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Nursing and Human Rights: A practitioner's guide

About this Guide

This Guide is written by the British Institute of Human Rights. This Guide has been written in partnership with the Royal College of Nursing, and in consultation with nurses who have acted as 'experts by experience' throughout the drafting process.

The British Institute of Human Rights and the Royal College of Nursing would like to thank the nurses and healthcare assistants who gave up their time to be part of this process, helping to ensure the Guide is accessible, relevant and useful for nurses working in a range of settings.

Royal College of Nursing

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Who this Guide is for

This Guide is for nurses. Healthcare assistants have been involved in writing the Guide, and it may be relevant for practitioners working in health services generally. It may also be useful for people accessing health services, and their friends, families and carers. When we say '**you**', we mean **the practitioner**.

How to use this Guide

The aim of this Guide is to support you to deliver health services that respect human rights by providing accessible information about human rights and how they are relevant in health and social care. It offers practical assistance when navigating difficult decisions which may impact on the human rights of the people you work with and for. The Guide includes decision-making flowcharts to pull out and keep with you for everyday use.

No knowledge of human rights or the Human Rights Act (HRA) is assumed. Those with some human rights knowledge may also find it useful, particularly sections 4-6. The guide is designed to allow you to '**dip in and out**', rather than having to read it cover-to-cover.

The human rights information in this Guide covers the UK. References to health law, policy, practice and institutions refer to England.

Contents

1. Introduction

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, for how the government should treat us. Our human rights are protected through the Human Rights Act (HRA), which makes 16 of the rights written in the European Convention on Human Rights part of UK law.

The HRA guarantees these minimum standards in two key ways:

1. Firstly, it places a **legal duty on public officials** (including health services) to uphold these standards by respecting our human rights in everything they do (section 6 HRA).

2. Secondly, all **legislation, including health and social care law, should be** compatible with human rights or '**human rights compliant**' (section 3 HRA). In practice this means the laws that are relevant to your sector should be designed and applied in a way that respects, protects and fulfils our human rights.

Human rights are not 'new' or 'extra' in the field of nursing. Human rights are at the heart of much of the law, policy and practice that you will be familiar with, and have supported practitioners to provide person-centred care.

Recent reviews have addressed the need for health and social care services that are accountable, deliver compassionate care, and respect and protect human rights.

Francis Report 2013

"The patients must be the first priority in all of what the NHS does. Within available resources, they must receive effective services from caring, compassionate and committed staff, working within a common culture, and they must be protected from avoidable harm and any deprivation of their basic rights."

Department of Health Review Final Report, Transforming care: A national response to Winterbourne View Hospital 2012

Services should focus on individual dignity and human rights... Workforces should demonstrate that they are providing quality care and support which includes... good understanding of the legislative framework and human rights.

Human rights will underpin many of the situations you come across in your day-to-day work. The HRA can be a practical tool, providing a framework to help practitioners make (often difficult) decisions.

Being able to identify the human rights involved and the impact a particular decision or action will have on a person's human rights will help you to deliver good quality care that is person centred, accountable, and balances the needs of individuals against the needs of others and the wider community.

Human rights in regulation of services: the new Care Quality commission approach

The health and social care regulator, the Care Quality Commission (CQC), launched a new policy, **'Human Rights Approach to the regulation of services'** in September 2014. The CQC will be applying their new approach to all the health and social care services they register or inspect. It will therefore be important for your service and staff, including nurses, to be familiar with human rights and the CQC approach.

Using this resource and being aware of human rights and putting them at the heart of healthcare can help staff contribute to service performance and outcomes, and can provide evidence of compliance with CQC regulation standards. BIHR, lead author of this guide, has developed and delivered the CQC's staff education programme to support their new human rights approach. This Guide reflects similar learning and information on human rights in healthcare.

2. How the Human Rights Act works

The **Human Rights Act (HRA) is the main law protecting human rights in the UK**. It contains a list of 16 rights (called Articles) taken from the European Convention on Human Rights. These rights belong to all people in the UK, and the HRA specifies several ways in which these rights should be protected.

The HRA provides a useful and practical tool which can be used by non-lawyers and non-specialists. As a practitioner in health services you will usually have legal duties under the HRA (see next). **The HRA is designed as a framework to help negotiate better outcomes before a situation gets to court** (unless it has to):

You can use this framework to help **inform your practice**, including challenging decisions internally with colleagues and in your interaction with other services. This guide provides information, tools and tips on how you can do this.

People may also rely on the HRA to **hold health services to account** without necessarily having to go to court, if services act in ways that don't respect rights.

In everyday situations

Section 6 of the HRA places a duty on public authorities to comply with human rights in everything that they do. This means that public authorities have legal responsibilities for respecting, protecting and fulfilling human rights. In everyday situations this duty enables people using services and you as a practitioner to challenge poor treatment and to negotiate better solutions, using a language of rights and duties. Rather than waiting to be challenged, public authorities can also use the HRA proactively to develop and deliver better services, policies and practices. For nurses, this means you can use the HRA to help inform your decisions and practice.

Who has duties under the Human Rights Act?

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

- NHS organisations and staff
- Outsourced NHS services provided by the private sector or charities
- Private nursing and care arranged and/or paid for by a public authority or funded by the NHS
- local authorities and their employees, e.g. social services staff, etc.

The duty applies across services, whether it is about frontline practitioners, senior managers, at board level etc.

When the HRA was being made law it was intended to apply to a range of organisations, recognising that lots of public services are now provided by private organisations and charities. The Care Act 2014 says **all local authority-funded and/or arranged care and support services regulated by the CQC have a legal duty under the HRA**. This includes commissioned services that are provided under contract to a local authority, and services obtained through local authority direct payments, if delivered by a regulated service provider (Care Act 2014).

Individuals do not have legal duties under the HRA. This means you cannot bring a claim against other individuals like family members or neighbours.

However, because of the HRA, public authorities have **positive obligations** which means they sometimes have to **step in and protect someone from harm** (often referred to as **safeguarding**).

This is explained next.

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

Respect

(known as a 'negative' duty): this means ensuring you respect people's rights. This can help you to **avoid interfering with someone's rights unless absolutely necessary**. For example, the right to respect for family life (Article 8) means not interfering with someone's family life unless it is necessary and proportionate to do so, such as to protect the rights of others.

