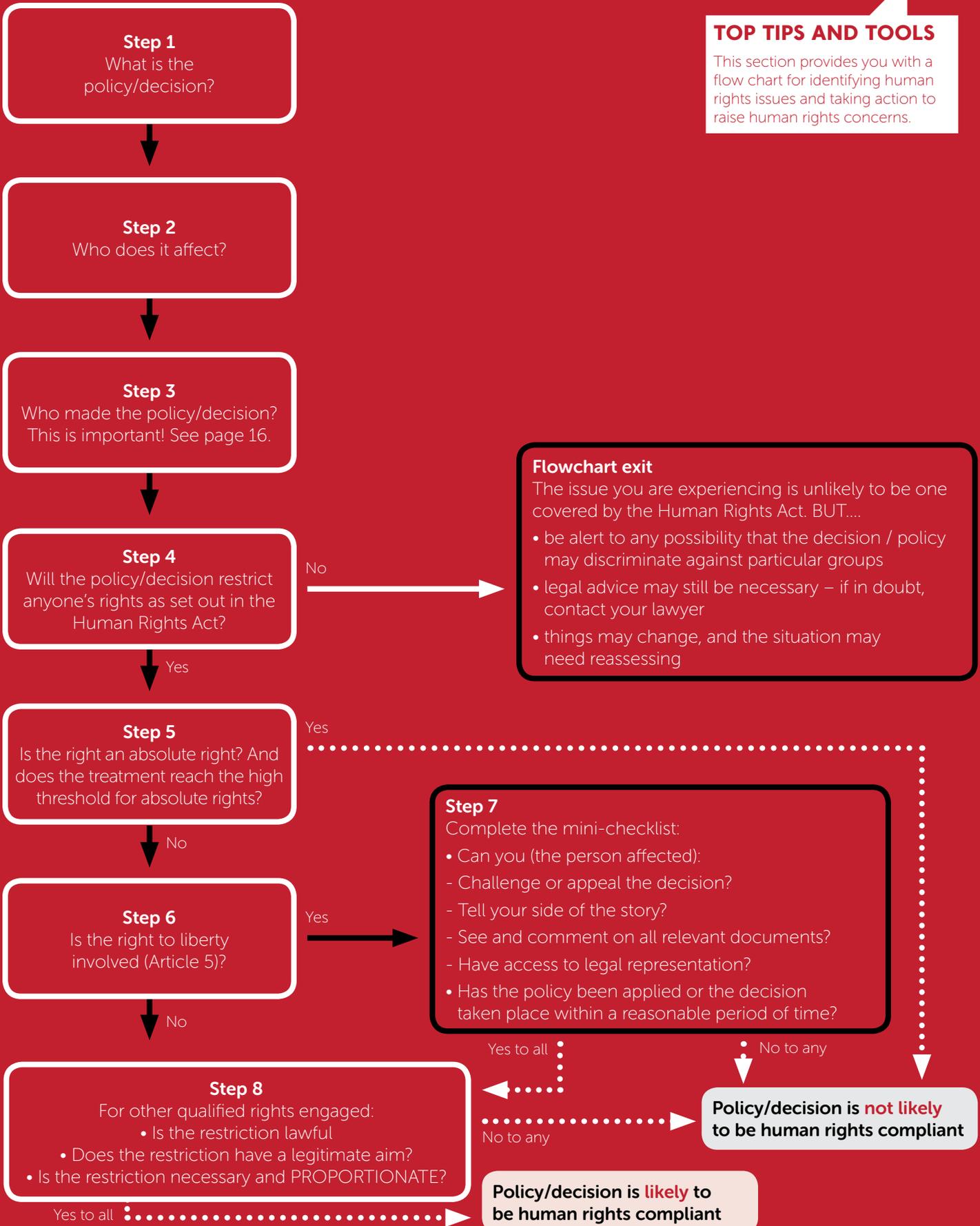
The prohibition on discrimination covers people with mental health problems

People with mental health problems are protected by the prohibition of discrimination under Article 14. This was clarified by the court in a case where people detained in high security psychiatric hospitals challenged the ban on smoking as a breach of their right to respect for private life (Article 8) in conjunction with the prohibition on discrimination in Article 14. This challenge was unsuccessful, as the court decided that freedom to smoke is not part of the right to respect for private life in Article 8. As the prohibition on discrimination in Article 14 is a 'piggy-back' right, the discrimination part of the challenge failed too, as there was no right to piggy-back onto. However, the court said that the difference in treatment between mental health units on the one hand and prisons, care homes and hospices on the other, was justified.



