

Shining a light on human rights

Social Care Intervention 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 social care settings. It is aimed at social care practitioners working in 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 **Bristol Social Intervention Service (part of Bristol City Council)**. 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 related 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 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 the Bristol Social Intervention Service 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. Social care practitioners might also find helpful ‘**Learning Disability and Human Rights: A practitioner’s guide**’, another resource in this series.

Social care intervention and human rights

As a service that provides care and support for people whose independence and autonomy might be at risk as a result of their personal and/or social circumstances, the aims of social care intervention align with human rights values. This includes supporting people to:

- be protected from harm where they are unable to protect themselves
- live their lives in accordance with their own wishes and beliefs
- be treated fairly and with dignity, especially when they might be placed in vulnerable situations

Dignity, fairness and autonomy are key human rights values protected by the **right to respect for private life** (Article 8 in the Human Rights Act 1998) and the **right not to be treated in an inhuman or degrading way** (Article 3 in the Human Rights Act). This booklet aims to give practitioners the knowledge and confidence to use human rights in practice to design and deliver rights-respecting social care services. It focuses on three key issues, identified by our partner.

Finding your way around

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

Removing people from their own home to a care setting

Where a person is assessed as lacking capacity to make a decision about where they live, removing them from their own home into a care setting is a serious step with far reaching consequences for the person and their family. Social care practitioners are often required to balance many competing views/demands from family members, other health and social professionals and from the wider community. This can make the task of meeting duties (which come from human rights law), to protect a person from harm and to respect the person's autonomy, challenging. The Human Rights Act provides practitioners with a framework for making a decision about removing a person from their home.

Potential human rights issues for practice

- a person being removed from their home without following the proper legal process (e.g. a capacity assessment and best interests decision, or if appropriate Deprivation of Liberty (DoL) Safeguards under the Mental Capacity Act 2005 (MCA)) and without considering their human rights, including people having a say over what happens to them and being supported to be as involved in the decision as possible
- failing to act on concerns or reports of a person being at risk of serious abuse/neglect or risk to their life
- placing someone in care a distance away from their family, making it difficult for them to maintain relationships

A human rights approach to removing a person from home to a care setting

This could include:

- ✓ only considering an intervention where there is evidence of serious risk of abuse/neglect or a risk to life
- ✓ judging whether the decision to remove a person from home to a care home is really the least restrictive way of achieving your aim to safeguard the person – are there other alternatives?
- ✓ supporting the person (and, where appropriate, their family) to be as involved in the decision as possible
- ✓ considering how the move is likely to impact on the person, including any changes to their lifestyle and relationships, when weighing up whether removal from home is really proportionate to the risks of remaining
- ✓ treating the best interests decision-making process as an investigation into what decision the person may have been most likely to make, had they been in a position to make it themselves
- ✓ ensuring that any person acting as an advocate or representative for the person is genuinely concerned to safeguard the person's best interests including their human rights

Key rights for moving a person into care

Right to respect for private and family life and home

(protected by Article 8 in the Human Rights Act)



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

- people living free from abuse or neglect (including self-neglect)
- people having control over their own living arrangements – where there are genuine concerns about someone's capacity to make a decision about where to live, carrying out an assessment under the MCA and making a best interests decision, while supporting the person to be as involved as possible
- people participating in decisions about their care, including having support to make their own decision about where and how they live
- family members also have protections, to participate in decisions; their views are not determinative and should not override the person's own views. When family member's views support those of the person, practitioners should give them due weight

The right to family life includes:

- maintaining relationships with family
- supporting people to have meaningful, regular contact with people close to them, especially when contact has been disrupted or made difficult as a result of removal from home

The right to home includes:

- respecting the place a person lives as their home
- only intervening in this where absolutely necessary, such as where there is a risk to life or serious abuse/neglect

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 liberty (protected by Article 5 in the Human Rights Act)



This right prevents extreme restrictions being placed on people's movement, except in specific circumstances (such as a DoL Authorisation). Even if a restriction on liberty is for a lawful reason, there are still human rights safeguards which must be in place. Restrictions on liberty could cover removing a person from their home without applying the safeguards of a DoL Authorisation.

