



RIGHTS IN ROLES

HUMAN RIGHTS

AN OVERVIEW FOR

RESIDENTIAL CARE STAFF

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INTRODUCTION

In preparing the resources as part of this series we spoke to many people working in residential care. Most residential care staff told us that, whilst they had a sense of what human rights are in general terms (e.g. treating people with dignity), they weren't always sure which particular human rights were commonly involved in residential care, or the level of protection required in order to ensure the law is being followed.

This resource will help you develop a better understanding of:

- What human rights are
- The key terms and the legal framework relating to human rights and residential care.

This publication focuses particularly on the human rights of people receiving residential care services.

HUMAN RIGHTS

WHAT ARE HUMAN RIGHTS?

Human rights are individual enforceable rights that are about ensuring people are treated fairly in society. In general terms they describe the minimum entitlements that we all have, as human beings, to things like freedom, equality, dignity and autonomy. They are based on universal democratic ideals and values such as justice, the rule of law, tolerance and pluralism.

The United Kingdom has incorporated human rights into domestic law (through the Human Rights Act 1998 (HRA)) which enables people in the UK to enforce their human rights through the UK courts. Admissible claims can also be taken to the European Court of Human Rights, after completing the domestic legal process, and claims before that court are brought against the United Kingdom. Other laws highlighted later in this publication are also relevant to the protection of human rights in the context of residential care.

Who has rights?

Human rights are universal (they belong to everyone covered by UK law no matter who they are), they are inherent (we're born with them – we don't have to 'earn' them), they are indivisible (we can't pick and choose which of them we protect) and they are inalienable (they can never be taken away).

Who has duties?

The HRA specifically requires public bodies (like the Government, courts and tribunals, local authorities and hospitals) to act in a way that is compatible with the European Convention on Human Rights (ECHR) when they exercise their functions. In the context of residential care, this includes commissioning organisations (such as local authorities) and those providing public services (including some private and third sector organisations that perform public functions).

Where a registered care provider provides personal care in a person's home or residential care with personal or nursing care it is considered to be providing a public function for the purposes of the HRA if the care is arranged or funded by a Local Authority or NHS Health and Social Care Trust.

It's worth noting that all care homes have to comply with Care Quality Commission (CQC) regulations on fundamental standards (which have been drafted to be compatible with UK human rights requirements) regardless of how residents are funded.

Which human rights are often relevant to older people's care homes?

An important part of learning about human rights in care homes is being aware of where things might go wrong and areas where rights are at particular risk of being infringed in a residential elderly care setting. Research¹ and case law indicate that some human rights are more commonly at risk in such settings – though, of course, other rights will apply depending on the circumstances. Generally, duties under human rights law oblige public bodies to effectively protect human rights, ensuring those rights can be realised in practice. They themselves are required to refrain from acting in a way that breaches individual rights, and in some circumstances to take action to protect people from others who threaten their rights. Where violations involving death or serious injury have occurred, investigations should be carried out to learn how these can be prevented to ensure human rights are better protected in the future. Each of those aspects of obligations under the HRA is summarised in the phrase: ***'respect, protect and fulfil'***.

Compliance with human rights duties is judged according to whether an individual right applies and, if it does, whether it has been breached and whether the breach is justified. Some human rights are absolute, which means breaches of those rights can never be justified. On the other hand, some rights can be restricted if legal conditions have been met. The scope and extent of rights and responsibilities are to be judged under modern day conditions and standards - human rights case law is not static but evolves over time. The precise context and the circumstances of each case are both important in determining whether human rights have been violated. Those three stages are often summarised as ***'engagement, interference and justification'***.

A brief explanation of relevant rights is set out below.

Right to life (Article 2 of the ECHR)

The public authority's duty under this right comprises 3 distinct elements:

- A prohibition on taking lives
- An obligation to protect lives
- A requirement to investigate loss of lives through use of force or failure to protect lives

The duties under this right are owed to everyone within the jurisdiction of the UK.