Protect

(known as a 'positive' duty): this means public authorities must **take action to protect people's human rights**. This can sometimes include protecting a person from harm by another (non-official) person (such as their spouse or neighbour). For example, under the right to life, officials should take action if they become aware that a person is in real and immediate danger, e.g. to protect someone from an abusive family member who has threatened to kill them. This is often referred to as **safeguarding** which has its legal foundations in this positive duty to take action to protect human rights.

Fulfil

(known as a 'procedural' duty): this means public authorities should take steps to strengthen access to and realisation of human rights. It includes having **systems in place to prevent or investigate human rights abuses**. For example, the right to life (Article 2) requires that the death of a person in hospital should be investigated where the hospital may be implicated (this is usually through an inquest).

3. Key human rights in nursing

There are 16 rights protected by the Human Rights Act (HRA). You can find a full list of these human rights below. This section provides information about the key rights which are most likely to be relevant to your practice

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 when you did it
(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 human rights listed here
(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)

Right to life (Article 2)

Q1. How might I encounter this in my work?

Examples could include:

- situations where a person's life may be at risk;
- decisions being made to withdraw life sustaining treatment or not to resuscitate a person; and
- when someone requests life-prolonging treatment against medical opinion.

Q2. What do the legal duties mean for me?

Respect: As a healthcare practitioner you cannot deliberately take away someone's life (for information on withdrawing care see page 15).

Protect: If you know that someone's life is at risk, you must take reasonable steps to protect it. This does not mean providing treatment at all costs (for more information see page 14).

Fulfil: There needs to be an independent investigation into a death where your organisation may be implicated or involved.

Q3. Can I restrict the right to life?

No, as a healthcare professional it is unlawful to deliberately take away someone's right to life. For information on withdrawing care see page 15.

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

Q4. What about other legislation, policy and practice guidance?

The Nursing and Midwifery Council (NMC) Code states you must:

- make sure you deliver the fundamentals of care effectively (1.2);
- balance the need to act in the best interests of people at all times with the requirement to respect a person's right to accept or refuse treatment (4.1); and
- raise and, if necessary, escalate any concerns you may have about patient or public safety, or the level of care people are receiving in your workplace or any other healthcare setting, and use the channels available to you in line with [NMC] guidance and your local working practices (16.1).

It is a general principle of law and medical practice that people have a right to consent to or refuse treatment. The courts have recognised that adults have the right to say in advance that they want to refuse treatment if they lose capacity in the future, even if this results in their death (Section 9.1 Mental Capacity Act (MCA) Code of Practice, 2007). Being involved in treatment decisions is an important part of the right to respect for private life (Article 8, HRA).

There are certain circumstances when the courts must decide whether a procedure will be lawful. These include:

- withdrawal of nutrition and hydration from a patient diagnosed as being in a vegetative state (see page 15) (NOTE: there is some unease around the term vegetative, and work is ongoing within the medical community on possible alternative terminology); and
- where there is doubt as to the person's capacity or best interests (NMC Guidance on Consent, 2010).

Real life: Right to life and Do Not Resuscitate orders for disabled people

Andrew Waters had Down's syndrome and dementia, and when he was in hospital aged 51 he had a 'do not resuscitate' (DNR) order put on his file without him or his family being consulted. The reasons given on the form were listed as: 'Down's syndrome, unable to swallow... bed bound, learning difficulties'. He argued that this was discrimination (Article 14) and that it breached his right to life under Article 2. The case was settled out of court and East Kent Hospitals University NHS Foundation Trust apologised.

Real life: Right to life and protecting patients' lives

There is a **positive obligation on health services to protect life in certain circumstances**. Where there is a **real and immediate risk** to a patient's life that you know about, or should know about (because it has been reported to you for example), you have a legal obligation to take reasonable steps to try and protect that life. For example, if you know that someone in your care is at risk of suicide, there may be a positive obligation for you to act to protect life.

Legal cases: Osman v UK (1998) and Savage v South Essex Partnership NHS Foundation Trust (2009)

Remember! When making decisions about this right...

- **This right is absolute and healthcare practitioners cannot deliberately end life. For information on withdrawing care see page 15.**
- **There is a positive obligation to protect this right. This means that if you are aware that a person is at risk of losing their life (for example by a family member) you must take steps to protect them.**
- **Wherever possible people – i.e. the patient and those who are family or with legal responsibility – should be consulted about decisions about care and treatment that may impact on the right to life. The right to be involved in these important decisions is a key part of our right to respect for private and family life (see page 23 - 27).**

Withdrawing and administering care

Decisions about withdrawal of care will be dependent on the particular circumstances of the patients involved. The following principles can be used to guide decisions:

Withdrawing care

NOTE: Some decisions involving withdrawal of life-sustaining treatment must be referred to a court (Court of Protection or Family Court for under 18s).

- Healthcare professionals have a medical duty not to withdraw treatment where it is still of some benefit to the patient. (Legal case: Bland v Airedale NHS Trust (1993)
- Where a patient is conscious and has capacity to make decisions about their care, withdrawing care serving a therapeutic purpose against their wishes would be a breach of the medical duty of care. It is also likely to breach the HRA e.g. the right to respect for private life under Article 8 (including decision-making) and potentially the right to life. (Legal case: Burke v GMC (2005))
- Where a patient is unconscious and unable to make decisions about their care, healthcare professionals could make a clinical decision to withdraw treatment where it is in the patient's best interest, provided there is no therapeutic or other benefit to a patient. For this to not breach the right to life (Article 2), it would have to be a responsible clinical decision which accords with respectable medical opinion. This can involve withdrawing artificial nutrition and hydration where a patient is in a persistent vegetative state but the decision would need to be referred to the Court of Protection.
- The right to life does not entitle anyone to compel healthcare professionals to continue with life-prolonging treatment where this would expose the patient to inhuman or degrading treatment breaching Article 3. (Legal case: Burke v GMC (2005))

Administering care

- It would be unlawful to administer medical treatment to someone who is conscious and has capacity to make decisions about their care without their consent. (Legal case: In re F case (1990))
- Healthcare professionals cannot actively seek to end life (Legal case: Bland v Airedale NHS Trust (1993)). Administering medicine which deliberately ends life, with no other therapeutic or pain relief benefit, would likely be a breach of Article 2 in the HRA and likely be a criminal offence.
- The right to life (Article 2) does not include a right to die. Assisting someone to commit suicide is a criminal offence. The positive obligation to prevent inhuman and degrading treatment (Article 3) does not stretch to requiring a practitioner to assist a terminally ill person to die. (Legal case: Pretty v UK (2002))
- Administering pain relief which has the result of hastening death could be justified as protecting people from inhuman or degrading treatment (Article 3) where the purpose is to ease pain, depending on the circumstances. The purpose cannot be to end life. This is known as the doctrine of double effect.