IDENTIFYING A HUMAN RIGHTS ISSUE

TOP TIPS AND TOOLS
 This section provides you with a flow chart for identifying human rights issues and taking action to raise human rights concerns.



Flowchart exit
 The issue you are experiencing is unlikely to be one covered by the Human Rights Act. BUT...
 • be alert to any possibility that the decision / policy may discriminate against particular groups
 • legal advice may still be necessary – if in doubt, contact your lawyer
 • things may change, and the situation may need reassessing

Step 7
 Complete the mini-checklist:
 • Can you (the person affected):
 - Challenge or appeal the decision?
 - Tell your side of the story?
 - See and comment on all relevant documents?
 - Have access to legal representation?
 • Has the policy been applied or the decision taken place within a reasonable period of time?

Step 8
 For other qualified rights engaged:
 • Is the restriction lawful
 • Does the restriction have a legitimate aim?
 • Is the restriction necessary and PROPORTIONATE?



IDENTIFYING A HUMAN RIGHTS ISSUE: EXPLAINING THE STEPS

» Step 1: What is the policy / decision?

What happened, when and where? Be clear about the details of your situation. Once you have done this, clearly identify what it is you want to challenge. Is it **the way you have been treated**, a **specific decision that has affected you**, or a **policy affecting a number of people**?

» Step 2: Who has it affected and how?

Does the policy / decision affect you or a number of people? How has it affected you? Think about the impact it has had on you, and include any relevant information about personal circumstances or characteristics (for example, age, health, gender etc) that are relevant, particularly the impact on your mental health.

» Step 3: Who has made the policy / decision?

Only policies / decisions made by public authorities or those carrying out a public function have duties under the HRA. For a detailed explanation of what a public authority is, see page 7. Even if a public authority hasn't been involved in making the policy / decision they may still have obligations under the HRA to protect you from serious harm. This is known as a 'positive obligation' which is explained on page 7.

» Step 4: Will the policy / decision restrict anyone's rights as set out in the HRA?

How has the policy / decision impacted on your rights? You need to be able to demonstrate that the policy / decision has restricted your rights in some way, and that the restriction amounts to a violation. Think about the individual impact on you (see stage 2). Be as specific as you can and identify exactly which human rights are affected and how they have been affected.

» Step 5: Is the right an absolute right?

The threshold for the restriction of an absolute right is very high because a restriction is not acceptable in any circumstances (see page 7). It's important to remember that most rights in the HRA are non-absolute and can be restricted in certain circumstances.

» Step 6: Is the right to liberty (Article 5) involved?

Detention under mental health law, will restrict your right to liberty, however this will not be an unlawful deprivation of liberty if it meets the requirements of Article 5 (see flowchart). If these safeguards have not been followed the detention may not be human rights compliant.

» Step 8: For other 'qualified' rights (Articles 8, 9, 10, 11, the back page tells you what these are!):

A careful balancing act must be applied to make sure any restriction of a qualified right is lawful, legitimate and necessary and proportionate. For more information about these tests see page 8.

