

Shining a light on human rights

Mental Health Accommodation, Support 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 accommodation based support settings for people with mental health issues. It is aimed at support workers, mental health practitioners and anybody else working in residential settings where mental capacity or mental health is a factor. 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 services, see www.bihr.org.uk).

This booklet was written by the British Institute of Human Rights (BIHR), in partnership with St. Martin of Tours Housing Association. This service is working with BIHR on our project called **Delivering Compassionate Care: Connecting Human Rights to the Frontline**. The project aims to place human rights at the heart of mental health and mental capacity 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 practitioners at St Martin of Tours for their help in producing this booklet, particularly the Human Rights Leads for their ideas, advice and guidance.

This booklet should be read in conjunction with our other resource **‘Mental Health, Mental Capacity and Human Rights: A practitioner’s guide’**. That resource contains more information about how UK law protects human rights, key rights for mental health/capacity services and where to find more information/support.

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Mental health accommodation, support and human rights

As services providing accommodation based support for people with mental health issues (either moving from other institutions such as secure hospitals or prisons, or moving into more supported settings after living independently), the aims of resettlement, recovery and rehabilitation support work align with human rights values. This includes supporting people to:

- maintain their independence and well-being, in the least restrictive setting possible
- make decisions about their own life in accordance with their wishes and beliefs
- participate in their community, finding ways to overcome the limits and obstacles associated with long-term mental health issues

Independence, autonomy and participation are key human rights values protected by the **right to respect for private life** (Article 8 in the Human Rights Act 1998). This booklet aims to give practitioners the knowledge and confidence to use human rights in practice to design and deliver rights-respecting services. It focuses on three key issues for mental health accommodation and support, identified by our partner.

one

‘Unwise’ lifestyle decisions in community residential settings

Many of the most challenging issues faced by staff in community residential settings involve residents whose private lives and personal decision-making may be seen to be jeopardising their own recovery and well-being (and perhaps that of others). This means support workers often have to balance their duty to protect the well-being of residents against their duty to respect the autonomy of residents. This can be particularly challenging when residents are making what some staff might consider to be ‘unwise’ lifestyle choices. A human rights approach can help practitioners strike this balance.

Potential human rights issues for practice

- people pursuing a lifestyle in the community that effectively prevents any rehabilitation from taking place in the support setting
- people in vulnerable positions making risky decisions in the community leaving staff uncertain about whether or not to intervene
- failing to act to protect someone in your care from serious risk of harm, or an immediate risk to their life
- residents making choices that might put at risk their license or tenancy, for example by using drugs on the premises
- risk management policies having a disproportionate impact on a particular person or group of residents

A human rights approach to ‘unwise’ lifestyle decisions in community residential settings

This could include:

- ✓ starting from the assumption that people have a right to make their own decisions, even those considered unwise
- ✓ understanding how doubt about a person’s capacity to make a decision triggers the need to take more positive steps to protect their right to stay in control of their life
- ✓ taking positive steps to support a person in areas where they may struggle to exercise their rights as a result of personal, social or environmental factors
- ✓ reviewing policies, rules or procedures to ensure they are rights-respecting and are only used in cases where it would be proportionate and necessary
- ✓ managing personal and sensitive information about residents (including lifestyle choices) in a way that carefully balances their right to privacy/autonomy with the duty to protect their well-being and that of others

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

Key rights for ‘unwise’ lifestyle decisions in community residential settings

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

(protected by Article 8 in the Human Rights Act)



The right to **private life** protects people’s **privacy, autonomy** and **well-being** including:

- people having their own private space and not being subjected to excessive checks or surveillance by staff
- having control over their own lives, making their own decisions/choices and managing their own affairs without outside interference
- living free from abuse or neglect

The right to **family life** includes people forming and maintaining relationships and having support to have meaningful, regular contact with people close to them.

The right to respect for **home** can include community residential settings, such as supported housing, and decisions to evict a resident/tenant.

The right to respect for **correspondence** includes residents being able to send and receive emails and letters without staff intercepting or reading them.