Relevant practitioners' duties:

- ♥ to respect this right: not interfering where possible
- ⚠ to protect this right: applying the procedural safeguards written into the right



See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide'** page 15 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 could be relevant when weighing up the risks of removing a person from their home, including where:

- a person is at risk of serious harm from themselves or others
- removal would lead to deterioration in health, causing serious harm

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.

Right to life (protected by Article 2 in the Human Rights Act)



This right may be relevant where a person's life is at risk due to:

- severe abuse or neglect (including self-neglect)
- a risk from another person

Relevant practitioners' duties:

- 🛡️ to protect this right: taking reasonable steps to protect life where necessary, including when someone in your care is in real and immediate risk either from themselves/others



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: removing a person from their home unlawfully

Charlie, 91, has lived in his own home for 50 years. He is affected with dementia and has other health issues. A safeguarding alert is raised after a neighbour reported concerns about suspected financial abuse and his ability to self-care. A capacity assessment concludes Charlie lacks capacity to make decisions about his care, residence and finances. Whilst residential care is investigated, a social worker receives a call from the neighbour requesting Charlie's urgent admission into residential care.

The next morning Charlie is taken from his home. Although reluctant and distressed, his neighbour persuades him to go. Charlie is placed in a locked dementia unit against his will for 17 months. During this time an urgent DoL authorisation is put in place, followed by a standard DoL authorisation, which expires. For several months, Charlie is detained without legal authorisation.

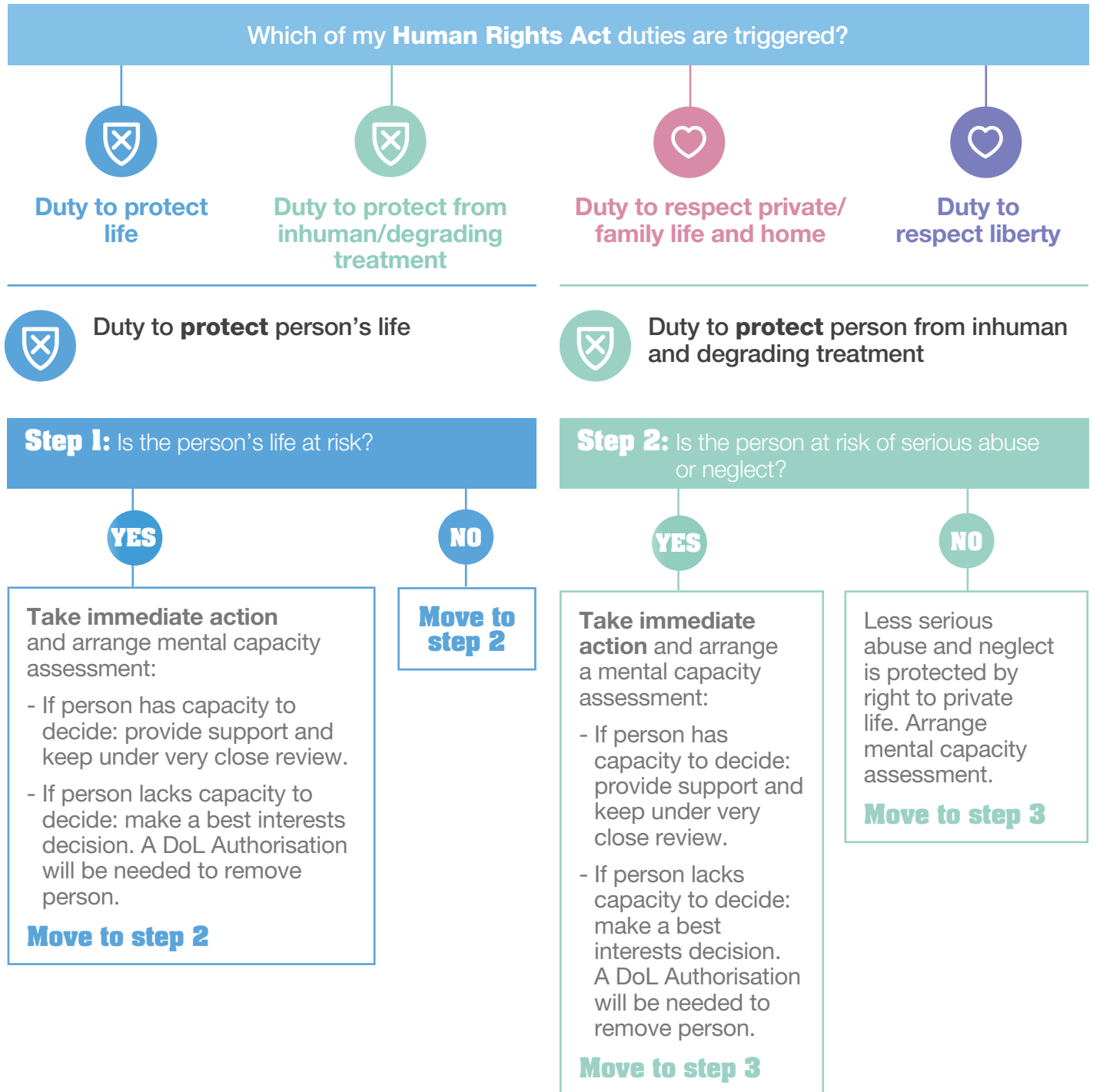
The original capacity assessment contained no record of Charlie's wishes and feelings. Five other assessments take place; a social worker concludes Charlie doesn't have capacity to decide where to live, but a best interests assessor concludes Charlie does have capacity to decide this and recommends he is allowed home.