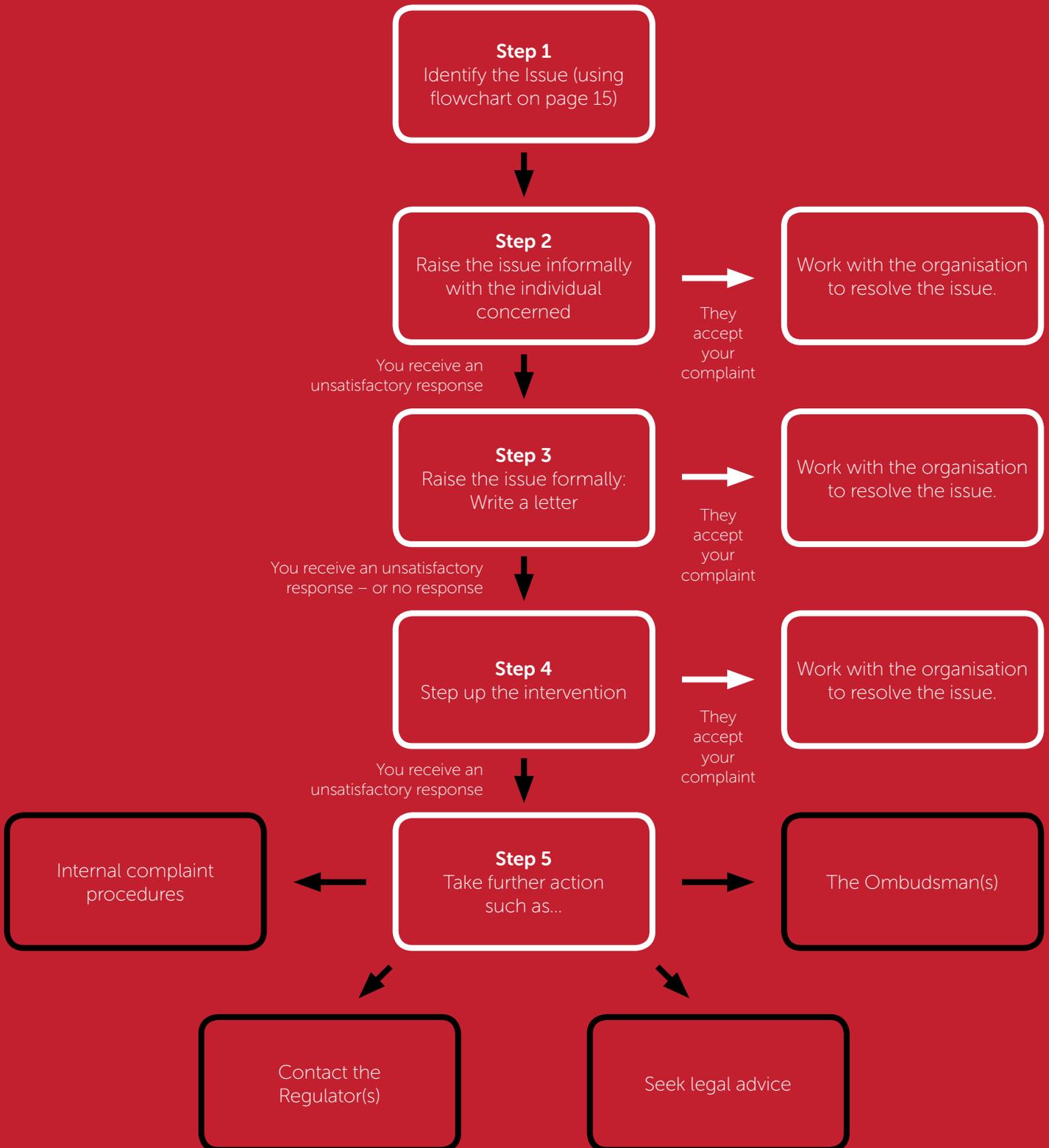
As with any advocacy, the stronger your claim is from a human rights point of view, and the stronger your arguments are, the better. It is worth remembering that a weak claim, or one that is not sound from a human rights point of view, can sometimes be counter-productive. Preparing the ground is important!

Top tips

- ✓ Think about and **record** the impact of a decision/ policy/ treatment on you.
- ✓ Do you need **more information** from the public authority (e.g. about how they made their decision or policy)?
- ✓ Try to think about what the public authority will say to your human rights points by weighing up the choices they have had to make. This will help you prepare and help identify possible **alternatives** they could have considered.
- ✓ Be clear about what you want to **achieve** (e.g. are you trying to reverse a decision or policy or are you only asking for it to be applied flexibly to you?)
- ✓ Remember any process of negotiation may involve a bit of compromise, think about the **minimum** you believe needs to be changed and when it has been achieved.
- ✓ Using human rights language **does not have to be confrontational**, in fact it can help frame discussions in a constructive way. For example, thinking about what is a proportionate response would be, can help you think of an alternative to suggest to the public authority. This approach can avoid putting the public authority on the back foot and can help create a spirit of cooperation and help find solutions.
- ✓ Whether you are having an informal chat or a formal meeting, **practice** your human rights points to help you talk about the issues as confidently as possible.



