

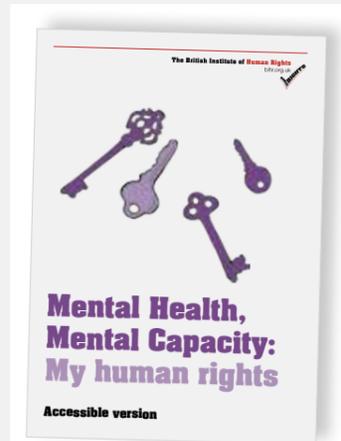
Mental Health, Mental Capacity: My right to liberty

Accessible mini guide

Finding your way around our mini guides

This factsheet is one of ten mini guides about your human rights.

- 1 Mental Health, Mental Capacity: What are human rights?
- 2 Mental Health, Mental Capacity: How are my human rights protected?
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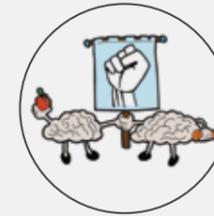
The information in these factsheets is taken from a booklet called 'Mental Health, Mental Capacity: My human rights.'

You can get a copy of the booklet by contacting BIHR or visiting our website: www.bihhr.org.uk/health

info@bihhr.org.uk
0207 882 5850

This factsheet is to help you understand your rights. It is not legal advice.

What is this mini guide?



This mini guide is about mental health, mental capacity and human rights.



This mini guide aims to give you information about how human rights can help you to have **more control over your own life** and be **treated with dignity and respect**.



This mini guide explains your human rights when you are receiving **health and care services**, e.g. at your GP, in hospital, community care, care homes etc.

This information can also help you with



education



housing

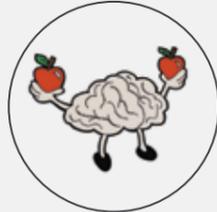


and dealing with the police.

Who is this mini guide for?

This mini guide is for anyone with a mental health or mental capacity issue.

Mental Health and Mental Capacity



Mental Health

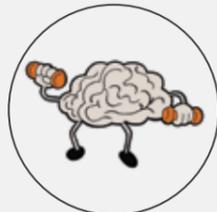
We use the term 'mental health' to include anyone who has a "disorder or disability of mind". This is how 'mental health' is described in law, in the Mental Health Act.



This includes things like depression, dementia, eating disorders, autistic-spectrum disorder, and behaviour changes caused by brain damage and personality disorders.



This mini guide will be useful for anyone receiving care or treatment for a mental health issue.



Mental Capacity

Capacity is about your everyday ability to make decisions about what happens to you.

Under the law, 'having capacity' means when a decision needs to be made (e.g. about what treatment you should have) you are able to

- understand
- remember
- weigh up the pros and cons and
- let people know what you have decided.



Sometimes having a learning disability, dementia or brain damage, drinking alcohol or taking drugs might mean you're not able to do those things. Under the law this is called 'lacking capacity'.

Right to liberty



This right is protected in law by the Human Rights Act. The right to liberty is called 'Article 5'.

How is my right relevant in mental health or mental capacity settings?

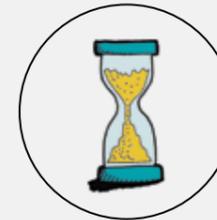
Examples include:



Being **restrained** for long periods



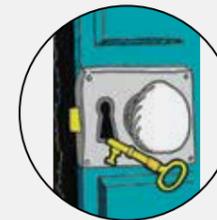
Being kept somewhere that isn't right for you because of lack of space in mental health hospitals. E.g. being sent to prison when a court hasn't ordered that you serve a prison sentence.



Significant **delays or cancellations of hearings** allowing you to challenge your detention.



Being told you are **not allowed to leave** or being stopped from leaving a place (like a care home or hospital).



Sometimes you can be detained. This would be done through the Mental Health Act or the Mental Capacity Act. We tell you more about this on the next page.

Can my right to liberty be restricted by mental health or mental capacity services?

Yes. Your right to liberty can be limited where necessary.

Here are 2 examples:



1. If you have been [detained under the Mental Health Act](#).

This can only be used if:

You have a recognised 'mental disorder'

AND

Your detention is necessary to keep you or others safe.

The authority detaining you would need to be able to prove this.



2. If you have been [assessed as lacking capacity](#) (See page 7 to find out more about what we mean about capacity).

That means you are unable to make a decision or unable to agree to treatment for a mental health issue.



It may be you are living somewhere that people think you may be in danger or at risk and you are unable to make a decision about leaving. [To keep you safe your right to liberty may need to be restricted](#).



Before this can happen there is a formal process that needs to be followed by those providing your care.



This is called a '[Deprivation of Liberty Authorisation](#)'. There is more information about this on page 9.

What is capacity?

Capacity is about how able you are to make decisions.



This includes making decisions about your care and treatment.

