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Midwifery 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 Birthrights and the Royal College of Midwives, and in consultation with midwives who have acted as 'experts by experience' throughout the drafting process to ensure it is relevant and practical.

BIHR, Birthrights, and the Royal College of Midwives would like to thank the midwives who gave up their time to be part of this process, helping to ensure the Guide is accessible, relevant and useful for midwives working in a range of settings.

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Who this Guide is for

This Guide is for midwives. Although developed with and for midwives this Guide will be **relevant for practitioners in maternity services generally**, including obstetricians and maternity support workers. It may also be useful for women accessing maternity 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 midwives to deliver maternity services that respect human rights by providing accessible information about human rights and how they are relevant in a maternity context. It offers practical assistance when navigating difficult decisions which may impact on the human rights of the people you work with. 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 to 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.

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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 maternity care. Human rights are at the heart of much of the law, policy and practice that you will be familiar with. Human rights are already supporting midwives to provide woman-centred care and protected women's right to make decisions for themselves.

Human rights legal cases have helped to establish what the law means in practice. For example:

Respecting women's decisions on care and treatment

The Court of Appeal considered the case of a woman with pre-eclampsia who had refused a caesarean section. The previous court had authorised the Trust to perform the operation without her consent. The Court of Appeal found that **competent pregnant women have the right to decide for themselves whether to undergo medical treatment.** The Court stated that a woman "is entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of her unborn child depends on it". In subsequent cases the court has held that if women lack mental capacity to give consent to a course of treatment/care, any decision about maternity care must respect their autonomy and dignity in accordance with the Human Rights Act and the Mental Capacity Act.

Legal case: S v St George's Healthcare Trust (1998)

Supporting women's choices on place of birth

In 2011, the European Court of Human Rights considered an application brought by a woman who wished to give birth at home with the assistance of a midwife. The Court found that **the right to respect for private life under Article 8 included the right to make choices in childbirth, including about where to give birth.** This meant that the state had to provide 'a legal and institutional environment' that enabled midwives to support women's choice of place of birth.

Legal case: Ternovszky v Hungary (2011)

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 decisions in (often) difficult circumstances.

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.

NOTE: some of the cases we refer to in the Guide were decided by the European Court of Human Rights and involve countries other than the UK. It is important to understand what the European Court says about human rights in maternity services because these cases explain what the rights in the European Convention on Human Rights (ECHR) mean. The Convention is the source of the rights in the HRA. Cases involving other countries can provide useful information for practice here in the UK.

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 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 behave in ways that comply with human rights in everything they do. This means that public authorities have legal responsibilities for respecting, protecting and fulfilling human rights. This duty is important in everyday situations because it enables people using services and you as a practitioner to challenge poor treatment and to negotiate better solutions, based on a language of rights and duties. Rather than waiting to be challenged, public authorities can also use the HRA proactively to develop and deliver services, policies and practices. For midwives, 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 requires that the death of a woman during or after childbirth should be investigated where the hospital may be implicated (this will usually be done through an inquest).

3. Key human rights in midwifery

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:

- Whenever you are providing maternity care: providing good midwifery care that anticipates risks to life and takes steps to prevent them is a fundamental means of protecting the right to life.
- When supporting women to access maternity services: women should never be denied access to maternity services. You should be aware of potential impediments to accessing care and what this may mean for women's right to life. For example, charges for overseas visitors can put women off accessing maternity services. You should take steps to ensure women understand that care cannot be withheld if they are unable to pay.
- When accommodating women's choices about childbirth: ilf women's choices about childbirth are not accommodated, they may decide to give birth without assistance ('freebirth'). This could pose a risk to the life of the mother and baby. You should be aware of this risk and respect women's choices whenever possible (see below, Article 8).

The unborn baby

It is important to remember that, under the law, the unborn baby does not have a legally enforceable right to life until it is born. Women are responsible for decisions about their pregnancy and birth. Health professionals cannot override a woman's decision(s) unless she is assessed as lacking mental capacity to make such decisions.

This is a long-established principle of English law and the right to life under Article 2 has not changed this position.

Legal cases: S v St George's Healthcare Trust (1998) and Vo v France (2004)

Q2. What do the legal duties mean for me?