Charlie's friend applies to the court challenging his care home placement. The court rules Charlie's placement was a breach of his right to liberty and private life. The local authority ignored the recommendation of the best interests assessor that the least restrictive option would be for Charlie to be supported to live at home. The local authority had also not taken seriously Charlie's consistently expressed wish to return home.

Charlie returned home and the local authority had to pay damages for his unlawful detention. Being looked after by carers, Charlie is reported to be happy. (Essex County Council v RF and Others, 2015)

ONE: Decision-making flowchart

Removing a person from their own home to a care home





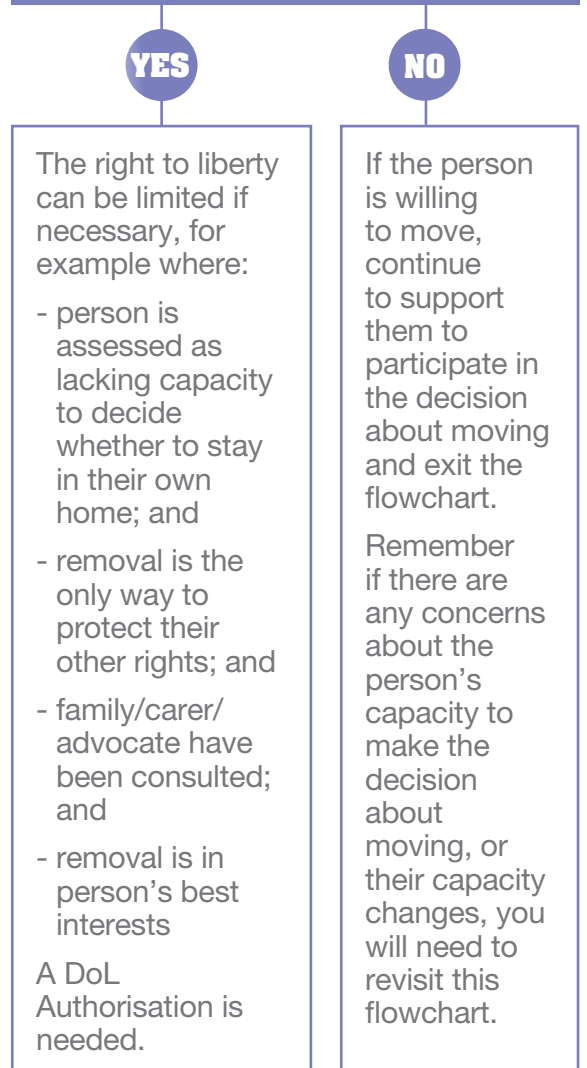
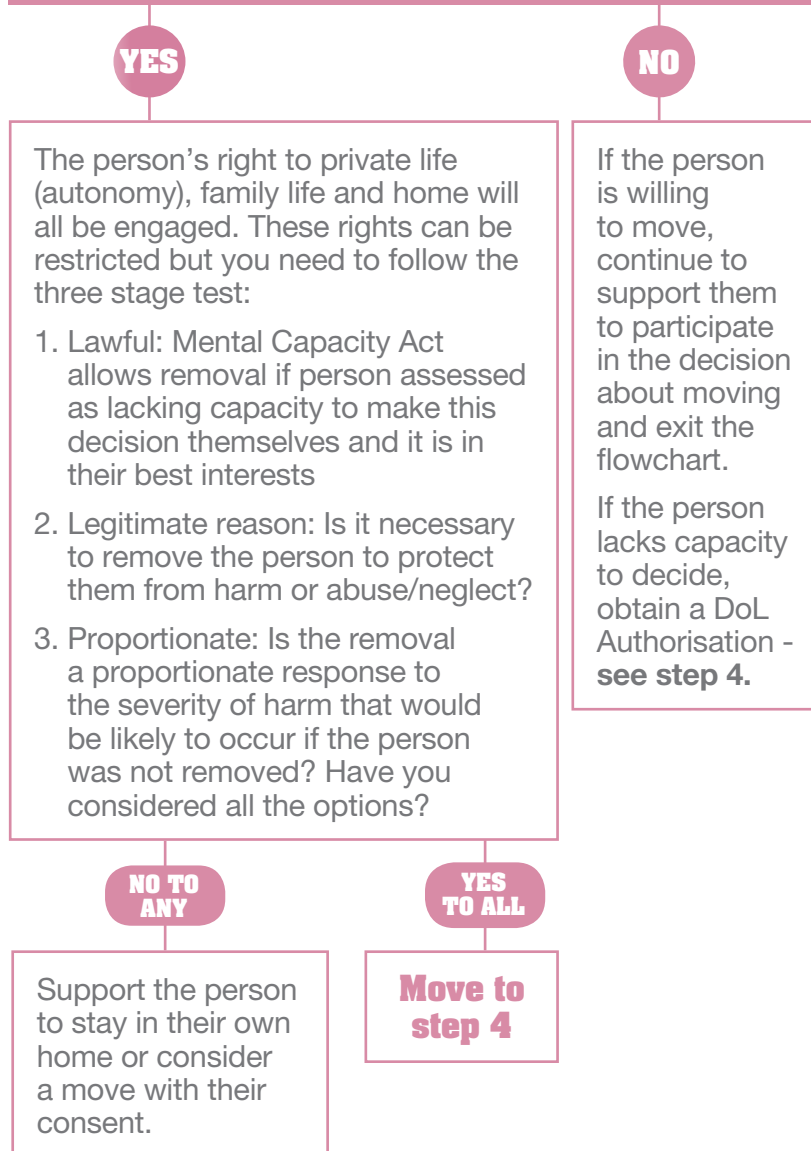
This toolkit is for practitioners considering removing a person with mental capacity issues from their own home and placing them in care

Duty to respect person's right to private/family life and home

Duty to respect person's right to liberty

Step 3: Are you considering removing a person against their will?

Step 4: Are you still considering removing the person against their will, or do they lack capacity to decide about moving?



Explaining the steps in the flowchart



Step 1. Is the person's life at risk?

If the person's right to life is at immediate risk you have a duty to take reasonable steps to protect them. In an emergency situation you should contact the police and/or safeguarding team. Other reasonable steps you could take include moving the person to a place of safety. If they do not want to be removed and there are genuine concerns about their capacity to make this decision, you will need to arrange a capacity assessment under the MCA. You should liaise with the police and/or safeguarding team in emergency situations.

If the person is assessed as having capacity to decide, you should support them and keep the situation under very close review. If the person is assessed as not having capacity to decide to stay, a best interests decision will need to be made. This should include consulting with their family/carer and/or an Independent Mental Capacity Advocate. If removal is the only option, a Deprivation of Liberty Authorisation will be needed.



Step 2. Is the person at risk of serious abuse or neglect?

If the person is at risk of abuse or neglect which is serious enough to reach the high threshold for inhuman and degrading treatment, you will need to take immediate action. You have the same duty to protect as outlined in Step 1, and the explanation there applies here.