¹ See for example, Northern Ireland Human Rights Commission (2012) *In Defence of Dignity: The Human Rights of Older People in Nursing Homes*

Deaths from use of force, abuse and/or neglect in a care home could breach the right to life. In these circumstances, the family of victims can bring claims under the right to life.

There are very few circumstances in which the right to life does not operate, for example, when using necessary and proportionate force that results in the loss of life in order to protect one's own life, the lives of others or to lawfully arrest an individual. Most of these situations are unlikely to occur in a care home.

The obligation to protect lives requires clear laws and responsibilities that, when properly understood, help to prevent criminal and other unlawful behaviour. It also requires effective regulation to ensure policies and practices are implemented, in contexts such as the provision of social care, to safeguard lives.

Care homes must take positive steps to protect people's right to life. This obligation includes the duty to take reasonable measures to protect a resident from risks of an accident that staff know or ought to know could result in a resident's death. For example, in one case involving two severely disabled adult sisters who received homecare from a local authority that allegedly had a blanket 'no lifting' policy, the court ruled that this meant that the sisters' right to life might be infringed if their building caught fire, or they slipped under water in the bath and could only be saved by being lifted out, so the policy had to be changed to protect the sisters' lives.

The purpose of an investigation (the third element of this duty) is to understand what went wrong and why and make sure the laws which protect the right to life are effectively implemented. An investigation must be independent, adequate, prompt and open to public scrutiny. The type of investigation needed depends on the circumstances of each case. In the context of deaths in care homes an inquest could be called or, in more serious cases, a public inquiry.

Prohibition of torture, and inhuman or degrading treatment (Article 3 of the ECHR)

This right is 'absolute', which means that it should never be interfered with under any circumstances. It comprises 3 requirements:

- A duty not to inflict torture, or inhuman or degrading treatment
- A positive duty to prevent or stop such suffering
- An obligation to investigate credible allegations of such treatment

For the purposes of this particular right, torture equates to deliberate inhuman treatment that causes very serious and cruel suffering, which is of a higher severity than inhuman or degrading treatment. It can take the form of real and immediate threats of violence or ill-treatment which has severe mental, not just physical, consequences.

Inhuman treatment refers to causing severe mental or physical suffering. .
Degrading treatment refers to humiliating or debasing treatment generating feelings of fear, anguish or inferiority which could break the victim's physical or moral resistance.

In residential elderly care this could include:

- threats of violence (or actual violence) inflicted by care staff towards residents;
- the consequences of failing to provide for a resident's eating, drinking and pain relief needs;
- being left for long periods in soiled sheets or the neglect of a resident's personal hygiene needs ;
- bullying or infantilising verbal abuse towards older people; or
- residents being fed while on the toilet.

In order for treatment to be covered by Article 3 of the ECHR, it must reach a high level of severity. In deciding whether the threshold for torture or for degrading or inhumane treatment has been met relevant factors to consider include the duration of the treatment, the mental and physical effects it had on the victim, and the victim's sex, age and health. Whether the conduct was premeditated can also be a relevant consideration, as can the level of vulnerability of a resident and their ability to complain. It is important to note that treatment can still be judged to be torture or inhuman or degrading treatment even if the person involved cannot perceive what is happening (e.g. because they are cognitively impaired or unconscious).

If a person has given consent, necessary medical treatment, as a general rule, cannot be regarded as violating the prohibition against torture, inhuman or degrading treatment. If treatment has been refused by a competent person, giving it could breach Article 3.

Right to liberty and security (Article 5 of the ECHR)

This right provides protection against arbitrary detention. It is a 'limited' right which means that it can only be restricted in certain very limited circumstances which comply with the law.

- It concerns personal liberty not safety
- It contains detailed conditions and safeguards on restricting individual liberty
- There are positive obligations to provide effective measures to protect vulnerable individuals being deprived of their liberty by other people.

A person can be deprived of their liberty if the detention falls within one or more of a list of exceptions. One of the exceptions permits the detention of 'persons of unsound mind'. This is often used as the basis to detain people who have mental health issues, and place in the social care system people who lack mental capacity

to manage their own lives. In all cases detention has to be a reasonable and necessary measure permitted by the law.