FLOWCHART FOR ACTION





FLOWCHART FOR ACTION: EXPLAINING THE STEPS

» Step 2: Raise the issue informally

It is often worth raising the problem directly with the public authority that you believe has interfered with your rights. Arrange a meeting with the people that you have been dealing with; or with their managers.

» Step 3: Raise the issue formally: write a letter

If you have been unable to resolve the matter informally, you may want to consider writing a letter of complaint. The public authority should give you a written reply setting out their response to your concerns.

No response? Depending on the severity and urgency of your issue, you can follow up with a phone call to check your letter has been received. If it hasn't re-send it and make a firm request for a response by a certain date and ask to be told when the letter arrives. You could send it by registered post or deliver it by hand.

If the letter has been received but the official is vague about when you can expect a response, or does not appear to take the issue seriously you can resend a copy to the management (e.g. the chief executive or head of a service) with details of your previous letter and the lack of response. You could send a letter to the original person telling them you have written to the managers.

» Step 4: Step up the intervention

Stepping up the intervention may take a number of forms:

- Strengthening the human rights arguments in a follow-up letter. How strongly did you make your case before? Did you outline the rights, are there any positive obligations you could make clear, are there more proportionate responses that could be put in place? Did you specifically refer to the rights and duties in the HRA?
- Asking for an immediate meeting to discuss the response.
- Warning that you may have to take more serious action if the issue is not resolved.
- Writing directly to the next level management as in step 3.

Any follow-up letter or meeting should also ask the authority to explain how they came to the decision which has led to your concern. By asking the public authority to do this, they may well reconsider the issue in light of the law and this can lead to a more satisfactory response. It is also useful to have their full reasoning before taking further action, as it makes it easier to think about how best to challenge the decision.

» Step 5: Taking further action:

There are a number of ways that you can follow up a failure at Step 4, either on your own or by getting help from someone else.

Internal complaints procedures: Most public authorities will have some kind of internal complaints procedure. There is a single complaint system for all health and adult social services in England. The first step is called 'local resolution'.

Key things to know about the local resolution complaints process:

- You have 12 months to make a complaint verbally, in writing, or electronically.
- The responsible body must offer to discuss with you how the complaint is to be handled.
- The responsible body must investigate the complaint as quickly and efficiently as possible and keep you informed of progress.
- Once the investigation is completed they must send you a written response, telling you what they decided and why.
- If the responsible body fails to send you a response within 6 months of making the complaint, they must explain why and respond to you as soon as possible.

The next step is to contact the Ombudsman. **(Please note:** at the time of writing the Government is reviewing NHS complaints procedures and a report is due in summer 2013).

The Health Service Ombudsman can investigate complaints about health services, and the Local Government Ombudsman can look at social care (or they can also jointly review the case). The Ombudsman is entirely independent of the NHS and of the Government. The Ombudsman does not have a duty to investigate every complaint referred to them and usually they will not take on a case until after you have been through the local resolution complaints procedure.

Human Rights in Practice: top tips and tools

Key things to know about making a complaint to the Ombudsmen:

- They will not investigate a complaint if the issue is also part of a legal case.
- A complaint must be made within 12 months.
- The Ombudsman can investigate complaints about an organisation when they have not acted properly or fairly, or have provided a poor service.
- The Ombudsmen can request an organisation to provide an explanation and acknowledgement of what went wrong, and take action to put the matter right, including giving an apology.
- The Ombudsman can also make recommendations to the organisation to ensure changes are made.
- The Ombudsman cannot enforce their recommendations but they are usually followed.

Contact a monitor and/or regulator:

The Care Quality Commission (CQC) is the independent regulator of all health and social care services in England. The CQC is responsible for making sure services are delivered in a way that meets national standards of quality and safety, this includes human rights. The CQC also monitors the use of the MHA and has duties to protect the interests of people who have had their rights restricted under the Act.

The CQC can investigate complaints from, or about, people who are, or have been detained in hospital, subject to a Community Treatment Order and/or subject to guardianship. Anyone can make a complaint to the CQC about how the MHA is being used including staff, patients and the public.