Relevant practitioners’ duties:

- ♥ to respect this right: not interfering where possible unless it is lawful, for a legitimate reason and proportionate
- 🛡 to protect this right: taking action to protect where necessary

See our other booklet **‘Mental Health, Mental Capacity and Human Rights: A practitioner’s guide’ page 17** for more information, including your other duties.

Right to be free from inhuman or degrading treatment

(protected by Article 3 in the Human Rights Act)



This right could be relevant where a person is at risk of serious physical or mental harm, including:

- serious harm arising as a result of a lack of care/support or self-neglect
- severe abuse or ill-treatment by others (which could include practitioners, family members, carers, other individuals etc)

Relevant practitioners’ duties:

- ♥ to respect this right: not breaching in any circumstances
- 🛡 to protect this right: taking action to protect a person from a known and immediate risk of serious harm, often called **safeguarding**

See our other booklet **‘Mental Health, Mental Capacity and Human Rights: A practitioner’s guide’ page 12** for more information, including your other duties.

Right to life

(protected by Article 2 in the Human Rights Act)



In very serious situations a resident’s right to life may be relevant. This includes a positive duty to take reasonable steps to protect a person’s life where you know it is at real and immediate risk, including from themselves (for example through lifestyle choices).

See our other booklet **‘Mental Health, Mental Capacity and Human Rights: A practitioner’s guide’ page 10** for more information, including your other duties.

In real life:

Balancing people’s right to respect for private life

“As a provider of mental healthcare and accommodation, St Martin of Tours Housing Association supports people with mental health issues and with offender backgrounds who need help to maintain their independence or to step down from secure hospital wards, prisons and similar institutions.

Prior to getting involved in BIHR’s project, we were very hands off about room searches, drugs and managing visitors. It was very liberating to find out that the right to respect for private life is a non-absolute right which can be balanced against the rights of others, prevention of crime etc. We’ve been able to use that framework to build room searches into residents’ care plans and help keep drugs out of the ‘projects’ (housing units).

We also had a blanket ban on visitors going upstairs in one of our projects because some residents had a history of sexual offences. We’ve now used human rights to amend our policy and assess visiting on an individual basis, which allows us to balance safety against resident’s right to privacy.”


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


ONE: Decision-making flowchart


Responding to lifestyle decisions considered 'unwise'

This flowchart is for practitioners working in community residential settings considering intervening in a resident's lifestyle choice they might consider unwise



 Duty to **protect** person's private life (well-being and participation in community)

 Duty to **protect** person's private life (well-being)

 Duty to **respect** person's right to private life (autonomy)

Step 1. Is the person's lifestyle choice putting their own/others' life at immediate risk? Or putting the person/others at risk of serious harm?

YES

NO

Move to step 2

Take immediate action (see note overleaf).

And if you have concerns about the person's capacity to make the decision about their lifestyle, arrange a mental capacity assessment:

- if the person has capacity to decide: provide support and keep under very close review
- if the person has no capacity to decide: arrange a best interests assessment

Move to step 2

Step 2. Is the person's well-being at risk?

YES

NO

Yes: if the person is at risk of (less serious) harm as a result of their lifestyle choice, you must take reasonable steps to protect the person.

Move to step 3

Move to step 3

Step 3. Are you considering intervening in the person's life because of their lifestyle choices?

(Your duty to respect the person's private life includes respecting their right to be in control of their own life.)

YES

NO

The person's right to respect for private life is not an absolute right; you must follow the three stage test to see if your interference would be permissible:

1. Lawful: the Mental Capacity Act will only permit you to interfere with the person's autonomy if they lack capacity to make that decision. If not already done so, arrange a mental capacity assessment. If assessed as not having capacity, arrange a best interests assessment, but that should aim to protect the person's right to autonomy as much as possible. AND
2. Legitimate aim: you must have a legitimate reason for the intervention, such as to protect the rights of others. AND
3. Proportionate: is the intervention you plan to make proportionate to that aim? You must choose the least restrictive option.

Exit the flowchart

Explaining the steps in the flowchart



Step 1. Is the person's lifestyle choice putting their/another's life at risk? Or at risk of severe harm?

When answering these questions, remember that there needs to be actual evidence of a link between the lifestyle choice and the risk of death or serious harm. What type of harm is being caused? How serious is it? What are the consequences for the person?