The Right to be free from inhuman or degrading treatment (Article 3)

Q1. How might I encounter this in my work?

Examples could include:

- when you are ensuring that people's basic needs are being met both in hospital and in the community;
- where a patient is neglected or not cared for in a way that is likely to cause serious harm or suffering, for example being left in a soiled state;
- continuing with treatment that may be causing serious harm or suffering;
- assessing and responding to the need for appropriate pain relief;
- the need to protect staff from a risk of harm; and
- when someone has undergone, or is at risk of, female genital mutilation (FGM). "Female genital mutilation: An RCN resource for nursing and midwifery practice" Second Edition (2015) clearly identifies FGM as a human rights violation, including Article 3 set out in the HRA www.bit.ly/1PVKcpq

This human right essentially covers serious harm, abuse or neglect.

Q2. What do the legal duties mean for me?

Respect: You cannot treat someone in an inhuman or degrading way (whether or not this is your intention, the impact is what counts).

Protect: If you know that somebody may be being subjected to such treatment, you must take reasonable steps to protect them.

Fulfil: There needs to be an independent investigation where inhuman or degrading treatment has occurred, and where your organisation may be implicated or involved.

Q3. Can I restrict the right to be free from inhuman or degrading treatment?

No, This right is absolute so there are no circumstances when it is acceptable to restrict or interfere with it.

Treatment must have a **very serious impact** on a person to be considered inhuman or degrading. Inhuman treatment causes severe **mental or physical suffering**. Degrading treatment is less severe than inhuman treatment but still grossly **humiliates** or causes the victim to **feel fear, anguish and inferiority**.

Individual circumstances are important. Practitioners will need to look at a patient's situation and the **impact** on them to determine whether the harm amounts to inhuman or degrading treatment. Important factors to consider include **age, health, disability and gender**.

Q4. What about other legislation, policy and practice guidance?

The NMC Code states you must:

- recognise when people are anxious or in distress and respond compassionately and politely (2.6);
- make sure you deliver the fundamentals of care effectively – including, but not limited to, nutrition, hydration, bladder and bowel care, physical handling and making sure that those receiving care are kept in clean and hygienic conditions (1.2); and
- take all reasonable steps to protect people who are vulnerable or at risk from harm, neglect or abuse (17.1).

Safeguarding states:

Abuse is a violation of an individual's human and civil rights by any other person or persons (section 2.5 of No Secrets: guidance on protecting vulnerable adults in care, Department of Health, 2000). Adult safeguarding has now been put on a statutory footing under the Care Act 2014. The **Care and Support Statutory Guidance 2014 (Department of Health)** clearly states: "Adult safeguarding means protecting a person's right to live in safety, free from abuse and neglect."

Real life: Right to be free from inhuman and degrading treatment and failing to provide someone with medical attention and treatment, leading to death

A woman who was addicted to heroin and asthmatic was imprisoned for four months. During this she suffered from severe withdrawal symptoms in prison, including vomiting and weight loss. The prison doctor was not present at weekends, although a locum doctor visited once, and nursing staff were expected to call out a doctor or arrange a transfer to a hospital if required. The woman's condition continued to **deteriorate** during the weekend. The **locum doctor did not visit** and **nursing staff did not call out a doctor or arrange for a hospital transfer**. The woman collapsed on Monday and later died. A court ruled that the prison had not protected the woman from inhuman treatment in breach of Article 3, because it had failed to take appropriate steps to treat her condition and relieve her suffering.

Legal case: McGlinchey v UK (2003)

Real life: Right to be free from inhuman or degrading treatment, Mid Staffordshire and severe neglect in hospital

Family members of patients who lost their lives at Stafford Hospital started legal proceedings under the HRA. Over 100 cases were taken and were settled out of court. One case was taken by "Jean's" family. Jean went into hospital following a fall at home (she had cancer but was not expected to die at that time). Whilst on the ward she was often not given fluid and food was left out of reach, and Jean's family repeatedly found her in soiled bedding. Jean developed **pressure sores, became dehydrated and malnourished**, and **contracted Clostridium difficile, MRSA and E-Coli**. Jean was often left **without pain medication**. After three months as an in-patient Jean died. The funeral home could not embalm her as her body was too full of infection and contagions and she had to be buried in a body bag. The family started legal proceedings arguing that Jean's treatment amounted to inhuman and degrading treatment (under Article 3) and that the rights of family members to respect for their privacy, including well-being (under Article 8), had been breached due to the anxiety and stress of watching Jean suffer. The case was settled out of court.

Information provided by the family's legal team. Names have been changed.

Remember! When making decisions about this right...

- **This right is an absolute right. This means there are no circumstances where a restriction on this right is acceptable.**
- **There is a positive obligation to protect this right. This means that if you are aware that a person is at risk of being treated in this way (for example by a family member) you must take steps to protect them.**
- **The treatment, decision, policy or action must have had a very serious impact on a person to be considered a breach of this right. Individual circumstances are important.**
- **Because this right cannot be restricted in any circumstances, limited resources are not a defence for treating someone this way.**

Right to liberty (Article 5)

Q1. How might I encounter this in my work?

Examples could include:

- where a person has restrictions placed on their movement as part of their care arrangements;
- when you need to prevent somebody from leaving the place where they are being cared for, because of concerns about their welfare;
- caring for somebody who requires constant supervision or monitoring for their own safety; and
- where a person is being restrained in a passive way, for example being unable to get out of bed because bars are left up.

Q2. What do the legal duties mean for me?

Respect: You cannot deprive someone of their liberty apart from in the specific circumstances set out in the right.

Protect: If a person in your care has been detained because they have mental health problems or lack capacity to make certain decisions, you have a legal obligation to apply the following **procedural safeguards**:

- Has the detained person been informed of the reason for detaining them?
- Are they able to challenge or appeal the decision?
- Are they being given the opportunity to tell their side of the story?
- Can they see and comment on all the relevant documents?

Q3. Can I restrict the right to liberty?

Yes, This is a limited right which means that it can be restricted, but **only in the specific circumstances** set out in the right itself. This reflects the need to balance the right to liberty against others and the needs of society.

