Shining a light on human rights

Hospital Discharge and Human Rights:

A practitioner's guide

The British Institute of Human Rights
bihr.org.uk

About this booklet

This booklet is about human rights and discharging people from mental health hospitals. It is aimed at any practitioners supporting people before, during or after hospital discharge. We use the term 'practitioner' throughout to include anyone working in these settings. Lots of information in the booklet may also be useful for people using services, their family, carers or advocates (BIHR has also produced a range of resources aimed at people using mental health services, see www.bihr.org.uk/health).

This booklet was written by the British Institute of Human Rights (BIHR), in partnership with **St. Martin of Tours Housing Association**. This service is working with BIHR on a project called **Human Rights and Hospital Discharge**. The project aims to build the knowledge and confidence of healthcare practitioners to use a human rights approach to hospital discharge; to better support people discharged from hospital, and in turn to help prevent unnecessary admissions. The project is funded by Skills for Care, therefore the information in this booklet focuses on English law and bodies.

BIHR would like to thank the service users and practitioners at St Martin of Tours for their help in producing this booklet, particularly the Human Rights Champions for their ideas, advice and guidance.

The booklet is part of a series of toolkits on mental health/capacity and should be read in conjunction with our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide'.** That resource contains more information about how UK law protects human rights, key rights for mental health/capacity services and where to find more information/support.

Hospital discharge and human rights

As services supporting people with mental health issues through transition, the aims of good practice in hospital discharge align with human rights values. This includes:

- promoting independence and well-being, in the least restrictive setting possible
- promoting recovery
- focusing on the needs and wishes of the person and promoting autonomy.

Independence, well-being and autonomy are key human rights values protected by the **right to respect for private life** (Article 8 in the Human Rights Act 1998). This booklet aims to give practitioners the knowledge and confidence to use human rights in practice, to design and deliver rights-respecting services. It focuses on three key issues for hospital discharge, identified by our partner.

Finding your way around

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

Delayed discharge from hospital

Delays in discharging people from mental health hospitals can be caused by a range of factors including lack of appropriate support for the person outside the hospital, lack of arrangements to support discharge, or a risk-averse approach by staff involved in discharge. These delays can raise human rights issues around the person's liberty. Using a human rights approach will help staff to weigh up the rights of the patient whilst taking into account the risks, which could affect the person's / other people's safety or well-being.

Potential human rights issues for practice

- Failing to act to discharge a patient where the criteria for continued detention are not met and instead waiting until the detention period expires.
- A risk-averse approach to discharge which doesn't properly take into account the person's rights to liberty, autonomy, family life etc. and overly focuses on risk.
- Keeping a person in hospital longer than is necessary due to concerns about them making decisions staff consider unwise, such as criminal behaviour, drugs or alcohol.
- Failing to make timely arrangements for discharge which leads to delays due to lack of appropriate placement or aftercare.
- Failing to include the person (and family/carer if appropriate) in plans for discharge leading to delays due to lack of support.
- Delayed discharge causing a person distress, or hindering their long-term recovery, putting their right to well-being at risk.
- Granting repeated or prolonged leave, to ease pressure on beds, rather than considering discharge.

A human rights approach to avoiding delayed discharge

This could include:

- ✔ planning for discharge at the start of admission (or at the earliest appropriate point) with the person (and family/carer if appropriate)
- ✔ liaising with other practitioners early on, such as social workers, housing workers, pharmacists, GPs, rehab services etc. in order to minimise delays
- ✔ helping the person keep in touch with life outside during their hospital stay (family, work, education etc) and facilitating trial periods at home/the discharge location to avoid delays in discharge
- ✔ ensuring the person has access to an advocate to support them through the process and have their voice heard.

Key rights for delayed discharge from hospital

Right to liberty

(protected by Article 5 in the Human Rights Act)

This right prevents extreme restrictions being placed on people's movement, except in specific circumstances, such as detention under the Mental Health Act (MHA). Even if a restriction on liberty is for a lawful reason, there are still human rights safeguards which must be in place, such as keeping the detention under review, and access to a tribunal to challenge the detention. Once the criteria for detention under the MHA is no longer being met, failing to act to discharge the person could breach their right to liberty.

Relevant practitioners' duties:

- To respect this right: not interfering where possible.
- To protect this right: applying the procedural safeguards written into the right.

See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide' page 15** for more information.

Right to respect for private and family life

(protected by Article 8 in the Human Rights Act)

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

- the person making choices about their own life and participating in decisions about their care and treatment, including discharge and their recovery goals
- avoiding harm caused by delayed discharge, such as serious distress or hindering recovery.

The right to respect for **family life** could be relevant where failing to discharge a person from hospital means they can't return home to their family.