What reasonable steps you'll need to take to respond to the risk will depend on the circumstances. An immediate risk requires an immediate response, for example contacting emergency services or requesting a Mental Health Act 1983 (MHA) assessment.

Responding to a less immediate risk may require a different approach, for example making a safeguarding referral or completing a mental capacity assessment where there is genuine concern about the person's capacity to make the decision.



Step 2. Is the person's well-being at risk?

If the risk of harm to the person is less serious or immediate, it will engage your duty under the right to respect for private life (Article 8) to take reasonable steps to protect the person's well-being. This could include offering support/advice or, if you have genuine cause to doubt the person's capacity to make a particular decision about their lifestyle, arranging

a mental capacity assessment. Remember that a person who has capacity can make a decision which others might consider unwise; that is a key part of their autonomy and independence, protected by Article 8.



Step 3. Are you considering intervening in the person's life because of their lifestyle choices?

A key part of the right to protect private life is protecting a person's autonomy and independence. This includes people having control over their own lives, making their own choices, based on what they want and not on what others believe is best for them. To interfere with a person's choices about how they want to live would interfere with their right to private life. This is not an absolute right and interference may be necessary in order to fulfil your legal duties to protect their other rights (as above). However restricting a person's right to private life is a serious step and any action taken will have to meet the 3 stage test:

1. **Lawful:** the Mental Capacity Act 2005 (MCA) will only permit you to interfere with the person's autonomy if they lack capacity to make that decision. The MHA might be relevant if you have concerns about the person's mental health. If not, there isn't a law which would permit you to interfere with a person's decision about their lifestyle where they have capacity. If you do need to use the MCA or MHA, you would still need to follow the next two steps...
2. **Legitimate aim:** you must have a legitimate reason for the intervention. These are written into the right and include protecting the rights of others. AND
3. **Proportionate:** is the intervention you plan to make proportionate to that aim? You must consider all options open to you to achieve the legitimate aim and choose the least restrictive option.



Respecting people's autonomy

Applying the principles of the MCA is an important part of ensuring that any interference in a person's private life is lawful because the MCA is designed to protect the independence of people whose right to make their own decisions is most at risk. The MCA Code of Practice sets out a test to assess mental capacity but before doing the assessment, you should consider how the 5 principles apply in each individual case:

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because they make an unwise decision.
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in their best interests.
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Responding to physical and/or verbal aggression in community residential settings

Uncertainty about how to respond proportionately and effectively to physical and/or verbal aggression in this setting can be challenging for support workers who must try to balance their duty to respect the rights of the person with their duty to protect staff and other residents. A human rights approach to this issue would work towards a culture of residents and staff being aware of their own rights, as well as staff members' responsibilities to protect the rights of others. This includes ensuring risks associated with aggressive behaviour are taken seriously, whilst at the same time seeking to understand the causes and to find the least restrictive way of resolving the issue.

Potential human rights issues for practice

- failing to take steps to address predictable/known aggressive behaviour
- unclear policies or lack of training for staff leading to uncertainty about how to respond to physical and/or verbal aggression
- failing to recognise that aggression could be a sign that a person's mental health may be deteriorating, or a side-effect of medication
- an expectation that staff or residents will tolerate aggressive behaviour from others in this setting
- responding to physical and/or verbal abuse reactively and disproportionately, which could interfere with the person's rights

“Using a human rights approach has revolutionised decision making. Staff are thinking differently and making decisions differently. It needs to be rights based, not just risk based.”

Paul Hill, North Essex Partnership University NHS Foundation Trust, from BIHR's Delivering Compassionate Care project

Key rights for responding to physical and/or verbal aggression

Right to respect for private life (protected by Article 8 in the Human Rights Act)



The right to private life protects people's **well-being** and **autonomy**, including:

- taking steps to protect residents and staff from treatment or behaviour that has a negative impact on their physical or mental wellbeing, including predictable/known aggressive behaviour, abuse, intimidation or assault
- respecting residents' autonomy, including their ability to think and act in accordance with their own wishes and beliefs

Relevant practitioners' duties:

- to respect this right: not interfering where possible unless it is lawful, for a legitimate reason and proportionate
- to protect this right: taking action to protect where necessary



See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide'** page 17 for more information, including your other duties.