This includes situations where a person has a mental health problem and is detained for the purposes of treatment or protection under the Mental Health Act or Mental Capacity Act. Lawful restrictions to a person's liberty may also happen in other settings, for example within the criminal justice system.

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

Q4. What about other legislation, policy and practice guidance?

The NMC Code states you must:

Keep to all relevant laws about mental capacity that apply in the country in which you are practising, and make sure that the rights and best interests of those who lack capacity are still at the centre of the decision-making process (4.3)

The Deprivation of Liberty Safeguards (DOLS) (Section 1.13 of the DOLS Code of Practice 2008) states:

Where a person who lacks the capacity to consent to their placement or care is deprived of their liberty in a hospital or care home, a DOLS authorisation by the local authority will be needed. The DOLS provisions state:

Depriving someone of their liberty who lacks the capacity to consent to the arrangements made for their care or treatment is a serious matter, and the decision to do so should not be taken lightly.

The deprivation of liberty safeguards make it clear that a person may only be deprived of their liberty:

- in their own best interests to protect them from harm;
- if it is a proportionate response to the likelihood and seriousness of the harm; and
- if there is no less restrictive alternative.

Real life: Right to liberty for disabled people

The UK's highest court has clarified whether a deprivation of liberty occurs in social care settings for adults who lack capacity to make decisions about their care. It involved three people with learning disabilities. One was living in a permanent home, one in a residential school and one with a foster mother. All care arrangements were recognised as positive but the providers confirmed that should the people attempt to leave the care they would be stopped.

The court ruled that all three were deprived of their liberty. The intention behind stopping the people leaving (or the positive nature of the care) is not the test for whether liberty has been deprived. The test is whether a person is 'under continuous supervision and control and not free to leave'. **As the DOLS scheme only applies to hospitals and care homes**, for each of these placements the Court of Protection had to authorise the deprivation of liberty, ensuring that people's Article 5 rights were protected.

Legal case: P v Cheshire West and Chester Council and P & Q v Surrey County Council (2014)

Remember! When making decisions about this right...

- **The right to liberty is not a right to do whatever a person wants; it protects against extreme restrictions being placed on movement.**
- **This right can only be restricted in very specific circumstances as set out in the right. For example when someone has a mental health or capacity problem, to keep someone safe, or to protect the rights of others.**
- **Restricting the liberty of someone who lacks mental capacity to make specific decisions about their care or who has serious mental health problems may be lawful, but the appropriate legal safeguards must be followed.**

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

Q1. How might I encounter this in my work?

Examples could include:

- when you have concerns about an individual's capacity to make an informed decision about treatment;
- ensuring patients are treated with respect and dignity when providing personal care (washing, dressing etc.);
- where a person in hospital or a care home wishes to return home against the recommendations of the care provider or local authority;
- where resuscitation decisions are made without consulting with a patient and/or family members or carers;
- managing family contact in environments with restricted visiting hours; and
- using family members as translators when making important decisions about care and treatment.

The four parts of this human right

Private life covers more than just traditional ideas of privacy. It includes the protection of **physical and mental well-being,** having **choice and control** over what happens to you (including being involved in **care and treatment decisions), participation in the community** and access to **personal information.**

Family life includes developing and maintaining 'ordinary' family relationships and **on-going contact** if your family is split up (including when accessing care).

Home includes enjoying the home you already have (not a right to be given a home), which could include long-stay wards or residential homes.

Correspondence covers **all forms of communication** including the right to receive, send and retain phone calls, letters, email etc.

Q2. What do the legal duties mean for me?

Respect: You cannot restrict a person's right to respect for family life, private life, home and correspondence unless there is a need for you to do this and you follow the rules for doing so.

Protect: If a person in your care is at risk of having this right breached, you must take reasonable steps to protect this right.

Fulfil: Your organisation must set out procedures to ensure fair decision making when decisions are being made which could impact on this right.

Q3. Can I restrict the right to respect for private and family life?

Sometimes, yes, The right to respect for private and family life etc. is not an absolute right. It is a qualified right and there are specific circumstances where it might be necessary to restrict it, for example to protect the rights of others or the needs of society.

When making decisions that may restrict this right, three tests must be met:

Lawful: is there a law which allows this restriction?

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

Necessary: are you taking the least restrictive action necessary to achieve the aim? The key principle to remember here is **proportionality.**

Proportionality in everyday situations

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

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

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

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

Q4. What about other legislation, policy and practice guidance?

The NMC Code states you must:

- encourage and empower people to share decisions about their treatment and care (2.3);
- share with people, their families and their carers, as far as the law allows, the information they want or need to know about their health, care and ongoing treatment sensitively and in a way they can understand (5.5); and
- avoid making assumptions and recognise diversity and individual choice (1.3).

Real life: Right to respect for private and family life and staff records

A nurse had been accused of neglect and ill treatment by healthcare assistants, which she claimed were made maliciously and following investigation were found to be unreliable. She was interviewed by the police and the Crown Prosecution Service decided there was insufficient basis to take action. The nurse resigned but when she applied for another nursing job her Criminal Record Bureau check disclosed the allegations and she was refused employment. The nurse used Article 8 to claim her right to respect for private life had been interfered with by the police's decision to disclose the allegations. The court said that balancing the interests of the patients to be free from ill treatment and negligence against the harm caused to the nurse by the disclosure was a particularly sensitive exercise where allegations had not been substantiated and were strongly denied. The court found that, on balance, the disclosure breached the nurse's Article 8 rights.

Legal case: R (A) v Chief Constable of Kent (2013)

Real life: Right to respect for private life and Do Not Resuscitate orders

Janet Tracey, who had been diagnosed with cancer ended up in hospital following an accident. A **Do Not Resuscitate Order** (DNR) was placed on her records, without consulting Mrs Tracey or her family. When they found out about the DNR, they asked for it to be removed, which the staff did. Following discussions with the family, a second DNR was made and Mrs Tracey died a little while later in hospital. However, the family challenged the making of the first order without considering their views as they thought this did not respect the right to respect for private life (Article 8).

The court agreed with the family. It said decisions about how a person spends the **last days of their life** are about **autonomy, integrity, dignity and quality of life**, which are **protected by the right to respect for private life** under Article 8. Hospitals **must consider a patient's rights before making a DNR** and **wherever possible involve** them in **and inform** them of the decision. The patient should only not be involved if involving them is likely to cause them to suffer serious physical or psychological harm.