Additional safeguards operate in these situations to protect the rights of detainees. They must be informed of the reasons for detention and any other relevant information, given the opportunity to challenge detention and provided with legal assistance to do so. For detained persons who lack mental capacity, deprivation of liberty safeguards apply that are set out in the Mental Capacity Act 2005 (as amended).

Deprivations of liberty in the social care context can arise when a person is under continuous supervision and control and is not free to leave. The freedom to leave also means the freedom to leave with assistance (e.g. from friends or family) where an individual cannot physically do that on their own. The assessment of whether there has been a deprivation of liberty depends on the context and circumstances in each situation, looking particularly at the type of action taken, its duration and effects and the way in which it is implemented.

In the case of the informal detention of an autistic man in hospital for a long period of time, this was seen by the European Court of Human Rights to be a breach of the right to liberty and security (article 5 of the ECHR) because the detention had been arbitrary, without fixed procedures and the lawfulness of his detention was not reviewed speedily. This judgement led to a consultation by the UK Government which resulted in an amendment to the Mental Capacity Act (2005) to include Deprivation of Liberty Safeguards.

This is an evolving area of the law. Following the Cheshire West verdict, there is a deprivation of liberty when a person is under continuous supervision and control and is not free to leave. If there would be a deprivation of liberty for a non-disabled person there would also be a deprivation of liberty for the disabled person concerned. Care arrangements, particularly for people lacking mental capacity to consent to their care, should be regularly reviewed to ensure they remain in the best interests of vulnerable people.

Right to respect for private and family life (Article 8 of the ECHR)

This is a qualified right, which means breaches are capable of being justified only if conditions set out in Article 8(2) have been met. Those conditions include pursuing a legitimate aim (such as protecting others' rights that are at risk of being breached) and only taking action that is lawful and necessary.

- This right imposes an obligation to refrain from breaching an individual's right to private life, family life, home and correspondence and also imposes positive obligations to ensure the right is not unjustifiably violated.

- Individual choice and autonomy underpins this particular right. A person should be free to make their own choices about matters such as identity, relationships with others, participation in the community and their physical and moral integrity.
- The right also protects uninterrupted and uncensored correspondence with others.
- The threshold for this right to apply is relatively low and it is often used together with other human rights such as articles 3, 5 and 14.
- An assessment of whether a restriction of this right is justified examines whether the law permits the restriction, whether there is a legitimate aim being pursued that is set out in the right (e.g. protecting the rights of others) and whether the restriction is necessary, ensuring the least restrictive action has been taken to achieve that aim (which is often called the proportionality principle)
- Sometimes a balance has to be struck under this right between the needs of the individual and the interests of the wider community. On its own, this right is unlikely to require a particular level of social care provision in situations where there are resource constraints and difficult choices must be made. However, Article 8 might be breached if the level of service undermines a person's dignity and/or personal autonomy.

Article 8 of the ECHR covers a broad range of issues, many of which apply in residential care for older people.

A number of recent publicised failures involving residential care (e.g. the Care Quality Commission's review of Castlebeck Services in 2011) have related to widespread interference with residents' autonomy and privacy (e.g. confiscation of mobile phones and the removal of their possessions as punishment for 'bad' behaviour).

Thinking about effective protection of this particular right could really help care homes to achieve significant improvements in the quality of life for residents and their relatives and carers.

A home is defined as the place where a person lives which is the centre of his or her existence. It can be a place they partially or wholly own, rent or are provided with under the health and social care system. Taking a decision on where a person should live, often in association with the assessment and delivery of social care, clearly engages this aspect of this right. Moving a person from their own home to a place where residential social care is provided, or changing the place residential social care is provided must be undertaken in compliance with an individual's article 8 rights.