Healthwatch England is an independent consumer body that acts as the 'patient voice' within health and social care. If you are unsatisfied with the response to your complaint from the organisation involved, you can raise your concerns with your Local Healthwatch. They have the power to 'submit views' to an organisation they believe is handling complaints poorly, and the organisation is legally required to consider these views. They also have the power to enter and view services, and if there are any concerns, Healthwatch England can recommend that the CQC takes action.

Legal advice and actions:

Many issues may be resolved without needing to go to court, but sometimes a court case will be the only way to get your issue addressed. If you think this may be the only solution, you should seek legal advice as soon as possible.

Going to court and/or seeking legal advice and representation from a solicitor usually costs money. You can contact the Legal Aid Agency for more information about getting help with this. Other avenues of support to help with legal advice and proceedings include Trade Unions, University Law Clinics, Pro Bono Law Centres, your local Law Centre or Citizen's Advice Bureau. Remember, taking a case to court is usually a last resort. It is often much easier, quicker, and cheaper to try and resolve issues before they end up in court.

Points to remember if you are considering taking a legal case:

- You have **12 months** from the date of the alleged violation to bring a legal challenge. This time limit applies to a "stand alone" human rights claim.
- If you are already involved in legal proceedings against the public body, such as a negligence case, you can add human rights to this.
- You can also take a human rights claim as part of a special type of legal case called a judicial review, which is a way of challenging decisions made by public authorities on the basis that they are unlawful, irrational, unfair or disproportionate. Judicial review claims must be brought as soon as possible, and no later than **three months** after the date of the decision under challenge. (**Note:** at the time of writing to Government was looking at shortening the three month deadline.)

What the courts can do if you take a human rights case:

- The HRA says that a person whose human rights are violated by a public authority must be provided with a remedy that is necessary, just and appropriate
- The kinds of remedies the court can give include making a declaration that the policy or decision breaches human rights, awarding financial damages, making an order to stop something or to make something happen. The higher courts can issue a 'declaration of incompatibility' (see page 8).

MENTAL HEALTH ADVOCACY

Examples from practice

This section provides some real life examples where people with mental health problems, with the support of their advocates, have used the Human Rights Act (HRA) to challenge poor treatment. They show how using human rights language can help change the way services treat you.

Informal patient not allowed off ward

Jenny was an informal patient in a hospital. She was not being allowed to go off the ward to visit the shops or go for a coffee. When Jenny's advocate questioned the hospital staff about this, they said they didn't feel she was well enough to leave the ward. Jenny's advocate explained to the staff that Jenny was effectively being unlawfully detained against her will and that this might be a breach of her right to liberty (under Article 5 HRA). Staff initially responded by saying the hospital had a duty of care to Jenny. The advocate suggested, with Jenny's agreement, that a staff member could accompany her on outside visits in order to protect her rights and uphold the hospital's duty of care. After consulting with the ward manager, Jenny was allowed off the ward unaccompanied and was perfectly safe. (Source: Mind Brighton and Hove, a partner organisation on BIHR's Human Rights in Healthcare Project)

Patient with mental health problems refused surgery

Advocates successfully supported a Registered Manager of an Independent Hospital to challenge a doctor's decision not to perform surgery on an 18 year old service user with mental health problems. The surgery was required following self-injury, and the patient's GP, her psychiatrist and the staff team all felt it was in her best interest to have the surgery. The delay caused significant distress and pain to the patient. Advocates supported the manager of the hospital to challenge the doctor's decision as an interference with her rights and discrimination, due to her severe mental health needs. As a result the service user has now had the surgery. (Source: one of the partner organisations on BIHR's Human Rights in Healthcare Project).