Legal case: Tracey v Cambridge University Hospitals NHS Trust (2014)

Remember! When making decisions about this right...

- **This right is a qualified right. This means it can be restricted or interfered with in certain circumstances, for example to protect the rights of others or to keep a person safe.**
- **Any restriction on this right must be lawful, for a legitimate reason and necessary.**
- **Proportionality is key! Don't use a sledgehammer to crack a nut – make sure any action that might restrict this right is proportionate to the problem or issue.**

The Right to enjoy these human rights without discrimination (Article 14)

This is a special right, because it is about **not being discriminated against in relation to any of the other rights listed in the Human Rights Act (HRA)**. You can think of it like a "piggy-back" right, because it must connect to or piggy-back onto another right. For example, if a doctor does not administer life-saving treatment based on a discriminatory attitude about a person's age or disability, this would engage Article 14 alongside Article 2, the right to life.

Under Article 14, discrimination can be based on a wide range of grounds such as sex, race, language, religion, political opinion, birth or '**any other status**'.

Discrimination may involve:

- Treating someone less favourably than other people in the same situation on the basis of a characteristic or status.
- Failing to treat someone differently when they are in a significantly different situation to others, for example when they are pregnant.
- Applying blanket policies that have a disproportionately adverse effect on a person and other people who share a particular status.

If there are objective and reasonable grounds for treating someone differently, this will not breach Article 14. For example, officials may be trying to take positive steps to compensate for inequality, or there is indirect discrimination and the authority is taking proportionate steps towards achieving a legitimate aim.

Article 14 has an **important relationship with the Equality Act 2010**. The Equality Act provides specific protection against discrimination on the basis of 9 protected characteristics, including race, gender, or disability. However Article 14 protects against discrimination on a wide range of areas because it includes "any other status". For example, a woman may be able to show that health services are discriminating against her because she is a disabled woman who is an asylum seeker (rather than only on the basis of disability or gender or nationality which is how the Equality Act works).

Real life: Right not to be discriminated against and patients with learning disabilities

A woman with learning disabilities had an operation in hospital. Her relatives visited her and found her lying on her back, eyes open but not saying a word. Usually she was talkative and lively so they asked the nurse what was wrong. The nurse said ‘well, she can’t talk can she, if she has a learning disability?’ The woman was re-examined and found to have had a minor stroke.

Source: BIHR’s booklet The Human Rights Act: Changing Lives (http://bit.ly/20bx6sW)

4. How to identify a human rights issue

This section provides you with a flowchart for identifying human rights issues. We use the word 'decision' to refer to a decision, action or policy that may raise human rights concerns.

How do I know when something is a human rights issue?

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

It's important to remember that a situation has to have had a serious impact on someone to be a breach of human rights. The flowchart below can help you decide this. It's also important to remember the **Human Rights Act (HRA) underpins all other law, policy and procedure**. So it's **not a case of either/or**. For example, the situation you are faced with might be **both a human rights issue and a safeguarding issue**, and human rights underpin the processes and procedures you will undertake. This could include making a safeguarding referral to protect someone's right to be free from inhuman or degrading treatment. You can use human rights arguments to make the case for why the safeguarding referral is necessary, or why you believe a particular course of action is necessary.

Using human rights: is my issue about human rights?

1. What is the decision?

Tip: this can be a decision, action (inaction), practice or policy

2. Who has the decision affected and how?

Tip: is it one person or a number of people? What is the impact on the person (or people)?

3. Who has made the decision?

Tip: the Human Rights Act covers public authorities and those carrying our "public function". This includes those working in the NHS.

4. Will the decision restrict anyone's rights as set out in the Human Rights Act?

Tip: check your list of the 16 human rights in the Act on page XX

YES

5. Is the right an absolute right?

Tip: a restriction on an absolute right is never lawful, no matter the reason. The impact of a decision must be serious to engage an absolute human right.

YES

Take immediate action to protect the person's human rights. This might include raising a safeguarding alert, seeking an order from a court or calling the police.