For example, the right may be infringed if care arrangements are altered without taking the necessary precautions to protect the individual (such as moving somebody to a care home without warning and authorisation). In one recent case an 81 year-old with dementia was moved without lawful authority from her home – where she had lived for thirty years with her family – to a care home. This amounted to a breach of Article 8 of the ECHR. This right could also be infringed by moving residents from one care home to another when this has a detrimental effect on the resident's well-being due to an emotional attachment to the previous care home. Family life covers the relationships between couples, parents and children, siblings, grandparents and any other relationships that 'disclose the real existence of close family ties'.

The right could be infringed by preventing a resident from remaining with a partner in a care home, or by moving a resident to a care home far away from their family. There have also been cases where local authorities have been challenged on the basis of Article 8 of the ECHR for closing care homes.

The term 'private life' has been interpreted broadly. The broad scope of the right to respect for private life covers matters such as:

- People's right to privacy in a care home (e.g. inappropriate use of residents' personal information);
- Protection from undue intrusion/monitoring of people in private situations (e.g. blanket, rather than proportionate, use of CCTV in care homes);
- Correspondence (e.g. staff controlling mail or phone calls without justification and authority);
- Maintaining and developing social relations inside and outside of the care home (preventing socialisation or recreational activities or failing to support residents to access such activities);
- Personal choices in respect of physical and mental wellbeing and autonomy to make decisions (e.g. failure to engage residents in decisions about their own care, failure to gain consent for medical treatment or forms of restraint), or
- Failure to treat people with dignity (it's worth noting that the right can cover poor treatment which doesn't reach the high threshold for an Article 3 of the ECHR violation);
- Failure to treat residents in a way which is consistent with their ideas of self and personal identity.

In the United Kingdom, the Data Protection Act 1998 also provides legal protection for an individual's private information in terms of what is retained, stored by care homes and the circumstances in which personal information can be lawfully disclosed to third parties.

Freedom of thought, conscience and religion (Article 9 of the ECHR)

This right has absolute and qualified dimensions.

- The right to hold (and change) one's religious or non-religious beliefs is absolute. There can be no justification for breaching this aspect of the right.
- The right to manifest one's religious or non-religious beliefs is qualified. Breaches of this aspect of the right, when it applies, can be justified in accordance with conditions set out in article 9(2), such as taking necessary action to protect the rights of others. Sometimes this involves balancing conflicting individual and community interests.
- Public bodies should avoid, where possible, passing judgment on beliefs, rules, doctrines or tenets, maintaining neutrality and upholding tolerance and diversity even in situations of conflict.
- Subject to some exceptions and qualifications, equality law also prohibits discrimination against individuals based on the protected characteristic of religion or belief in respect of employment, the provision of services and the exercise of public functions.

Beliefs falling within scope of this article are defined in broad terms, and this right applies to both religious and non-religious beliefs (e.g. atheism, agnosticism and humanism). For a belief to be protected under this right it must be serious, concern important aspects of human life or behaviour, be sincerely held, and be worthy of respect in a democratic society. The protection does not usually cover mere opinions or viewpoints.

The manifestation of beliefs covers worship, teaching, practice (including proselytising) and observance. Not every manifestation of religious or non-religious belief is protected under this right. There must be a reasonable connection between the belief and manifestation, however, beliefs within the same broad religion can significantly differ, and decision-makers are not expected to scrutinise this aspect too carefully.

Infringements of the right to manifest one's religious or non-religious beliefs must satisfy certain conditions in order to be justified. They must pursue a legitimate aim set out in the right (such as in the interests of safety and health, or to protect the rights of other residents in a care home) and the form of action taken must be lawful and necessary (usually the least restrictive course of action to achieve the aim i.e. proportionality).

For those providing publicly arranged residential care for older people, compliance with this right would mean they should not do anything that undermines residents' freedom to think or believe what they want to. Similarly, a care home would need to make sure that any restrictions to a resident's rights to manifest their beliefs was

both legitimate (i.e. having a legitimate reason permitted under the law for restricting the right) and necessary/proportionate (the least restrictive action necessary to achieve the aim).