Parents banned from visiting their son after complaining about bruising on his body

Jim, a young man with mental health problems was placed in residential care on a short-term basis. Lisa and Ben, Jim's parents, were visiting when they noticed unexplained bruising on Jim's body. Lisa and Ben raised the issue with managers at the home but their concerns were dismissed and they were told they were no longer permitted to visit Jim. Lisa and Ben participated in a BIHR training session, after which they went back the care home, this time saying they were concerned that there was a breach of their son's right not to be treated in an inhuman and degrading way and their right to respect for family life. As a result, the ban on their visits was lifted and the home conducted an investigation into the bruising on Jim's body. (Source: BIHR, The Human Rights Act: Changing Lives, second edition. Anonymous)

Mother in supported care has reduced access to her children

Amina was placed in 24 hour supported care because she was experiencing mental health problems. Her children, Sara and Ravi were placed in foster care. The local authority agreed that Sara and Ravi would visit Amina three times a week. These visits were gradually reduced to just one a week due to the authority's lack of staff. Both Amina and the children were very distressed by the decreasing visits and lack of time together as a family. Amina's advocate spoke with the mental health team pointing out that the children's right to respect for family life was at stake. Using this human rights language the mental health team invited children's services staff to the next care programme approach meeting so that the children's interests could be represented. The three visits per week were restored as a result. (Source: BIHR, The Human Rights Act: Changing Lives, second edition. Anonymous)

What is advocacy?

Advocacy is about helping you to express your views or concerns, to explore your choices, to access information and services and to protect and promote your rights. An advocate is independent and there to represent you. Advocacy can be helpful in all sorts of situations, including if you are worried that you are not being listened to by services or professionals. **Instructed advocacy** is when you are able to express your views and an advocate acts on this and helps you to be heard and access services and information.

Non-instructed advocacy is when an advocate acts on your behalf when you are not able to communicate what you want in a particular situation. There are some **legal rights to advocacy** for people who have mental health problems. If you do not have capacity and there is no one to speak on your behalf, the Mental Capacity Act says an Independent Mental Capacity Advocate must be appointed to support you. In some situations the Mental Health Act says you have a right to an Independent Mental Health Advocate (IMHA). An IMHA should support you to understand and exercise your legal rights. The hospital should give you information about IMHAs.

Human Rights in Practice: top tips and tools

The flowcharts in practice: working through Shauna's situation

This section takes "Shauna's" story and shows how you can work through the steps in the flow chart, finishing with an example of the kind of letter you could send to try and resolve the situation. Shauna's story is based on a real life example from one of the partner projects on BIHR's Human Rights in Healthcare Project.

"Shauna is a patient detained under Section 3 of the Mental Health Act (MHA) on a locked women's ward. The patients have recently been moved from their regular ward whilst maintenance works are carried out. Shauna has been moved into a room which was previously a communal sitting room, and was never designed as a bedroom for patients. Shauna does not have a toilet or sink as other patients do, and she only has a bed and a couple of drawers. Every time she needs the toilet, Shauna has to alert a member of staff and be escorted to the locked bathroom down the corridor, and supervised (due to safety risks) at all hours of the day or night. Often, despite Shauna's best efforts, staff are too busy to stop what they are doing and escort her to the bathroom when she needs to go. Out of desperation Shauna sometimes uses the small rubbish bin in her bedroom as a makeshift toilet. Shauna has been told there are no other bedrooms she can be moved to at the moment. This is despite her explaining how degrading she finds having to ask staff to escort her every time she needs the toilet; and also being left with no choice but to use her rubbish bin as a toilet when staff are too busy to assist her."

Working through the flowchart: Identifying a Human Rights Issue

» Step 1: what is the policy/decision?

The decision to carry out maintenance work on a whole ward, requiring relocation of the patients to a location where there are not enough bedrooms to accommodate them all. The decision to house Shauna in a communal space not designed as a bedroom, which lacks adequate facilities like a toilet and sink.

Think /ask about:

- How long the works are expected to last?
- Were the patients pre-warned?
- What was Shauna told?
- Why has Shauna been given this room?
Has the hospital explained their decision?
- Have other options been explored?

» Step 2: who will it affect?

Shauna will be directly affected by living in these conditions.

Think about: the impact it will have on Shauna:

- Think about her age, her situation as someone on a locked women's ward, and the impact this decision has had on her – on her health, emotional well-being, and her relationships with other patients on the ward/staff?

- Have any attempts been made to improve the facilities?
- How are the staff treating Shauna, are they sympathetic to her needs/concerns?

Think /ask about: the impact this might have on the other patients and staff.