Relevant practitioners' duties:

- To respect this right: not interfering where possible unless it is lawful, for a legitimate reason and proportionate.
- To protect this right: taking action to protect where necessary.

See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide' page 12** for more information, including your other duties.

Right to non-discrimination

(protected by Article 14 in the Human Rights Act)

Practitioners should also consider whether a person's right to enjoy their human rights without discrimination is an issue. For example, is their discharge from hospital being delayed because they have a drug or alcohol issue, or a history of criminal behaviour which staff think might be triggered on discharge?

See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide' page 20** for more information.

In real life: discharging from hospital to respect rights

Yaling had been detained under the Mental Health Act for 4 months. During her detention Yaling had been on leave from the hospital and taken recreational drugs. When the hospital staff became aware of this they revoked her leave. Towards the end of Yaling's detention, her mental health and her medication regime were stable. Yaling felt ready to leave the hospital but staff were not discussing discharge arrangements as her leave continued to be revoked due to drug use.

Yaling's mental health advocate had been trained by the British Institute of Human Rights. The advocate spoke to Yaling about her right to autonomy (protected by Article 8 in the Human Rights Act) and to make decisions others might consider unwise, and about her right to liberty (protected by Article 5 in the Human Rights Act). Yaling spoke to the hospital staff about her rights and her concern that her detention under the MHA had become about preventing her taking recreational drugs rather than for treatment for her mental health issue. She also spoke to them about her right to liberty as she no longer fit the criteria for detention under the MHA. The hospital staff reviewed Yaling's case and, taking into account her human rights, began making plans for discharge. Yaling was discharged a few days later.

Example from BIHR's project Care and Support: A Human Rights Approach to Advocacy

"Using a human rights approach has revolutionised decision making. Staff are thinking differently and acting differently. It needs to be rights based, not just risk based."

Paul Hill, Essex Partnership University NHS Foundation Trust, from BIHR's project 'Delivering Compassionate Care'

Premature discharge from hospital

One of the most challenging issues faced by staff involved in hospital discharge is the timing of the discharge. Keeping someone in a mental health hospital for longer than is necessary will raise human rights issues, particularly their right to liberty (see pages 4-5). Discharging someone from hospital prematurely or abruptly, without the correct care plan in place, could also have human rights implications. There are often legitimate reasons for this, such as a concern about keeping someone in hospital longer than is necessary. Practitioners often have to balance these concerns against the patient's right to well-being and safety. A human rights approach can help with this balance to ensure discharge is planned for and the person is involved in their own recovery.

Potential human rights issues for practice

- Discharging a person before they feel ready.
- Pressuring a person into discharge.
- Sudden discharge where the patient (and family/carer where appropriate) isn't consulted or involved in the decision/process.
- Rushed discharge without an agreed care and support plan or arrangements in place at the discharge location (home or other setting).
- A person being discharged from hospital due to lack of beds where there are concerns that they might pose a risk to themselves/others.

A human rights approach to avoiding premature discharge

This could include:

- ✔ avoiding rushed or abrupt discharge by beginning discharge planning from the start of admission with the person (and family/carer if appropriate)
- ✔ identifying with the person where they will be discharged to, and ensuring arrangements are in place for their arrival well in advance
- ✔ producing the discharge plan with the person so that it aligns with their own recovery goals, needs and views, to protect their autonomy
- ✔ ensuring an appropriate care and support plan with the person, to protect their safety
- ✔ ensuring the person has the right support plan in place and understands what to do if they relapse or need more support
- ✔ prompt face-to-face follow-up (within 48 hours) arranged before discharge
- ✔ ensuring the person has access to an advocate to support them through the process and have their voice heard.

In real life

Frannie was discharged from a mental health hospital before she felt ready. She had recurring thoughts about ending her own life and her follow-up meeting didn't take place within the agreed seven days. Her advocate spoke to the care and support team and pointed out that they should be taking positive steps to protect Frannie's right to life because they knew that she was at risk of suicide. The support meetings were then increased from fortnightly to weekly.

Example from BIHR's work

Key rights for premature discharge from hospital

Right to respect for private life

(protected by Article 8 in the Human Rights Act)

This right protects people's **well-being** and **autonomy** which include:

- protecting people from psychological trauma or physical harm (including self-harm)
- people making choices about their own life
- participating in decisions.

Relevant practitioners' duties:

To respect this right: not interfering where possible unless it is lawful, for a legitimate reason and proportionate.

To protect this right: taking action to protect where necessary.

See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide' page 17** for more information.

Right to be free from inhuman or degrading treatment

(protected by Article 3 in the Human Rights Act)

This right could be relevant where a person is at risk of serious harm (including self-harm) or poses a risk of seriously harming others.

See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide' page 12** for more information.