Respect: As a healthcare practitioner you cannot deliberately take away someone's life.

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.

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?

Remember all other law needs to be compatible with human rights. You can think about applying other law, policy and guidance through a "human rights lens".

There are clear links to human rights in other laws, policy and guidance:

Nursing and Midwifery Council, The Code: Professional standards of practice and behaviour for nurses and midwives, part one states:

"you make [peoples'] care and safety your main concern and make sure that their dignity is preserved and their needs are recognised, assessed and responded to".

Nursing and Midwifery Council, Midwives Rules and Standards 2012 rule 5 states:

"the needs of the woman and her baby should be your primary focus, working with her and her family to provide safe, responsive, compassionate care in an appropriate environment facilitating physical and emotional care throughout childbirth."

Department of Health, Guidance on implementing the overseas visitor hospital charging regulations (2015) states:

"11. A relevant NHS body also has human rights obligations, so chargeable treatment which is considered by clinicians to be immediately necessary must never be withheld from an overseas visitor..."

"8.6 Due to the severe health risks associated with conditions such as eclampsia and pre-eclampsia, and in order to protect the lives of both mother and unborn baby, all maternity services, including routine antenatal treatment, must be treated as being immediately necessary. No woman must ever be denied, or have delayed, maternity services due to charging issues. Although she must be informed if charges apply to her treatment, in doing so she should not be discouraged from receiving the remainder of her maternity treatment. Overseas Visitor Managers (OVMs) and clinicians should be especially careful to inform pregnant patients that further maternity healthcare will not be withheld, regardless of their ability to pay."

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.**
- **There is a positive obligation to protect this right. This means that if this right is at risk from another person, for example a family member, you must take steps to protect it.**
- **Wherever possible women (or, where it is not possible to consult with a woman, her relatives or carers) should be consulted about decisions about care and treatment that may impact on the right to life (see also the right to respect for private life page 18 - 22).**

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

Q1. How might I encounter this in my work?

Examples could include:

- where a woman is neglected or not cared for in a way that is likely to cause serious harm or suffering;
- obtaining consent for medical procedures;
- assessing and responding to the need for pain relief during and after childbirth;
- caring for women on post-natal wards, where they may be particularly vulnerable and require support for basic needs; 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

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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 from harm.

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 woman's individual situation to determine whether the harm could amount to inhuman or degrading treatment. In the maternity context, important factors to consider include the woman's age, health, ethnic or religious background and disability.

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

Remember all other law needs to be compatible with human rights. You can think about applying other law, policy and guidance through a "human rights lens". There are clear links to human rights in other laws, policy and guidance:

The NMC Code states you must:

- recognise when people are anxious or in distress and respond compassionately and politely (2.6);
- take all reasonable steps to protect people who are vulnerable or at risk from harm, neglect or abuse (17.1); and
- 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).

NICE, guideline CG190, Intrapartum care: care of healthy women and their babies during childbirth:

"Providers, senior staff and all healthcare professionals should ensure that in all birth settings there is a culture of respect for each woman as an individual undergoing a significant and emotionally intense life experience, so that the woman is in control, is listened to and is cared for with compassion, and that appropriate informed consent is sought."

Real life: Right to be free from inhuman or degrading treatment and consent

Imposing medical treatment on a person without their consent could potentially constitute inhuman or degrading treatment, and/or it could violate the right to respect for private life under Article 8 (see page 18 - 23) unless the person lacks mental capacity.

In a case before the European Court, sterilisation of a woman during a C-section was ruled to be inhuman and degrading treatment. The procedure was not an imminent medical necessity and the woman did not give her informed consent to it.

Instead, she was asked to sign a form while in pain from labour and was prompted to sign after being told by medical staff that she or her baby would die in the event of a further pregnancy. Although there was no indication that the medical staff intended to ill-treat the woman, the Court found they displayed gross disregard for her right to autonomy and choice as a patient and she suffered serious medical and psychological after-effects from the sterilisation.

Legal case: VC v Slovakia (2014)

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

Q1. How might I encounter this in my work?

Examples could include:

- supporting a woman in any choice that she makes during pregnancy and childbirth;
- protecting the privacy of women during labour and on post-natal wards;
- involving and supporting birth partners and/or family members during the birth and afterwards; and
- ensuring that women who do not speak English can understand what you are saying and are able to participate in their care.