- If Shauna is living in what was previously a communal sitting room, does this mean that there is now no communal area for the other patients? If so, are they effectively confined to their own bedrooms?
- As Shauna is now dependent on staff to accompany her to the toilet is this putting additional pressure on their time?

» Step 3: Who has made the decision?

Shauna is a patient detained under the MHA in a mental health institution. If the hospital is local authority/NHS/ social services run, it will have duties under the HRA to uphold her rights. If the hospital is run by a private company or charity, they will be carrying out a public function and will also have duties under the HRA to uphold her rights.

» Step 4: Will the decision restrict anyone's rights as set out in the HRA?

The decision may constitute inhuman or degrading treatment which is not allowed under Article 3 HRA. Shauna has to rely on staff to use the toilet and has had to use a rubbish bin in her room on occasion, this may be degrading treatment (see step 5). If the patients have no communal area as a result of the decision to place Shauna in this room, this may have an impact both on Shauna and the other patients' right to develop relationships and participate in their community which is part of the Article 8 right to respect for private life (see step 8).

» Step 5: Is the right an absolute right?

The right to be free from inhuman and degrading treatment is an absolute right, and therefore has a high threshold. The treatment or consequences of the policy / decision must be severe to violate this right and be considered inhuman and degrading treatment.

Think/ask about:

- How many times has this happened? How long is the make-shift toilet left in her room un-emptied afterwards? What impact does this have on Shauna – on her emotional well-being, on her health?
- Is Shauna often left needing the toilet for long periods – is this painful, or cause her anxiety?
- Shauna has complained of feeling degraded – does she also feel humiliated? Is the impact on her severe?

» Step 6 and 7: Is the right to liberty, involved?

It doesn't appear to be an issue. Shauna has been detained under the MHA and is living on a locked ward. There is no suggestion that the law has been improperly applied. However it is important to make sure that any detention under mental health law is lawful, including human rights compliant (see pages 11-12).

Human Rights in Practice: top tips and tools

Step 8: For all other 'qualified rights' (Articles 8, 9, 10 and 11)

If Shauna and the other patients have no access to a communal space as a result of the decision, this may restrict their rights to respect for private and family life under Article 8. This right can be restricted in certain circumstances, provided the **lawful, legitimate and necessary and proportionate tests** are met (see page 8):

- Lawful: the MHA allows the hospital to keep Shauna in a locked room for her safety (provided the requirements for detaining her have been met)
- Legitimate: the hospital can probably argue that they have a legitimate aim; carrying out maintenance work on the regular ward and keeping Shauna safe in her own locked room.
- Necessary and proportionate: it may be necessary but is the solution of putting Shauna in a living room proportionate?

Think/ask about:

- Have staff considered Shauna's rights and/or those of the other patients' rights?
- Have they considered other options open to them which are less restrictive of those rights?
- Have they balanced their aims against these rights and come up with the best solution?

Sample letter for Shauna's case

Once you have identified the human rights issue(s) you can move onto the next steps in the Flowchart for Action. Using the information you have identified through the steps above, you can now consider raising the issue informally with the hospital/individual concerned. If this doesn't work, you might want to raise the issue formally with a letter. Below is a sample letter on S's case:

Ward Manager
Sunnyside Hospital
Cherry Tree Lane
Timmerton
HR1 1UV

1 April 2013

Dear Mr Thompson,

I am a patient at your hospital and have been affected by your decision to carry out maintenance work on my ward. I have now been moved to a room which was previously a communal sitting room and was not designed to be a bedroom. It does not have a toilet or sink. When I need to use the toilet, I have to wait for a member of staff to escort me to a bathroom and I am supervised 24 hours a day. On several occasions, staff have been too busy to take me to the bathroom and out of desperation I have had to use the rubbish bin in my room as a toilet.

As an NHS hospital, you have a legal duty under the Human Rights Act (HRA) to respect and protect my rights. I believe my treatment is a violation of my rights under Article 3 of the HRA, this is my right to be free from inhuman or degrading treatment. My treatment has had a detrimental impact on my emotional well-being. I feel degraded and humiliated by having to use a rubbish bin as a toilet, which then sits in my room until staff have time to empty it (which sometimes is hours). This situation causes me anxiety and distress and I feel my treatment has reached the threshold of being degrading treatment under Article 3. This is an absolute right, so there is no justification allowed for breaching it, such as lack of resources.