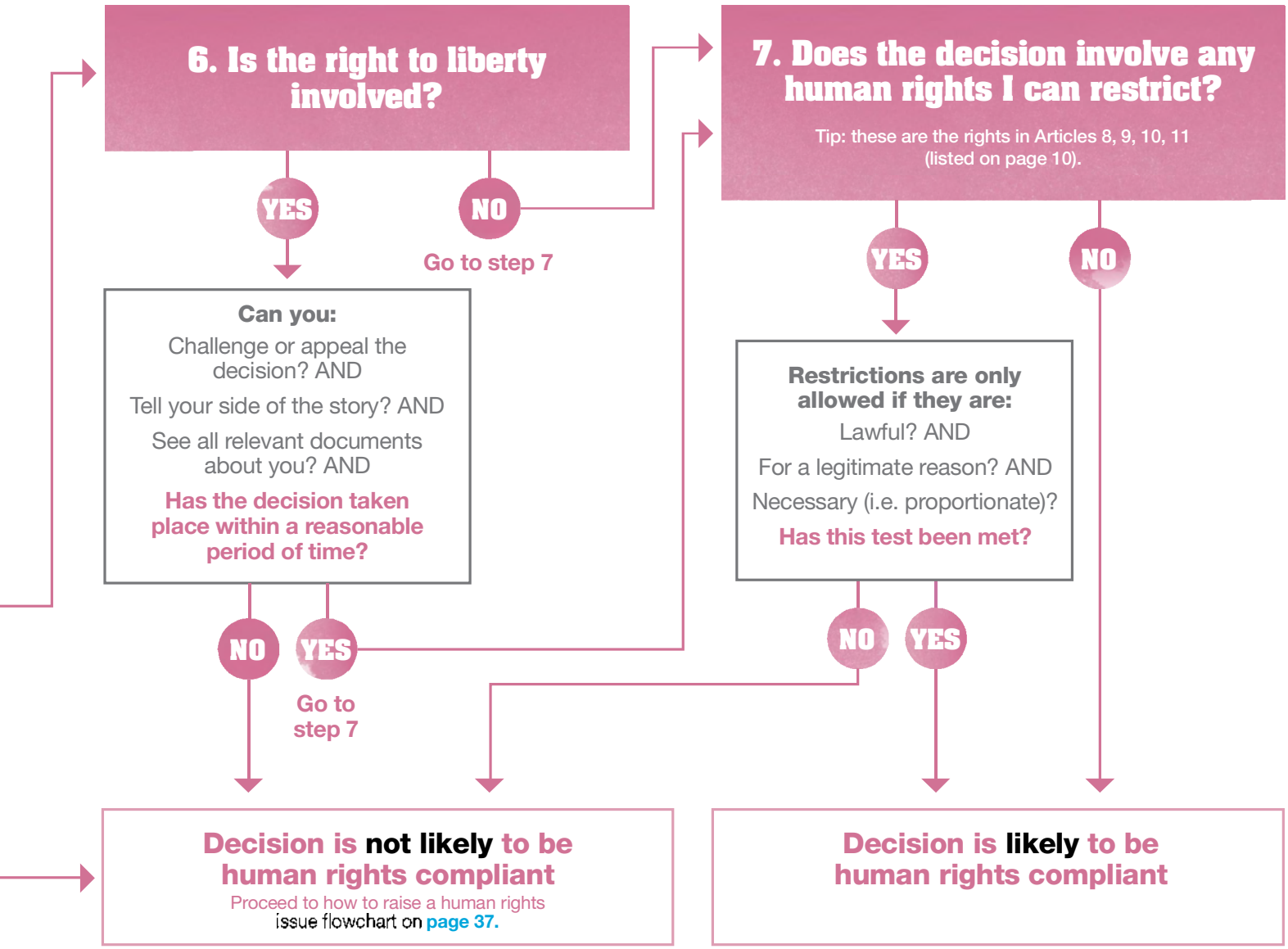
NO

Go to step 6

NO

The situation is unlikely to be covered by the Human Rights Act. BUT:

- Be alert to the possibility that the decision may be discriminatory, which could be covered by the Equality Act.
- If you are unsure, it may be necessary to get some additional support or advice from the signposting suggestions on page 46 - 47.
- Monitor the situation for any changes, and you can revisit this flowchart again in future.


6. Is the right to liberty involved?
YES
NO
Go to step 7
Can you:
Challenge or appeal the decision? AND
Tell your side of the story? AND
See all relevant documents about you? AND
Has the decision taken place within a reasonable period of time?
NO
YES
Go to step 7
7. Does the decision involve any human rights I can restrict?
Tip: these are the rights in Articles 8, 9, 10, 11 (listed on page 10).
YES
NO
Restrictions are only allowed if they are:
Lawful? AND
For a legitimate reason? AND
Necessary (i.e. proportionate)?
Has this test been met?
NO
YES
Decision is not likely to be human rights compliant
Proceed to how to raise a human rights issue flowchart on page 37.
Decision is likely to be human rights compliant

Top tips for working through the flowchart

Step 1. What is the decision?

Be clear about the details, consider:

- What happened, when and where?
- What is it you want to challenge? Is it the way a person has been treated or something that has affected you, your colleagues, families or carers?
- Is it a specific decision or action or a policy affecting a number of people?

Step 2. Who has it affected and how?

Consider:

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

Step 3. Who has made the decision?

Remember:

- When care is provided by public authorities (e.g. NHS) or those carrying out a public function this is covered by the duties in the HRA. For more information see page 8.
- If a person's rights are at risk because of someone who is not part of a public authority (e.g. a family member) the positive obligations under the HRA mean you may need to step in and protect them. For more information see page 9.

Step 4. Will the decision restrict anyone's rights as set out in the Human Rights Act?

Consider:

- Which human rights are affected? Remember it may be more than one. Be as specific as possible. All the rights in the HRA are on page 10.
- You need to be able to show the decision in question has restricted the human right(s) in some way.

Step 5. Is the right an absolute right?

Consider:

- If you are dealing with an **absolute** right, remember the impact of the decision must be very serious to breach this type of right
- There is **no justification** for breaching an absolute human right, no matter the reason (including resources)
- Two key rights here will be the right to life (check back on page 11 - 15 for information) and the right to be free from inhuman and degrading treatment (check back on page 16 - 19 for information).
- Remember most human rights in the HRA are non-absolute and can be restricted in certain circumstances.

Step 6. Is the right to liberty involved?

Remember this right has two parts:

1. Is liberty being restricted for a permissible reason? **AND**

2. Are the safeguards in place, meaning can the person

- Challenge or appeal the decision?
- Tell their side of the story?
- See and comment on all relevant documents?
- And has the decision taken place within a reasonable period of time?

Both 1 and 2 must be met for the deprivation of liberty to be lawful.

Step 7. Does the decision involve any human rights I can restrict? (Articles 8, 9, 10, 11, all listed on page 10):

Remember:

- A careful balancing act must be applied to make sure any restriction of a qualified right is **lawful**, for a **legitimate reason** and **necessary** (i.e. proportionate).
- In practice this means there should be a good reason for restricting this right and any restriction should be the **least restrictive option available** and **proportionate** in the circumstances. Consider whether there are other less restrictive alternatives that could be explored?
- Check back on page 23 - 27 for information about the right to respect for private and family life.

5. How to raise a human rights issue

This section provides you with a flowchart for taking action to raise human rights concerns.

Raising human rights concerns is an important part of the legal duty to respect and protect human rights set out in the Human Rights Act (HRA). Most human rights include positive and procedural obligations. These can mean taking steps to protect people who are being cared for at the end of their lives. Raising human rights concerns is a key way of ensuring your organisation is meeting its human rights obligations.

If you are worried about an **issue affecting patients, their family/carer,** other **staff** members or the **wider organisation,** you may be able to raise this as a human rights issue. This flowchart is designed to help you do that. We use the word 'decision' to refer to a decision, action or policy that may raise human rights concerns. We also refer to the RCN Raising Concerns Guidance, which says "Don't wait for a problem to develop. If you see poor care or feel you are being prevented from providing safe, compassionate care, you should raise your concern as soon as you can." (See the Signposting section of this Guide on **page 46 - 47** for website links).

This flowchart **does not** cover making a complaint about how you personally have been treated at work. In this case you may need to make a complaint to your employer. Human rights may be relevant to the situation you face, and could form part of your arguments about why what has happened to you is not appropriate. It is likely you will need to follow your employer's complaints or grievance procedure and seek further advice.