In general, requests to accommodate the religious or non-religious beliefs of residents should be accepted unless there are compelling reasons not to do so, which comply with the conditions to justifiably restrict this right. Set out below are some of the matters that could arise in the provision of residential social care which engage this right.

- Meeting dress requirements (e.g. headscarves)
- Allowing residents to wear religious symbols (e.g. a visible crucifix)
- Accommodating religious practices (e.g. prayers, festivals and other gatherings)
- Permitting reasonable discussions about faith or lack of faith
- Managing conflicting interests (e.g. between religious and other rights)

For example, if family members made arrangements for a resident to attend a religious place of worship every week in accordance with the family's religious wishes, but the resident no longer shares those beliefs and does not want to go, the care home provider would be obliged to listen to the wishes of the resident and take steps to protect his/her freedom to choose not to attend the place of worship in accordance with his/her human rights.

Freedom of expression (Article 10 of the ECHR)

This right is frequently described as fundamental to the operation of a democratic society. However, it is a qualified right that can be restricted under conditions set out in article 10(2) which include pursuing a legitimate aim, such as the protection of the rights of others, provided the restrictive action taken is in accordance with the law and it is necessary and proportionate (usually the least restrictive measure to achieve the legitimate aim).

- It covers the freedom to hold ideas and opinions
- It also covers the right to express oneself in any medium and to receive opinions and information
- Protected categories include political, artistic and commercial expression, although the latter does not necessarily attract the same level of protection as the other categories
- States have positive obligations to facilitate the exercise of this right
- The scope of the right includes expressions that 'shock, offend or disturb' others
- Expressions harmful to tolerant, diverse and democratic societies do not attract protection under this right, so gratuitous personal attacks and hate speech are not protected.

Freedom of expression is sometimes associated with other rights such as the right to respect for private and family life (article 8 of the ECHR), freedom of thought, conscience and religion (article 9 of the ECHR), freedom of assembly and association (article 11 of the ECHR) and non-discrimination in the enjoyment of rights (article 14 ECHR).

In practice, residential care home providers should not constrain residents' ability to express their beliefs, opinions and ideas and their ability to receive and share information, unless there are very good reasons to do so that accord with the conditions to restrict the right to freedom of expression under article 10(2). Not all forms of expression are protected, so appropriate action can be taken to safeguard the rights of others not to be subject to racist or homophobic or other forms of hate speech. For example, residential care home providers could legitimately restrict expressions of holocaust denial and prohibit hate speech concerning religion or sexual orientation.

Freedom of association and assembly (Article 11 of the ECHR)

It is often described as an essential component of a tolerant and plural democratic society.

- Freedom of association includes the right to take collective action and to pursue common purposes.
- Individuals are free to form associations to protect and promote their religious or non-religious beliefs or political ideas and opinions.
- Associations can, however, control who is allowed to join, provided the rules are not wholly unreasonable or arbitrary. Individuals are also free to choose not to join an association if that is what they wish.
- Freedom of assembly concerns matters such as protests, marches, processions, public and private meetings.
- Restrictions on the freedom of assembly and association are permitted under article 11(2) particularly where there is disorder or violence (the right protects peaceful gatherings) and in other circumstances where particularly convincing reasons have been provided to demonstrate the interests of a democratic society requires those freedoms to be limited.
- There is a positive obligation to secure the effective enjoyment of this right as well as the obligation to refrain from restricting this right without justification.

In essence, residents in a care home should be allowed to choose who they wish to associate and assemble with, unless there are convincing and lawful reasons to restrict their ability to do so.

Residents who wish to join religious organisations, political parties, campaigns, protests, marches or other gatherings should not be prevented from doing so without

very good reasons. Their rights to respect for private life and freedom of expression, thought, conscience and religion could also apply and provide an additional basis for exercising such freedoms.