Right to be free from inhuman or degrading treatment (protected by Article 3 in the Human Rights Act)



This right protects against serious harm caused by abuse/neglect and could include:

- taking reasonable steps to protect residents/staff/others from serious harm in response to information about historical and current risk of violence
- taking reasonable steps to provide a safe living and working environment for residents and staff
- reasonable steps could include conducting risk assessments or sharing relevant information about risk with others who need to know about it for their own protection or to protect others

Relevant practitioners' duties:

- to respect this right: not breaching in any circumstances
- to protect this right: taking action to protect someone from a known and immediate risk of serious harm, often called **safeguarding**



See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide'** page 12 for more information, including your other duties.

In real life:**Responding to physical and/or verbal aggression**

As a provider of mental healthcare and accommodation, St Martin of Tours Housing Association supports people with mental health issues and with offender backgrounds who need help to maintain their independence or to step down from secure hospital wards, prisons and similar institutions. With an increasing number of complex referrals and residents exhibiting behaviours of concern, they applied to be a part of BIHR's project to see if human rights could help change their philosophy of care.

Following an increase in violent incidents in their projects (housing units) where both staff and residents had been assaulted, they used human rights to review their internal policies and practices on dealing with violent behaviour. They are now recording incidences of physical and/or verbal aggression more closely, assessing people to ensure they are getting the mental health support they need, working more closely with the police and talking about this with residents and neighbours as a positive step to create a safe environment for well-being and recovery. As a result, violent incidences have been reduced by 50% and evictions are also down.

“Using a human rights approach has helped change the character of the service and was a wonderful way to bring us back to focusing on the human beings that our service users are.”

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

A human rights approach to responding to a breakdown of care arrangements

This could include:

- ✓ empowering residents, staff and others who visit the setting (family/carers etc) about their rights and the expectation for everyone to respect the rights of others to live free from abuse (whilst being clear that only staff have legal duties to respect rights under the HRA)
- ✓ taking risk seriously and responding proportionately, taking into account all relevant factors such as the context, frequency, likelihood and severity of any violence or aggression
- ✓ attempting to understand the significance of hostile and aggressive behaviour for the person, including any links to their mental health issue
- ✓ taking positive steps to support residents to self-manage their anger and aggression by identifying triggers, learning anger management techniques or using advance statements
- ✓ taking early preventative measures to de-escalate potential incidents and only ever using restraint as a last resort (which could engage people's right to liberty – see our other booklet 'Mental Health, Mental Capacity and Human Rights: A Practitioner's guide' page 15 for more information)
- ✓ consulting with victims of violent and aggressive behaviour as part of the process of assessing the emotional and psychological impact of incidents and deciding how to respond
- ✓ continuing to take steps to respect and protect the human rights of residents who are issued warnings or evicted as a result of violence or aggression
- ✓ having clear policies and procedures on responding to violence and aggression, which staff receive appropriate training on and which are shared with residents and visitors
- ✓ having a shared understanding with local police about responding to violence and aggression in this setting

Accessing physical and mental healthcare

A key issue raised by practitioners, advocates and service users alike is the lack of parity between physical and mental healthcare and the difficulties or discrimination faced by people with mental health issues when trying to access physical healthcare. Life expectancy for people diagnosed with certain mental health issues can be up to 20 years lower compared to the general population. A human rights approach can help support workers to take positive steps to make it easier for people to access the physical and mental healthcare they need.