1. Raise the issue informally
Tip: often issues can be resolved informally with the person who made the decision.
2. Raise the issue with your manager
Tip: be clear about why you think there is a human rights issue to resolve.
3. Raise the issue at a higher level in your organisation
Tip: find out who is responsible for hearing staff concerns. Consider the steps in the RCN's Raising Concerns Guidance.
4. Contact the regulator
Tip: The CQC has a contact line for staff, and remember they have a new human rights approach to regulation.
5. Raise your concerns externally
Tip: think carefully about your options.

Top tips for working through the flowchart

Step 1. Raise the issue informally

It is often worth raising the problem directly with the person who made the decision that you are concerned about. You could arrange a meeting with this person to discuss your concerns. Be clear about why you think the decision raises human rights concerns. You can also refer to your local raising concerns or whistleblowing policy which should identify who to contact to raise a concern.

Remember:

- Tell them about the impact of the decision for the individual/s concerned and link this impact to their rights protected by the HRA and your organisation's legal duties to respect and protect these rights.
- Think about what you are trying to achieve. A change in policy, or a specific decision about a person you are caring for?
- Raising a human rights issue doesn't need to be confrontational. Can you think of less restrictive alternatives to suggest?

Step 2. Raise the issue with your manager

If possible, you can raise concerns in line with your local policy. If you are unable to raise your issues directly with the person concerned, or you do this and you are unable to resolve the issue, the next step is to discuss your concerns with your manager.

Remember:

- Set out your concerns clearly in human rights terms, explaining which rights you believe have been affected and why.
- Make explicit reference to the HRA legal duty to protect rights.
- You can do this verbally or in writing but keep a record.

Step 3. Raise the issue with at a higher level in your organisation

If you are unable to talk to your line manager or if concerns are not addressed, escalate to the next level of management or director of nursing or equivalent.

If your concerns are still not addressed satisfactorily then escalate the issues again to the chief executive or equivalent but ensure that your director of nursing is aware that you have taken this step. You should always ensure that you have support from your trade union or other appropriate body to do this.

Most NHS organisations and care providers have a designated person who deals with concerns raised by staff (this person should be named in your whistleblowing or raising concerns policy). Consider raising your concerns with this person, making explicit reference to human rights law and the duty to respect rights under

the HRA. **The RCN Raising Concerns Guidance provides useful information for nurses on raising concerns**. This can include raising human rights concerns.

Remember:

- You can contact the RCN for support and advice in raising concerns. The RCN Raising Concerns Guidance sets out steps you can follow. It suggests contacting RCN Direct on 0345 772 6100 or your local rep for assistance.
- For advice about whistleblowing procedures you can contact the Public Concern at Work (PCaW) whistleblowing helpline (see page 47).
- If you are unable to raise your concerns with the designated person, you can discuss concerns with your department manager, head of service or chief executive.

Step 4. Contact a Regulator

If you have exhausted all local workplace policies and procedures, you should consider raising your concerns externally. You should always ensure that you have support from your trade union or other appropriate body to do this, such as the RCN (see the RCN Raising Concerns Guidance).

You may want to consider contacting a regulator. Nurses working in England can contact the Care Quality Commission (CQC) using their helpline for staff wishing to raise concerns about the health or social care provider they work for (see page 46).

Remember:

- Raise your concerns in human rights terms, making explicit reference to the rights in the HRA.
- As a public authority, the Care Quality Commission has duties under the HRA, so they should take action if they believe an organisation is failing to protect rights.

Step 5. Raising your concern externally

If previous steps fail, you have the option to raise concerns externally. A list of bodies to which you can make a disclosure can be found at www.gov.uk; enter 'Blowing the whistle: list of prescribed people and bodies'. Other options you may want to consider include contacting your MP or the media. **You should consider this step carefully** and should be sure that you can demonstrate that you have used and exhausted all routes to resolve the issue internally.

Remember:

- You must also be able to clearly demonstrate you are 'acting in the public interest'; otherwise you may lack legal protection.
- If you are considering this option please seek advice from your union, Public Concern at Work (see page 47) or seek legal advice.

6. Identifying and raising a human rights issue

Example case study

An older man on your ward, Eddie, has been admitted to hospital following a fall in which he broke his pelvis. He is very confused but has complained about being thirsty several times throughout the day. There is a glass of water beside his bed but he is unable to pick it up and drink. Earlier today you helped him to drink but have not been able to since.

You have asked your colleagues to check in on Eddie periodically and help him to drink but the ward is seriously understaffed and you do not believe anyone has done this. Eddie is now dehydrated and you are concerned that you do not have the time to ensure he is drinking regularly enough. Additionally, Eddie's condition is deteriorating due to the dehydration and he became agitated and struck out at you when you tried to help him to drink. This is not the first time you have noticed people becoming hungry and dehydrated on the ward, and staffing is starting to become a real concern.

Identifying a Human Rights issue

Step 1. What is the decision?

Staffing levels on the ward are very low. This means that people who need to be assisted with eating and drinking are not receiving enough support.

Step 2. Who has it affected and how?

Because he has not been supported to drink, Eddie's condition is deteriorating. Although the problems with staffing levels have not affected people who are able to eat and drink without help, because Eddie is unable to do this, the staffing levels are having a very serious impact on him.

Step 3. Who has made the decision?

The problem of the low staffing levels lies at a management level. You are also concerned that your colleagues are not aware of Eddie's additional needs and are therefore not prioritising him. Everyone who works within the hospital has a legal duty under the Human Rights Act (HRA).

Step 4. Will the decision restrict anyone's rights as set out in the Human Rights Act?

Not supporting Eddie to drink (or eat) may interfere with his physical and psychological well-being. This is protected by his right to respect for private life under Article 8. You are also concerned that by allowing him to dehydrate, this may be severe enough to be inhuman or degrading treatment under Article 3. If Eddie's condition continues to deteriorate, his right to life could be at real risk, protected by Article 2.

If Eddie continues to become violent due to dehydration, there is also a risk to the staff treating him. Their physical and psychological well-being must also be protected under Article 8.

Step 5. Is the right an absolute right?

Eddie's right to be free from inhuman or degrading treatment under Article 3 is an absolute right so there can be no justifications for interfering with it. The treatment must be very serious to be considered inhuman or degrading. If you believe this treatment is so serious it reaches this threshold, your organisation should take action immediately.

Eddie's right to life is also an absolute right and if you believe his life is at risk you have a positive duty to protect this right.

Step 6. Is the right to liberty involved?

No.

Step 7. Does the decision involve any human rights I can restrict?