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, emails, etc.

Q2. What do the legal duties mean for me?

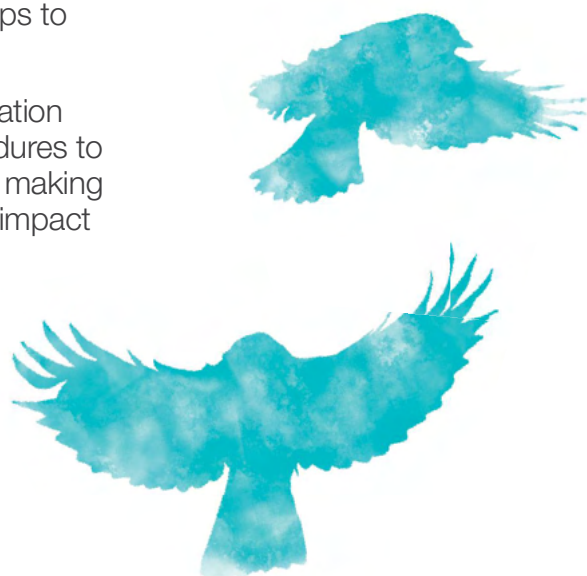
Respect: You cannot restrict people's right to respect for family life, private life, home and correspondence unless there is a need for you to do this and you follow the rules for doing so.

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 on issues that may 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 maternity service has a policy of placing CCTV in all areas for safety reasons.

Outcome: This restricts the right to respect for private life of all women using the service, and staff and visitors, etc.

A proportionate policy: Alternative measures are put in place to monitor the safety of women, staff and others. CCTV is only used in certain areas and in limited circumstances where there is a known risk of harm and this decision will be made on a case-by-case basis.

Outcome: A small number of people may have their right to respect for private life restricted for their own safety or the safety of others; in general women, staff and others do not have their right to respect for private life interfered with.

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

Remember all other law needs to be **compatible with human rights.** You can think about applying other law, policy and guidance through a **"human rights lens"**. There are clear links to human rights in other laws, policy and guidance:

The NMC Code says 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);
- avoid making assumptions and recognise diversity and individual choice (1.3); and
- respect a person's right to privacy in all aspects of their care (5.1).

NMC cases relating to privacy and dignity:

- Rostron v NMC (2009): "[The midwife] failed to uphold the dignity of a patient by allowing her to walk through the labour ward naked from the waist down and with a sanitary towel between her legs."
- Kostova v NMC (2013): A midwife was struck off the register for shouting at a patient: "You are no longer a human being but an animal". The NMC found that she had failed to respect the patient's dignity.

NICE, Guideline CG190, Intrapartum care: care of healthy women and their babies during childbirth:

"Providers, senior staff and all healthcare professionals should ensure that in all birth settings there is a culture of respect for each woman as an individual undergoing a significant and emotionally intense life experience, so that the woman is in control, is listened to and is cared for with compassion, and that appropriate informed consent is sought."

Real life: Right to respect for private and family life and choice and autonomy

Autonomy is a key part of private life in Article 8, which means people should have choice and control over what happens to them. This includes women's right to choose the circumstances in which she gives birth, such as where she wishes to give birth. Where laws are ambiguous and dissuade health professionals from providing assistance at birth outside hospital, this has been found to breach Article 8.

Legal case: Ternovszky v Hungary (2011)

Real life: Right to respect for private and family life and removal of children

If a local authority seeks to remove a child at birth, the mother must be informed of the care plan, except in exceptional circumstances (for example, if there is an immediate risk to the life of the new-born baby). Every mother facing a plan involving removal of her child has the right to be consulted and involved in that process, to protect her Article 8 rights.

Legal case: Re DM (2014)

Real life: Right to respect for private and family life, privacy and giving birth

Article 8 protects women's right to respect for **privacy whilst giving birth** and cannot be interfered with arbitrarily. For example, a woman complained to the European Court of Human Rights that her privacy had been violated by the presence of medical students during her labour. When she arrived at the hospital, she was given a leaflet informing her it was a teaching hospital and there would be medical students attending the birth. She objected to them being present during her labour, but they were allowed to stay and observe. This was found to breach her right to respect for privacy under Article 8 due to the lack of safeguards in place to ensure that her consent was properly obtained.