If the abuse/neglect is not serious enough to reach the high threshold for inhuman and degrading treatment, less serious abuse and neglect is protected by their right to private life, which includes well-being. This right also includes a duty to take steps to protect people at risk, so you should arrange a mental capacity assessment as above.



Step 3. Are you considering removing a person against their will?

If you are considering removing a person against their will and you have genuine concerns about their capacity to make this decision, you will need to arrange a mental capacity assessment to determine whether they have capacity to decide to stay in their own home. If the person is assessed as not having capacity to make that decision, a best interests assessment will need to take place to determine whether removal is appropriate. This could include consulting their family/carer and/or their Independent Mental Capacity Advocate. Remember that capacity must be assumed (until an assessment demonstrates otherwise) and is decision specific. Remember also that people's autonomy - to have a say over their own lives and make their own decisions - is protected by the right to private life. This right also protects their family life and respect for their home. This right is not absolute, which means it can be restricted, but you will need to follow the three stage test to make sure your interference is lawful:

1. **Lawful:** Is there a law which allows the interference? The Mental Capacity Act allows removal of someone from their own home into care, but only if they have been assessed as lacking capacity to make that decision and it would be in their best interests taking into account all the circumstances (including their human rights).
2. **Legitimate reason:** You must have a legitimate aim. In this situation this means the removal must be necessary to protect them from abuse/neglect or a risk to their life.
3. **Proportionate:** The removal needs to be a proportionate response to the severity of harm that would be likely to occur if the person was not removed from home. Are there other steps you can take to achieve this aim which interfere less with their right to private/family life and home? Could you support the person to stay in their own home? Could you take steps to attempt to reduce/minimise the risk of harm?



Step 4 Are you still considering removing a person against their will?

Removing a person against their will or without their capacitous consent engages their right to liberty. This right is not absolute, and can be limited in certain circumstances. This includes if the person has been assessed as lacking capacity to decide on the issue of removal from home and you are considering removing them into care because of a risk to one of their other rights.

A best interests assessment will need to be carried out to determine whether a move is genuinely in their best interests taking into account their human rights, including their wishes and beliefs. To be lawful, a deprivation of liberty must be authorised by a supervisory body or the Court of Protection, ideally in advance of a planned move as part of the care planning process. An urgent application can be made, if necessary and proportionate to protect somebody from immediate harm.

Adult safeguarding interventions and ‘unwise’ decisions

Social care practitioners are often in the position of having to make decisions about whether or not to intervene in another person’s risk taking behaviour. This raises human rights issues as any action taken by practitioners to restrict a person’s freedom to make their own decisions is likely to interfere with their right to private life (which protects autonomy). This includes the right to make decisions which others might consider ‘unwise’, including (but not limited to) financial decisions.

The dilemma for those working on the frontline is how to make such decisions in a way that protects the person’s right to private life as far as possible. The Human Rights Act provides practitioners with a framework for making a decision about intervening in what might be considered an ‘unwise’ decision.

Potential human rights issues for practice

- social care practitioners being under pressure from concerned family members or carers to restrict a person’s freedom to make a financial decision they consider unwise
- social care practitioners intervening in a person’s financial decision (where the person has capacity) because they are fearful about the consequences of an ‘unwise’ decision
- practicable measures not being taken to support a person to make a decision (i.e. manage their own finances) before they are assessed as not having the capacity to do so

A human rights approach to safeguarding interventions involving an ‘unwise’ decision

This could include:

- ✓ assuming capacity to make the decision as the starting point and only conducting an assessment where there are genuine concerns about the person’s capacity to make a particular decision
- ✓ assessing mental capacity not with the aim of ruling a person out of the decision making process, but with the aim of finding ways to keep them at the centre of it
- ✓ completing nuanced assessments of capacity that draw out those aspects of a decision that a person is able to make in addition to those they are unable to make
- ✓ taking steps to respect the person’s autonomy as far as possible, whether they are assessed as having capacity or not
- ✓ where a person is assessed as lacking capacity, having genuine regard to a person’s views, values and sense of identity when working out what may be in their best interests
- ✓ where restrictions are considered to be in a person’s best interests, only applying the minimum restrictions needed to address the actual risks