In order to justify interfering with a person's Article 8 right to private life, the following test must be applied:

- The must be a **law** or policy that allows a restriction
- There must be a **legitimate reason** for restricting the right
- The restriction must be absolutely **necessary** in the circumstances

In Eddie's case, management's decision to reduce staffing levels could potentially be justified as lawful (depending on how it was made) and could have a legitimate aim of deploying staff to other essential health services. A key issue will be whether the impact of this decision is having a disproportionate impact. You would need to demonstrate that the low staffing levels are having a serious impact on Eddie through lack of time for essential care giving, like supporting him to drink.

Given the severe impact the low staffing levels are having on Eddie's well-being, it does not seem that the policy is proportionate. However, even if it is, the impact on Eddie may be so severe that it amounts to inhuman or degrading treatment under Article 3, and may even put his life at risk, protected by Article 2. As the right to be free from inhuman and degrading treatment and the right to life are absolute, management's justification for the low staffing levels does not matter, and immediate action should be taken to protect Eddie.

What do I do now?

Eddie's case is clearly quite urgent. His condition is deteriorating and his life could potentially be at risk. You need to take action promptly.

Raising a human rights issue

Step 1. Raise the issue informally

You start by raising the issue urgently but informally – refer to your local raising concerns / whistleblowing policy to help identify who to contact. For example, you raise the staffing levels issue with the ward manager and point out the serious impact the situation is having on Eddie. You highlight the hospital's obligation under the HRA and particularly the risk to Eddie's right to life and right to be free from inhuman or degrading treatment and the fact that there is a positive duty to protect these rights. You also highlight the fact that these are both absolute rights, and there are no circumstances where a restriction on these rights is justified.

You also raise the risk to the staff caused by Eddie's dehydration and the impact on his behaviour. Your manager brings Eddie's case to the attention of the ward staff but does not agree that it raises human rights concerns.

Step 2. Raise the issue with the relevant manager

Although the problem with Eddie has been raised with the other ward staff, you are concerned that similar situations will happen with people who have similar difficulties in accessing food and drink. You decide to email your supervisor.

From: nurse@nhstrust.net
To: George@nhstrust.net
Subject: Some concerns regarding a patient

I am concerned about serious issues arising on the ward caused by staffing levels. I was treating a man yesterday who became very dehydrated because nobody had the time to check his notes and find out he needed help to drink. He became very confused and when I tried to help him to drink he lashed out at me. This is not the first time this has happened and I am concerned that the next time it does the outcome could be more serious.

As an NHS hospital, we all have duties towards the people in our care under the Human Rights Act. I am very concerned that staffing levels are risking the rights of people in our care. If we continue to allow people to become dehydrated and hungry we risk treating them in an inhuman or degrading way. The right not to be treated in an inhuman or degrading way, Article 3, is an absolute right protected by the Human Rights Act, so there are no circumstances where this treatment is acceptable. If these situations are allowed to escalate we may also be risking people's right to life under Article 2, also protected by the Human Rights Act, particularly those people that are older and more vulnerable.

The man yesterday became confused and then violent due to dehydration. I am concerned that by allowing people to deteriorate into this condition we are also putting the staff on the ward at unnecessary risk; when the situation could have been prevented if he had not become dehydrated in the first place.

I hope you agree that this is a serious problem that needs to be addressed urgently. I appreciate that the hospital has limited resources and difficult decisions about staffing levels need to be made, but not at the expense of people's safety – something which our human rights duties can help us with.

Your supervisor agrees to escalate the issue. She meets with hospital management and Director of Nursing, who agree to examine the staffing levels. They admit that nothing can be done immediately, so they look at solutions that will be less restrictive of the rights of those on the wards. The hospital develops a system for identifying people that need help eating or drinking, using coloured drinking jugs, so that staff and volunteers can clearly identify when a person needs additional support to eat and drink and they are much less likely to become dehydrated.

7. Where can I get more information and support?

If you need some advice or support about your human rights, here are some organisations who can help:

Royal College of Nursing

The (RCN) has comprehensive guidance about raising concerns for its members working in either the NHS or the independent sector. It provides step-by-step guidance about raising and escalating matters of concern as well outlining the support RCN members will receive. There is also advice for managers approached about a matter of concern:

rcn.org.uk

0345 772 6100

Care Quality Commission

The CQC has a disclosure line for reporting concerns in all the services they inspect (which includes maternity services):

cqc.org.uk

03000 616161

Equality Advisory Support Service

Free helpline and website providing information and advice for people with equality and human rights questions:

equalityadvisoryservice.com

Freephone 0808 800 0082
Text phone 0808 800 0084

Equality and Human Rights Commission

The EHRC provides a range of information on human rights for health and social care providers and commissioners:

equalityhumanrights.com

Health Ombudsman

The Health Ombudsman has a complaints procedure when you have exhausted all internal processes. For more information on how to make a complaint you can call their helpline on:

0345 015 4033

Healthwatch England

Your local Healthwatch can help you raise a complaint. You can locate them here:

healthwatch.co.uk

Liberty

Human rights and civil liberties organisation Liberty run a public helpline three afternoons a week. Contact them by phone or online:

yourrights.org.uk

0845 123 2307
020 3145 0461

Monday and Thursday 6.30 p.m. to 8.30 p.m, Wednesday 12.30 p.m. to 2.30 p.m.

NHS and Social Care Whistleblowing Helpline

For advice on the whistleblowing process within the NHS and to raise concerns:

08000 724 725

Nursing and Midwifery Council

You can also make a 'prescribed disclosure' (bodies authorised by the Government to receive complaints) to the NMC using the fitness to practice referral route:

020 7637 7181

or their email address for other concerns:

whistleblowing@nmc-uk.org

Public Concern at Work

Public Concern at Work runs a whistleblowing helpline providing independent advice for workers who are unsure whether to raise a public interest concern. You can call

020 7404 6609

or email:

whistle@pcaw.org.uk

This Guide 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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The British Institute of Human Rights
bihr.org.uk

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

We empower people to:

- **know** what human rights are (and often what they are not),
- **use** them in practice to achieve positive change in everyday life without resorting to the courts, and
- to make sure those in power **respect** and progress our human rights laws and systems.

At the heart of everything we do is a commitment to making sure the international promise of the Universal Declaration of Human Rights, developed after the horrors of World War II, is made real here at home.

Our innovative work seeks to achieve a society where human rights are respected as the cornerstone of our democracy and enable each of us to live well in communities that value the equal dignity of each person.

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