Right to marry and found a family (Article 12 of the ECHR)

- The right to marry is of narrow scope. It can only be exercised in accordance with national laws that, for example, impose conditions concerning nationality, age, capacity, prohibited relationships and compliance with other rules. It does not cover divorce.
- The right to found a family is subject to conditions imposed by national laws.
- This particular right does not encompass a duty to facilitate cohabitation, enable consummation of the marriage or provide accommodation or subsistence to maintain family life – those aspects may be covered by the right to respect for private and family life (article 8 of the ECHR)

The general principle, based on Article 8 ECHR (see above), is that everyone is presumed to have the capacity and freedom to choose who they want to socialise with and with whom they wish to have a relationship, even if the resident's choices appear to be bad to the care provider. People whom the law has decided do not have the mental capacity to manage their personal life do not enjoy the same rights.

Consequently, residents who have the capacity to marry and who can satisfy other conditions to marry should be allowed to marry without unnecessary restrictions being imposed by residential care providers.

Care providers could also be obliged to consider and permit married couples to live together in order to facilitate respect for the couple's private and family life (article 8 of the ECHR).

Prohibition on discrimination in the enjoyment of ECHR rights (Article 14 of the ECHR)

This right is underpinned by the principle that every individual has equal worth. It is not a stand-alone right like the other rights described above: it is only engaged when the issue is within the ambit of another right. This requirement is not as onerous as showing the other right actually applies in the given situation.

- It prohibits discrimination and may require positive steps to be taken to ensure the equal enjoyment of rights
- Discrimination based on race, gender, nationality, disability, age, sexual orientation, gender reassignment and many other kinds of status is prohibited.
- It requires people in analogous situations to be treated equally (treating like cases alike)

- It also requires people in dissimilar situations to be treated differently (treating unlike cases differently)
- Discrimination is capable of being justified on objective and reasonable grounds. The usual tests of pursuing legitimate aims and proportionality apply

The reference to other status means the list is not exhaustive and it goes beyond the limited list of characteristics protected in equality law, including, for example, somebody's refugee status.

Not applying policies consistently to every resident could result in discrimination. For example, placing greater restrictions on the freedom of older as opposed to younger residents could result in violation of the former group's human rights, requiring very good reasons to justify the different treatment.

On the other hand, consistent application of policies could result in discrimination, often inadvertently, where it results in some groups experiencing greater disadvantages than others. For example, a policy and practice in a residential care home that prevents many members of staff from lifting residents adversely impacts on the ability of residents with mobility impairments to fully make use of facilities and heightens risks in an emergency situation. Action should be taken to explore and implement reasonable alternatives that do not have those consequences.

Protection of property (Article 1 of protocol 1 of the ECHR)

This is a qualified right directed at the actions of State (including public bodies), which protects an individual from:

- Interferences with the peaceful enjoyment of one's possessions
- Deprivation of possessions
- Controls placed over possessions

This right imposes positive obligations to take necessary and reasonable steps to protect this right, including enabling individuals to challenge measures that interfere with this right. Interference with this right is, however, permitted in accordance with conditions provided by law and in the public interest, as long as the action taken strikes a fair balance between individual rights and the public interest.

Possessions are defined broadly for the purposes of this right. As well as land, property, shares, money, income, it can also apply to lawful entitlement to social welfare benefits, 'legitimate expectations to obtain enjoyment of a property right' and to claims for compensation.

States have considerable discretion to set taxes and define entitlement to social welfare schemes, although they must ensure that taxes and welfare benefits do not

operate in a discriminatory manner in violation of this right and the prohibition on discrimination in the enjoyment of rights (article 14 of the ECHR).

Residential care home providers who have duties under this right must ensure that residents (or those lawfully managing their financial affairs) are free to enjoy their possessions as they see fit. Restrictions will rarely be in justified in the context of residential care homes, although different issues arise in relation to residents who do not have the capacity to manage their own financial affairs (see below). In addition, of course, residents may be required to pay lawful charges for their care.

Right to free elections (Article 3 of Protocol 1 of the ECHR)

This right incorporates an individual's right to vote and right to stand for election to Parliament. National laws set conditions on how those rights operate.