Legal case: Konovalova v Russia (2014)

Remember! When making decisions about this right...

- **This right is a non-absolute right (also called qualified rights). This means it can be limited or restricted 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 the least restrictive option; it must be proportionate to the problem or issue.**

The Right to Freedom of Thought, Conscience and Religion (Article 9)

Q1. How might I encounter this in my work?

Examples could include:

- where religious convictions lead women to decline a blood transfusion, even when circumstances are life-threatening, e.g. this may be the case with Jehovah's Witnesses; and
- a woman makes choices based on her beliefs, such as preferences about the gender of health professionals supporting her, the birth environment or birth partner.

Q2. What do the legal duties mean for me?

Respect: You cannot interfere with a person's right to think or believe what they want. You can only interfere in their freedom to manifest their beliefs in certain circumstances (see below).

Protect: In some situations you may have a positive duty to secure people's enjoyment of these rights.

Q3. Can I restrict the right to freedom of thought, conscience and religion?

This right has **two components;** the freedom to think or believe what you want, and the freedom to manifest or act on those beliefs.

The first part, **believing what you want, is an absolute right** and cannot be restricted. The second part, the **freedom to manifest your religion or beliefs, is a right that it can be restricted** and balanced against the rights of others and needs of society.

When making **a decision that may restrict a person's right** to act on their beliefs, you must meet the same **three tests** set out on page 19.

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 will be key to deciding whether a restriction on a right is lawful.

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

Remember all other law needs to be compatible with human rights. You can think about applying other law, policy and guidance through a "human rights lens". There are clear links to human rights in other laws, policy and guidance:

The NMC Code states you must:

- respect, support and document a person's right to accept or refuse care and treatment (2.5); and
- encourage and empower people to share decisions about their treatment and care (2.3).

NMC guidance, Maintaining Boundaries:

"Ideas about what is intimate or appropriate may differ across society and the nurse or midwife must treat people as individuals with sensitivity to, and respect for cultural and other differences. Cultural differences can affect individuals' ideas about their personal boundaries. Nurses and midwives should therefore be sensitive to this and treat people in a way that reflects their views and wishes and preserves their dignity. For example, an individual may prefer to be cared for by a nurse or midwife of the same gender."

Real life: right to freedom of thought, conscience and religion and staff uniform

Midwives' uniforms which limit expression of their faith may be a legitimate restriction of rights under Article 9. In one case a nurse working on a geriatric ward challenged the hospital's policy that prevented her from wearing a necklace with a cross on it, arguing that her right to religious freedom had been violated. The Court found that her rights had not been breached. The policy was a justified restriction of her rights because a necklace could pose a risk to the safety of her and her patients. The clinical managers were better placed to make decisions about this risk than judges and she had been offered other options to express her faith. Restrictions on expressions of belief at work will not always be proportionate and will depend on the factual circumstances.

Legal case: Chaplin v UK (2013)

Remember! When making decisions about this right...

- **The right to manifest a religion or belief right is a non-absolute right (also called qualified right). This means it can be limited or restricted 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.**

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 midwife did not provide life-saving care (right to life, Article 2) based on a discriminatory attitude about a woman's age or disability, this would engage Article 14 alongside 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; and
- 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).

Some maternity units may operate policies that discriminate against women on the basis of age and other personal characteristics, such as Body Mass Index. There may be clinical reasons that justify these policies. However, whenever a policy is applied to a woman, her personal circumstances must be taken into account and if she requests an exception to the policy, it should be considered on an individual basis.

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 maternity care 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 **women accessing maternity services**, their **families,** or **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 a woman'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 →

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 44 - 45.
- Monitor the situation for any changes, and you can revisit this flowchart again in future.

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

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 rextrict?

Tip: these are the rights in Articles 8, 9, 10, 11 (listed on page 11)

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 35.

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 9.
- 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 10.

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 11.
- 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 pages 12 - 14 for information) and the right to be free from inhuman and degrading treatment (check back on pages 15 - 17 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 11):

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 pages 18 22 for information about the right to respect for private and family life and on pages 23 - 25 for information about the right to religion and belief.