Key rights for safeguarding and ‘unwise’ decisions

Right to respect for private life

(protected by Article 8 in the Human Rights Act)



This right protects people’s **autonomy** and **well-being**, including:

- people having control over their own life, including being free to make decisions considered by others to be unwise
- people being allowed to enact personal choices about their lifestyle and, in the case of finances, what they do with their money
- people living free from abuse or neglect

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 in helping social care practitioners work out reasonable steps to protect people from harm as a result of risk taking behaviour including:

- taking reasonable steps to prevent serious harm occurring as a result of risks likely to result from a particular decision

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.

Right to peaceful enjoyment of possessions

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



This right protects people’s access to, and enjoyment of, their possessions (including money). This includes people receiving the benefits they are entitled to, free from restrictive conditions about how they spend the money.

Relevant practitioners’ duties:

- ♥ to respect this right: not interfering where possible, any interferences would have to be lawful, for a good reason and proportionate



See our other booklet **‘Mental Health, Mental Capacity and Human Rights: A practitioner’s guide’ page 21** for more information, including your other duties.

Worked example: ‘unwise’ financial decision

Aslan is a 71 year old man with a learning disability living alone in a private rented flat. He has a carer, Eleanor, who visits three times a week to assist with day to day tasks. Aslan is in receipt of benefits due to his low income and disability, but is known to be generous with his money. He gives most of his money away to religious charities, spending around 70% of his income in this way every month. Recently however, Aslan’s rent was increased and he has struggled to pay it alongside all his monthly outgoings.

Margaret, a social care practitioner, responds to a safeguarding concern raised by Eleanor, questioning Aslan’s capacity to manage his money. Eleanor is worried about Aslan’s tenancy as he does not seem to understand the consequences of continuing to give so much away. Keeping in mind her duty to respect Aslan’s right to make decisions including those considered unwise, Margaret starts by assuming in advance that Aslan has capacity until proven otherwise. The fact that he gives his money away unwisely is not in itself proof of incapacity.

From her discussions with Aslan and others involved in his care, Margaret finds that Aslan has always prioritised donating money to charity over his own welfare. His decision to do this is strongly linked to his religious beliefs which he has consistently held from an early age. For Margaret this is an indication of the great personal significance that Aslan attaches to his decision to donate money to charity. This suggests to her that any interference with this area of his private life should be taken very seriously.

On the issue of his rent, the situation is less clear. Aslan denies that his rent has increased. He does not seem to understand that there may be a link between his generous donations and the risk of losing his tenancy. Over several meetings, he repeatedly declines to consider that this may be a reality and refuses to reduce any of his donations. At this point, Margaret feels she has grounds to question Aslan’s capacity to manage his money. Margaret arranges an assessment and Aslan is found to lack the capacity to manage his finances.

Mindful of her duty to protect Aslan’s autonomy as far as possible, Margaret wants to ensure Aslan remains at the centre of all decision-making about his own money. Margaret takes steps to achieve this by ensuring that Aslan has access to an advocate and by paying close attention to his wishes throughout the whole process. This helps her to work out what might genuinely be in Aslan’s best interests.

As a result, an Appointee is allocated to Aslan. This person will manage his benefit payments and ensure that his rent is paid. More importantly for Aslan though, 70% of the remaining money continues to be paid in donations to charities of his choosing. This means that Aslan has very little to live off day to day but by respecting the decision to prioritise Aslan’s wishes, Margaret seeks to minimise the interference in Aslan’s right to private life and protect his autonomy whilst still achieving her aim of averting eviction and homelessness.

“Human rights helps people understand why we have safeguarding – where it comes from and what its about.”

Practitioner on BIHR’s Delivering Compassionate Care project

Rights of learning disabled people to marry and have a family

Learning disabled people enjoy the same human rights as everybody else. This includes the right to form relationships and the right to marry and have a family. These rights may raise issues for social care practitioners, and there may be differences of opinion on how to approach the matter, including a focus on possible adverse outcomes for learning disabled people of making decisions about relationships. From a human rights perspective, the freedom to make decisions as personal as the decision to marry and have a family is fundamental. (Another booklet in this series covers learning disabled people making decisions about relationships which might be considered 'unwise', see '**Learning Disability and Human Rights: A practitioner's guide**'.)