Care home residents who are entitled to vote should, if they want to vote, be allowed and if necessary supported to do so. For example, the right to vote usually requires registering residents on the electoral roll to ensure they are able to vote. Voting usually takes place in polling stations, but it can now also be done through postal and proxy votes. Polling stations should be accessible to disabled residents. Some assistance is permitted to help people to vote in the polling station, but it is not allowed in the voting booth because free and fair elections require a secret ballot.

Residents who wish to participate in the democratic process by standing for election should also be allowed to do so, though there are conditions set in law that have to be met before one can become a candidate. The Electoral Commission regulates elections and provides guidance on the how to become a candidate and how to vote.

EQUALITY LAW

The Equality Act 2010 protects people against discrimination on the basis of a number of different protected characteristics (such as race, religion or belief, age, sexual orientation, gender and disability). Although it is separate from human rights law it pursues similar aims such as fairness and respect for individual dignity. Violations of human rights could also result in violations of equality law, and vice-versa.

It imposes specific legal duties on people and organisations employing people, and those who exercise public functions or provide services to the public. Residential care home providers will be covered under the employment provisions in relation to their staff and the services or public functions provisions apply in relation to residents receiving care services. The Equality Act 2010 prohibits discrimination, harassment and victimisation based on protected characteristics. Discrimination takes the form of direct and indirect discrimination, discrimination arising from disability and failure to comply with the duty to make reasonable adjustments for disabled people. There are different provisions and exceptions that operate in each context.

It also imposes positive duties on those exercising public function to give due regard when doing so to the need to eliminate discrimination, advance equality of opportunity and foster good relations.

EHRC guidance and codes of practice (available on the EHRC website) explain the operation of equality law in much greater detail.

MENTAL CAPACITY ACT ²

(ENGLAND AND WALES)

The law in England & Wales presumes every adult (and young person aged 16 or over) has the capacity to manage and take decisions concerning their own lives. They make their own decisions on things like what they wear, eat, where they live, what medical treatment they consent to and the use and enjoyment of their property and a range of other personal matters. Just because a person makes a decision deemed to be poor by others does not, on its own, demonstrate they lack the capacity to manage their own life.

Wherever possible, people should be encouraged and supported to make their own decisions, which includes providing sufficient information in an accessible way and at an appropriate point in time to understand the available choices and facilitate decisions that need to be made in a given situation.

An illness or impairment which indicates a person may lack the ability to make day-to-day decisions regarding their personal life could result in an assessment of capacity. The concept of mental capacity is judged according to a functional test carried out by appropriate people in specific situations. It is designed to objectively assess what information a person understands, retains, can weigh and analyse and whether they can communicate their decision (with support if required) in each situation.

Where the law has determined a person lacks mental capacity to make some or all decisions affecting their lives, it takes a different approach. Anything done on behalf of a mentally incapacitated person must be done in that person's best interests and must also be least restrictive in terms of that person's basic rights and freedoms.

Individuals who have planned ahead can issue advance decisions or lasting powers of attorney to express how they wish to be treated in the event they lose the capacity to manage their own lives, which must be considered by the relevant decision-maker. A suitable person (usually a family member or friend) can be appointed by the Court of Protection to lawfully manage their finances and property. That person is not empowered to make decisions on behalf of the mentally incapacitated person on matters such as marriage, relationships, divorce, adoption and voting. However, s/he must be consulted on decisions concerning the care and medical treatment of the mentally incapacitated person (who should also be involved in the decision). The

² Although there are some similarities, different laws apply in Scotland

Office of the Public Guardian is also responsible for protecting people who lack mental capacity.

In situations where there no family or friends are available to assist, an independent mental capacity advocate can be involved to support and represent the mentally incapacitated person and help to ensure important decisions concerning where that person lives, the care they receive and the medical treatment they receive are taken in their best interests.

Additional safeguards and procedures have been set up to protect the rights of people in this situation. This includes what are commonly known as deprivation of liberty safeguards (DOLS).