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 **pages 44 - 45** 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 45).
- 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 44).

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 45) or seek legal advice.

6. Identifying and raising a human rights issue

Example case study

Nandi attended an antenatal appointment with you. She is seven months pregnant with her second child. Her first child was born by emergency C-section, which she found very traumatic. She told you that this time she would like to give birth in the birth centre in the hospital and use the birth pool for pain relief. The policy of your NHS Trust does not permit women who have had a previous C-section to access the birth centre and recommends they do not use a birth pool in labour.

You explain to Nandi that continuous electronic monitoring is recommended for women who have had a previous C-section and that is not offered in the birth centre. She says that she will decline monitoring and continues to request access to the birth centre and the birth pool. After assessing Nandi's situation and the risks involved you believe that, in light of Nandi's previous traumatic experience, you should support her choice for a water birth in the birth centre with appropriate risk assessment and planning.

Nandi meets Bridget, the Matron from the birth centre, and explains her choice. However, Bridget repeats the hospital policy and tells Nandi she will not be able to access the birth centre. Nandi calls you in distress and tells you she will freebirth unless she can be accommodated in the birth centre.

Identifying a human rights issue

Step 1. What is the decision?

Nandi's wish to attend the birth centre and use the birth pool has been refused on the basis of the Trust policy. Although you understand the reasoning behind the policy, you are concerned it is being applied on a blanket basis. You believe an exception should be made in this case.

Step 2. Who has it affected and how?

Nandi is affected by the decision. You believe it will have a particularly serious impact on her because of the trauma she experienced during her last labour, and her indication that she will decline all care if she is unable to access the birth centre.

Step 3. Who has made the decision?

The Matron of the Birth Centre made the decision. There are legal duties under the Human Rights Act (HRA) to respect and protect Nandi's human rights because the Matron works for the Trust, which is a public authority. The policy was designed by the Trust. Policy development and implementation is covered by the duties under the HRA.

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

You consider the reasons for the NHS Trust policy. Water births can make monitoring the fetal heartbeat more difficult and therefore staff might be slower to detect complications. There are some risks involved which may possibly affect Nandi's right to life (Article 2, HRA).

You consider Nandi's rights under Article 8, which is protected by the HRA. This includes Nandi's right to be involved in decisions about her own maternity care.

You are concerned that overriding Nandi's decision about her labour without considering her wishes or circumstances may breach Nandi's right to respect for private life.

Step 5. Is the right an absolute right?

The right to life is an absolute right. Any restrictions on Nandi's right to life are therefore not lawful. It may also be necessary for maternity services to take positive steps to protect Nandi's right to life. You assess Nandi's situation and believe the risks involved are relatively low and Nandi is fully aware of them. You do not think that supporting Nandi in the birth centre with appropriate risk assessment would breach her right to life.

Step 6. Is the right to liberty involved?

No.

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

The right to respect for private life under Article 8 is not an absolute right. You know that any decision to restrict Nandi's Article 8 rights must be lawful, for a legitimate reason and necessary. Is the refusal to allow Nandi access to the birth centre the least restrictive option available and is it proportionate action to take in the circumstances?

You recognise that the hospital policy may have a legitimate aim to prevent potential risks to Nandi and her baby's health. However, you think her individual circumstances – the trauma experienced in her last labour and the risk to her health if she chooses to freebirth – mean that it would be disproportionate for the policy to apply in her case. You don't believe the Matron has considered her individual circumstances and has instead applied a blanket policy.

What do I do now?

You believe you have identified a potential breach of Nandi's rights which would be unlawful under the HRA. You want to facilitate reconsideration of the decision by the Matron, in collaboration with other members of the maternity team.

Raising a human rights issue

Step 1. Raise the issue informally

You decide to raise the issue with the Matron. You catch her on her break and she agrees to chat with you about Nandi. You remind her that as NHS staff you all have duties to Nandi under the HRA. You explain that you think Nandi's right to respect for private life is being restricted in a way that risks breaching Nandi's rights. You outline her individual circumstances which make the policy inappropriate in this particular case.