The Mental Capacity Act has a legal test to check this.

A number of things can affect your capacity, such as mental illness, learning disability, dementia, brain damage or if you have taken drugs or drunk too much alcohol.

The public official will have to assess if you are able to:



understand,



remember what you are being asked,



weigh up the pros and cons of your choices and



let people know your decisions.

Capacity is 'task-specific'. This means:

- It focuses on the decision that needs to be made at the time.
- If your incapacity is temporary (for example if it's due to being drunk) you can ask officials to wait until you are able to make a decision.
- If you lack capacity to make one decision it doesn't mean that you lack capacity to make other decisions
- Capacity can also change, so things need to be kept under review and your capacity re-assessed later on.

Capacity: What about my human rights?



A public official should first think that you do have capacity to make a decision and, if they are not sure, they should do an assessment.



This is because of your human rights.



If it is decided that you do not have capacity to make a decision, a public official will make the decision for you. That person must make the decision in your best interest. This means the decision must be what is best for you, not for anyone else.

They should:



Think about your human rights



Consider your wishes and feelings and



Support you to be involved in decisions as much as possible.

Mental capacity and restricting your liberty



The 'Deprivation of Liberty Safeguards' are part of the Mental Capacity Act.



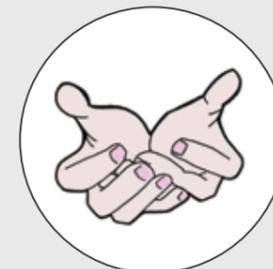
Sometimes, people who couldn't understand what was happening to them, people who had mental capacity issues, didn't have their human rights protected.



To stop this happening, the government passed a set of laws in the Mental Capacity Act called the Deprivation of Liberty Safeguards or 'DOLS' for short.



DOLS are a set of rules that must happen to protect your rights if you are in hospital or in a care home.



These are called safeguards and are there to protect you.

These safeguards make sure your freedom is only restricted when it is really necessary.

What duties do health or care workers have about my right to liberty?



To RESPECT your right

This means they must not do extreme things to stop you moving (for example, being locked in a room or being strapped to a chair) unless it is absolutely necessary and can they can give good reason why you need to be stopped.



To PROTECT your right

There are lots of safeguards which apply if your right to liberty is restricted.

The safeguards set out in the right to liberty in the Human Rights Act include:



You must be able to **challenge** the restriction of your liberty through an independent court or tribunal (in England you can do this through a Mental Health Tribunal for mental health issues or the Court of Protection for mental capacity issues).



This review of your detention must be carried out **'speedily'** and delays or cancellations of hearings can be challenged using your right to liberty.



You must have a **chance to have your side of the story heard** at the hearing, either by you or your representative.



You must have chance to **see and challenge a report about you** or any other evidence about the decision to restrict your liberty.

In real life: Right to liberty



Young man with learning disability returned home to live with father



Steven was a young man with a severe learning disability. He lived at home with his dad. **When his dad was ill he went for a short break at the local authority support unit.**

The local authority kept Steven there for over a year. He and his dad didn't want this.



When Steven tried to leave, the local authority signed a Deprivation of Liberty Authorisation. **They wanted Steven to stay in a care home miles away from his father.**



Steven and his dad took a human rights case through the courts to challenge this. **The court decided that Steven's right to liberty had been breached.**



This was because the Deprivation of Liberty assessment **had not asked what Steven and his dad wanted and it had taken too long.**



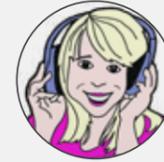
The court also decided that the local authority hadn't protected Steven and his dad's right to family life (more on this right in our other mini guide).

(Hillingdon London Borough Council v Neary, 2011)

In real life: Right to liberty



Preventing people with mental capacity issues from leaving services



Meg was 17 years old. Meg had a learning disability and sometimes behaved in a way some people found difficult.



She had been living with her mum. People were worried that there was abuse, so **Meg was moved to an NHS residential unit.**

Meg had staff with her whenever she left the unit.



The court was asked to decide whether Meg's right to liberty was being restricted.



The court said **everyone** has human rights and **the right to liberty applies to people with a learning disability in the same way.**



The court decided that Meg's right to liberty was being restricted because she was not allowed to leave on her own and was always controlled by staff.



When things like Meg's story happen 'Deprivation of Liberty Authorisation' needs to be made so that checks and safeguards are put in place to make sure the restriction of liberty is necessary and justified.

(P and Q v Surrey County Council, 2014, better known as the 'Cheshire West Case'. We made up the name.)

The rights protected by our Human Rights Act:



Right to life
(Article 2)



Right not to be tortured or treated in an inhuman or degrading way
(Article 3)



Right to be free from slavery or forced labour
(Article 4)



Right to liberty
(Article 5)



Right to a fair trial
(Article 6)



Right not to be punished for something which wasn't against the law 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 to 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)