Potential human rights issues for practice

- a person presenting with physical health issues not being taken seriously because they have/ previously had a mental health issue
- lack of support for a person accessing mental healthcare to access physical healthcare
- people being denied access to vital treatment for discriminatory reasons, such as their mental health and/or capacity issue, being homeless/of no fixed abode/not being registered with a GP
- long delays for mental health assessments where no steps are taken to protect the person's human rights in the interim period
- patients accessing physical healthcare being discharged from hospital too early because they are living in community residential settings
- lack of regular care reviews for people with complex mental and/or physical health needs

A human rights approach to access to physical and mental healthcare

This could include:

- ✓ reviewing policies and procedures to check for any barriers for people with mental health and/or capacity issues to access physical healthcare
- ✓ identifying and challenging any unlawful restrictions, conditions or decisions that could prevent people with mental health and/or capacity issues from being able to access physical healthcare
- ✓ empowering people in your care about their right to respect for private life and how it includes access to the physical healthcare they need to maintain their physical and mental well-being
- ✓ empowering people about their right to autonomy (also protected by private life) and to make their own choices about accessing healthcare
- ✓ supporting people to access both physical and mental healthcare where necessary
- ✓ understanding the importance of processes such as multi-disciplinary care reviews for continuing to ensure that a care plan is proportionate and rights-respecting for that person
- ✓ specifying in each person's support plan how and when they can access treatment in a timely way to maintain their independence

Key rights for access to physical and mental healthcare

Right to respect for private life

(protected by Article 8 in the Human Rights Act)



This right protects people's **autonomy** (choice, control, independence) and **well-being**, including:

- people having timely access to treatment that could prevent their physical or mental well-being from deteriorating
- participation in, and control over, decisions about healthcare and treatment

Relevant practitioners' duties:

- ♥ to respect this right: not interfering where possible unless it is lawful, for a legitimate reason and proportionate
- 🛡️ to protect this right: taking action to protect where necessary

See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide'** page 17 for more information, including your other duties.

Right to be free from inhuman or degrading treatment

(protected by Article 3 in the Human Rights Act)



This right could be relevant where lack of access to healthcare leads to severe mental or physical suffering.

Relevant practitioners' duties:

- ♥ to respect this right: not breaching in any circumstances
- 🛡️ to protect this right: taking reasonable steps to protect someone from a known and immediate risk of serious harm, often called **safeguarding**.

"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 Housing Association, from BIHR's Delivering Compassionate Care project.

See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide'** page 12 for more information, including your other duties.

Right to life

(protected by Article 2 in the Human Rights Act)



This right could be relevant where lack of access to healthcare leads to a risk to life.

Relevant practitioners' duties:

- 🛡️ to protect this right: taking reasonable steps to protect the life of someone in your care where it is at immediate risk

See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide'** page 10 for more information, including your other duties.

Right to non-discrimination

(protected by Article 14 in the Human Rights Act)



This is a right not to be discriminated against in relation to any of the rights contained in the Human Rights Act. This could cover:

- decisions to refuse or delay emergency care and treatment due to disputes about a person's legal status in the country
- decisions about access to physical healthcare being based on a person's mental health and/or capacity issue
- rules, procedures or restrictions that might prevent a person with a mental health and/or capacity issue from accessing healthcare in practice

Relevant practitioners' duties:

- ♥ to respect this right: not breaching where possible
- 🛡️ to protect this right: taking into account that sometimes people need to be treated differently, because their situation is different

See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide'** page 20 for more information, including your other duties.

Worked example: accessing physical healthcare

Fola is a 44 year old man with a diagnosis of schizophrenia living in a supported housing project. He has been a resident for just over a year after stepping down from a secure hospital where he was an inpatient for a long time. Fola's mental health is stabilising and he is considering moving into his own flat. One day he tells his support worker, Jo, that he has been feeling unwell with severe stomach cramps. Jo is concerned about Fola's health and says he might want to visit his GP.

A week later Fola still hasn't been to his GP and his cramps are so severe he has to go to A&E. Later that afternoon he returns to the housing project and Jo asks him what the hospital doctor said about his

cramps. Fola tells her that he was sent home by the A&E doctor who told Fola the cramps were 'just in his head' and to go home and take his anti-psychotic medication.

Jo is concerned about this response and asks Fola for a quiet word. She explains that Fola has a right to private life, which includes his well-being, and the doctors at the hospital have a duty to protect this right. She offers to accompany Fola back to A&E so that she can support him to get the care he needs if he would like that. Fola agrees and they return to the hospital to talk to the doctor about Fola's right to well-being. Fola is examined by the hospital this time and a scan is arranged.

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 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.

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