I also feel that my rights, and those of the other patients, to respect for our private life (Article 8, HRA) are being breached by having no access to a communal area (as I am having to use it as a bedroom). Although I appreciate that you need to carry out this maintenance work, have you considered our human rights in your decision to allocate me this room? Have you considered other options which are less restrictive of this right, such as finding me another room on a different ward, or finding another suitable space to use as a communal area?

I would like you to respond to my letter within the next two weeks and I look forward to hearing your response. I would like to resolve this matter as soon as possible. If we are not able to find a solution, I would like information about how to make a formal complaint.

Yours sincerely,

Shauna

The British Institute of Human Rights (BIHR) is a UK-wide independent human rights charity committed to bringing rights to life in the UK. We support people and organisations to know about human rights, put them into practice in everyday life beyond the courtrooms, translating the law into a force for positive change. We marshal this evidence of human rights in action in the UK to inform law and policy change.

BIHR has been working on human rights in healthcare for over 10 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 over 1000 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.

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Useful contacts

Below you can find the contact details for bodies mentioned in this guide, and some other useful places you can try for advice and support.

Advice UK:

(Do not give out advice but website has a directory of advice centres) website www.adviceuk.org.uk. Telephone: 020 7469 5700

Care Quality Commission:

Website: www.cqc.org.uk. Telephone: 03000 616161 (press '1' to speak to the mental health team). In writing: CQC Mental Health Act, Citygate, Gallowgate, Newcastle upon Tyne, NE1 4PA

Citizens Advice:

Website: www.citizensadvice.org.uk, advice website: www.adviceguide.org.uk. Telephone: 020 7833 2181 (not an advice line, but can provide details of your local Citizens Advice Bureau that can give you advice)

Equality Advisory Support Service:

Website: www.equalityadvisoryservice.com. Telephone: 0808 800 0082, Textphone: 0808 800 0084. In writing: FREEPOST EQUALITY ADVISORY SUPPORT SERVICE FPN4431

Health (and Parliamentary) Ombudsmen:

Website: www.ombudsman.org.uk. Telephone: 0345 015 4033 Textphone (Minicom): 0300 061 4298. In writing Parliamentary and Health Service Ombudsman, Millbank Tower, London, SW1P 4QP

Healthwatch England and Your Local Healthwatch:

Website www.healthwatch.co.uk. Telephone central Healthwatch England 03000 683 000

Legal Aid Agency:

Website: www.justice.gov.uk/contacts/legal-aid-agency. For the Mental Health Unit (MHU) queries telephone 0151 213 5350 email liverpool@legalaid.gsi.gov.uk. In writing: Legal Aid Agency, Level 6, The Capital, Union Street, Liverpool L3 9AF

Liberty Public Advice Line:

(for individuals and advocacy organisations) website www.yourrights.org.uk. Telephone 0845 123 2307

Local Government Ombudsman:

Telephone 0300 061 0614. Website: www.lgo.org.uk In writing: The Local Government Ombudsman, PO Box 4771, Coventry, CV4 0EH

Please remember: the information in this guide is not legal advice. If you have serious concerns that your human rights are being abused or are at risk of being abused you may need to seek legal advice. If you have concerns about your safety or that of a child you should contact social services or the police. Information about where you can go for further advice is provided at the end of this guide



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www.bihr.org.uk • www.bihr.org.uk/ebulletin-signup

THE RIGHTS CONTAINED IN THE HUMAN RIGHTS ACT ARE:

Article 2: Right to life

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

Article 4: Right to be free from slavery or forced labour

Article 5: Right to liberty

Article 6: Right to a fair trial

Article 7: Right not to be punished for something which wasn't against the law at the time

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

Article 9: Right to freedom of thought, conscience and religion

Article 10: Right to freedom of expression

Article 11: Right to freedom of assembly and association

Article 12: Right to marry and found a family

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

Article 1, Protocol 1: Right to peaceful enjoyment of possessions

Article 2, Protocol 1: Right to education

Article 3, Protocol 1: Right to free elections

Article 1, Protocol 13: Abolition of the death penalty