Potential human rights issues for practice

- people being discouraged or prevented from forming personal relationships, because of assumptions about their capacity to have sexual relations, marry or parent a child
- restrictions on contact being used to prevent a couple from engaging in sexual relations based on welfare concerns, rather than an assessment of capacity
- a person's living and/or support arrangements having the unintended effect of restricting their freedom to form and maintain personal relationships
- an assessment of capacity to have sex or marry which imposes an unreasonably high threshold and/or discriminates against learning disabled people by incorporating concerns about their parenting ability or choice of partner
- blanket approaches, including standardised responses which assume people lack capacity

A human rights approach

This could include:

- ✓ starting from the assumption that the person is able to make their own decisions, including those about sex, marriage and parenting a child
- ✓ making sure that people are aware of their right to make decisions about personal relationships and providing accessible information to help them to decide
- ✓ keeping in mind that consent to sexual relationships is extremely personal and any interference with this innermost part of private life must be taken very seriously
- ✓ when assessing capacity to consent to sexual relationships the test and the level of understanding required should not be too complex as people can demonstrate capacity by:
 - having a rudimentary understanding of the mechanics of the act
 - that sexual relations can lead to pregnancy
 - that there are health risks caused by sexual relations (IM v LM, AB & Liverpool City Council, 2014)
- ✓ making it easy for people to access independent advocacy in situations where there are restrictions placed on their freedom to form and maintain personal relationships, marry or have a family
- ✓ considering what positive steps can be taken to protect people's right to exercise their right to marry and found a family, for example by providing specialist support

Key rights for learning disabled people to marry and have a family

Right to respect for private and family life

(protected by Article 8 in the Human Rights Act)



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

- a person having control over their own life, including making choices about relationships
- having access to a private space if a person needs or want it, to enjoy and maintain relationships
- people living free from abuse (or neglect)

The right to respect for **family life** includes:

- a person being able to develop relationships with others, including an intimate relationship with a partner
- maintaining pre-existing relationships with others

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 marry and found a family

(protected by Article 12 in the Human Rights Act)



This right includes people having the freedom to decide to marry and have children with the person of their choice.

Relevant practitioners' duties:

- to respect this right: not interfering except where there is a law permitting restrictions

"Human rights have provided us a different focus which helps support our service users live independently with dignity, respect and pride."

Practitioner on BIHR's Delivering Compassionate Care project

Right to non-discrimination

(protected by Article 14 in the Human Rights Act)



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

- a person being prevented from marrying or having a sexual relationship because they are learning disabled

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: right to marry and have family

Michelle is a 20 year old learning disabled woman who lives in a 24 hour supported house. She has been in a relationship with Steve for 6 months. Michelle's parents have requested that her contact with Steve is supervised due to concerns that she may be pressured to have sex if they are left alone together. They are supported in this view by Michelle's carers who share the belief that Michelle does not have capacity to consent to a sexual relationship with Steve. Consequently, all contact between Michelle and Steve is supervised.

Michelle isn't happy about the decision and contacts Sanjay, her social care practitioner, to announce that she and Steve want to have a sexual relationship and plan to get married. Sanjay starts from the assumption that Michelle has the right to make these decisions free from interference, whilst recognising his duty to take reasonable steps to address the concerns about risk expressed by others involved in her care.

Sanjay discusses the issue with Michelle and finds that whilst she does appear to have an incomplete understanding of what is involved in a sexual relationship and marriage respectively, it is not certain that she lacks the capacity to consent to either or both.

Sanjay arranges a formal mental capacity assessment covering each decision separately. In advance of the assessment, support is provided to assist Michelle in making decisions on both issues. She is provided with an advocate and accessible information about basic sexual health, pregnancy and what sexual intercourse essentially involves.

Sanjay considers whether there is a need to take further action in relation to concerns about possible abuse. He makes enquiries to assess the risk and decides based on the evidence that Michelle's care arrangement is protective enough of her well-being without supervised contact in the house. He decides there is no need for more restrictions to her private life which would be disproportionate under the circumstances.

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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