These safeguards came into force in 2009 and are designed to provide administrative and judicial safeguards for adults lacking mental capacity who are deprived of their liberty in care homes and hospitals. If a care home feels it may be necessary to restrict a resident's liberty, the safeguards require that a request is made which needs to be authorised by a supervisory body (local authority) that will appoint assessors to make a judgment.

In care homes, if appropriate safeguards and procedures are followed then residents may be deprived of their liberty if it is deemed in their best interests. Yet, the right could be infringed if a resident's freedom of movement is restrained excessively or if deprivation of liberty safeguards are not implemented (e.g. when a person who does not have the mental capacity to decide where they should live is detained without proper authorisation by a care home).

UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Many care home residents will fall within the definition of a disabled person. Older people may be more likely to have impairments or health conditions constituting disabilities.

The UNCRPD is the most recent international human rights treaty the United Kingdom has signed up to, containing an up-to-date statement of aspirations, principles, obligations and rights required by disabled people to secure substantive equality in all areas of life.

Many of the rights contained in the ECHR are replicated – with a disability-specific focus – in the UNCRPD and it also reflects the aims of domestic equality law. Although it creates no individually enforceable rights in the United Kingdom, the UNCRPD can influence how laws such as the Equality Act 2010, the Mental Capacity Act 2005, the Human Rights Act 1998 as well as the ECHR operate in relation to disabled people. It also impacts on establishment and regulation of policies and practices in the social care sector.

One particularly notable UNCRPD obligation for the residential social care sector concerns disabled people's right to independent living which is designed to enable disabled people to participate fully in all aspects of community life, without isolation or segregation. It is explained in the following terms:

Living independently and being included in the community (Article 19 of the UNCRPD)

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to

support living and inclusion in the community, and to prevent isolation or segregation from the community;

- c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

THE REGULATORY FRAMEWORK

A FINAL WORD

All residential care providers must be licensed with the Care Quality Commission (CQC) and must meet its fundamental standards which are set out in a series of regulations. The CQC aims to protect and promote compliance with human rights as part of these regulatory functions. The CQC's fundamental standards are in accordance with the HRA where applicable and they can help the CQC identify and address breaches of human rights through its own powers. Thus helping providers to meet CQC standards can help to promote human rights and vice versa. Keeping positive obligations to promote human rights of residents high on the agenda should help to improve the quality of service for residents.

However, it's important to note that the CQC isn't explicitly inspecting for compliance with the Human Rights Act, so meeting CQC fundamental standards may not always be enough to ensure you are protecting and promoting human rights. The CQC inspects to see how providers meet the fundamental standards in the Health and Social Care Act regulations. If the CQC finds breaches of the HRA that it thinks the Equality and Human Rights Commission (EHRC) has more suitable regulatory powers to address, then it can share information and refer cases to the EHRC.

The EHRC has direct responsibility for promoting and ensuring compliance with equality and human rights law. This can include monitoring and acting on violations of human rights, advising government and educating the public. In some cases, claims relating to the European Convention on Human Rights (of the type described above) will be brought by individuals through the courts to seek redress for potential human rights infringements. Ultimately it is the courts that decide whether or not human rights have been infringed.

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OTHER USEFUL RESOURCES

Age UK

Older People and Human Rights: A Reference Guide for Professionals Working With Older People

http://www.ageuk.org.uk/documents/en-gb/for-professionals/equality-and-human-rights/older_people_human_rights_expert_series_pro.pdf

BIHR

Your Human Rights: A Guide for Older People

<https://www.bihr.org.uk/Handlers/Download.ashx?IDMF=09673898-9b40-47a1-9bef-5806a004b0b8>

Dementia Rights

Examples of Human Rights in Health and Social Care

<http://www.dementiarights.org/examples-of-human-rights-in-health-and-social-care/>

Northern Ireland Human Rights Commission

In Defence of Dignity: The Human Rights of Older People in Nursing Homes (Chapter 2)

<http://www.nihrc.org/documents/research-and-investigations/older-people/in-defence-of-dignity-investigation-report-March-2012.pdf>

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