The Matron is sympathetic to your concerns. She is aware of her duties under the HRA but does not believe she can go against the policy of the NHS Trust. She is concerned about potential complications and although she concedes the risk to Nandi is low, she is worried about any risk to Nandi's life should complications occur. She therefore will not change her decision.

Things to remember in informal meetings:

- **Be clear about the rights being affected. You can use this guide to help you.**
- **You can practice putting your case forward with a colleague or write it down.**
- **If you think you need support, take a colleague with you or seek advice from an external organisation who will have experience of raising similar concerns (see pages 44 - 45).**
- **Stay calm: be assertive but not confrontational.**
- **Make a record of what was said at the meeting so you can refer back to it later if necessary.**

Step 2. Raise the issue with the relevant manager

You decide to raise the issue with the Matron. You catch her on her break and she agrees to chat with you about.

From: midwife@nhstrust.net
To: Angela@nhstrust.net
Subject: Concerns regarding Nandi Smith

Dear Angela,

I am working with a woman called Nandi Smith, who is seven months pregnant. She would like to give birth in the birth centre and use a birthing pool for pain relief. She has had a previous C-section and I have explained to her that the hospital policy states that the birth centre should not admit women who have had a previous section. Nandi understands that it will not be possible to use continuous monitoring in the birth centre. She has said that she wishes to decline continuous monitoring in any event. If she is not permitted to access the birth centre, she says she will choose to freebirth.

Nandi was very traumatised by her previous labour and I am keen that we try to accommodate her choices during her second birth. I have spoken to Bridget James, the Birth Centre Matron, about my concerns, but she is reluctant to make an exception to the policy.

As an NHS hospital, we all have duties towards Nandi under the Human Rights Act. She has a right to make choices about childbirth under Article 8, the right to respect for private life. This includes the right to be involved in decisions about care and treatment. We cannot apply the policy to Nandi on a blanket basis and without considering her individual circumstances. If we do not consider accommodating her choice, I fear that we risk breaching her rights under the Human Rights Act.

I would welcome the opportunity to meet with you and Bridget to discuss this case in more detail and explore options that are less restrictive of Nandi's rights.

Step 3. Resolution

Your manager organises a meeting with you, Nandi and the Matron of the Birth Centre. After setting out your concerns with reference to Nandi's rights under the HRA, it is agreed that an exception should be made to the policy on this occasion and you consider options for Nandi's labour that would be more proportionate in the circumstances. You agree to a plan of care for Nandi. She will be given access to the birth centre and pool. She agrees to accept intermittent monitoring and to transfer to the labour ward if she is advised to do so during labour.

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:

Birthrights

Birthrights provides information and advice to women and maternity professionals on human rights in pregnancy and childbirth. You can find more information here: birthrights.org.uk/advice

Royal College of Midwives

If you do not have a workplace representative, you can call the RCM national number for work related and professional support:

rcm.org.uk

0300 303 0444.

Association for Improvements in Maternity Services

AIMS's provides independent support and information about maternity choices:

aims.org.uk

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/contentcontact-us-using-our-online-form

03000 616161

EASS helpline

Equality and human rights advice:

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/private-and-public-sector-guidance/public-sector-providers/human-rights-health-and-social-care

Health Ombudsmen

The Health Ombudsman has a complaints procedure that can be used 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/find-local-healthwatch

Maternity Action

Maternity Action operate a helpline aimed at maternity service users, and also a number of free information sheets on post-natal and employment rights:

www.maternityaction.org.uk

0845 600 8533

Liberty Public Advice Line

Liberty's human rights advice line runs three times a week. Call on 0845 123 2307 or 0203 145 0461 (cheaper for mobiles).

The line is open at the following times:

Monday and Thursday 6.30pm - 8.30pm

Wednesday 12.30pm - 2.30pm

Local Supervising Authority of Midwives

Local Supervising Authorities (LSA) and LSA midwifery officers provide support and supervision to midwives in their local area:

nmc-uk.org/Nurses-and-midwives/Midwifery-New/Contact-a-LSAMO1/Local-Supervising-Authority-Midwifery-Officer-contacts-England/

NHS and Social Care Whistleblowing Helpline

For advise on the whistle blowing 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 run 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) 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.