Relevant practitioners' duties:

To respect this right: not breaching in any circumstances.

To protect this right: taking action to protect a person from a known and immediate risk of serious harm, often called **safeguarding.**

Right to life

(protected by Article 2 in the Human Rights Act)

This right may be relevant in cases of severe risk where a person has suicidal thoughts or poses a risk to other people's lives.

See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide' page 10** for more information.

Relevant practitioners' duties:

To protect this right: taking reasonable steps to protect where there is a known and immediate risk to a person's life.

two: Decision-making flowchart

Premature discharge from mental health hospital

Which of my **Human Rights Act** duties are triggered?

- **Duty to protect life or from inhuman or degrading treatment**
- **Duty to respect person's well-being (right to private life)**
- **Duty to protect person's autonomy (right to private life)**

Duty to protect life or from inhuman or degrading treatment

Step 1 Would discharge from hospital put the person's or someone else's life at immediate risk, or put the person/others at risk of serious harm?

YES

Take immediate action to prevent this by assessing the risk and the steps you should take to protect those rights.

Move to step 2

NO

Move to step 2

This flowchart is for practitioners working in a mental health hospital considering discharging a detained patient where there are concerns that it is premature, to help you think about using a human rights approach

Duty to respect person's well-being

Step 2 Would discharge from hospital put the person at risk of psychological trauma or physical harm?

YES

If you are considering discharging a person, but are concerned that their well-being would be put at risk by discharge, this right can be restricted; you must follow the three stage test to see if your action would be permissible:

1. Lawful: the Mental Health Act covers this; you should discharge a patient where the criteria to justify keeping the person in hospital are not met. AND
2. Legitimate aim: your reason for discharge could be to protect their other rights, such as family life or liberty. AND
3. Proportionate: is the decision to discharge proportionate to that aim? Have you explored other options with the person which would respect their well-being as well as protecting their other rights, such as offering continued support as a voluntary patient with trial periods at home, or a CTO?

Move to step 3.

NO

Move to step 3

Duty to protect person's autonomy

Step 3 Has the person been involved in the decision to discharge them?

YES

If the person understands the process and agrees to the discharge plan, implement the plan and exit flowchart.

NO

You have a duty to protect the person's autonomy, which means supporting the person to participate in the decision about their discharge. Discuss the process and agree a discharge plan with the person. Exit flowchart.

Exit the flowchart

Explaining the steps in the flowchart

Step 1. Would discharge from hospital put the person's or someone else's life at immediate risk, or put the person/others at risk of serious harm?

If discharge from the hospital would put the person's, or someone's, life at immediate risk you must take immediate action to protect this right. The right to life in the Human Rights Act includes a positive duty to take reasonable steps to protect a person's life, if you know it is at immediate risk.

If discharge from the hospital would put the person, or someone else, at risk of inhuman or degrading treatment, you must take immediate action to protect this right. The right to be free from inhuman or degrading treatment in the Human Rights Act also includes a positive duty to take reasonable steps to protect a person known to be at risk. The threshold for inhuman and degrading treatment is very high. It covers very serious harm, either physical (including self-harm or assault) or psychological (such as extreme distress or anxiety).

If there is a risk to life or of serious harm, you should consider putting plans for discharge on hold whilst you assess the risk. What 'reasonable steps' you need to take will depend on the circumstances. An immediate risk requires an immediate response, such as contacting the emergency services. A less immediate risk may require a different approach, such as arranging for a mental health assessment and discussing this with the person to see if a longer stay in hospital with more support is required.

Step 2. Would discharge from hospital put the person at risk of psychological trauma or physical harm?

If the risk of harm to the person is less serious, it will engage your duty under the right to private life (Article 8) to respect the person's well-being. This is not an 'absolute' right, which means that it can be restricted. If you are thinking about discharging a person where this could put their well-being at risk, you must follow the three stage test to see if your interference with this right would be permissible. All three stages of this test must be met.

1. **Lawful:** is there a law which allows the inference? Yes, the Mental Health Act (MHA) covers this. You should discharge a patient from hospital where the criteria to justify keeping the person in hospital are not met.

2. **Legitimate aim:** think about what you are trying to achieve by discharging a person where there is a risk to their well-being. Is it to protect their other rights? For example, protecting their right to liberty by removing them from formal detention. Or their right to family life by discharging them back into the community where they can more easily see family and friends.

3. **Proportionate:** is the decision to discharge proportionate to that aim? This is about considering all other options with the person and weighing up the risk to their well-being against the positive impact of protecting other rights. Have you explored the other options with the person, such as trial periods at home/in supported living, removing the person from formal detention but offering continued support at the hospital on a voluntary basis or a CTO?

Step 3. Are you still considering secluding a young person?

The right to private life also protects people's autonomy. This is about people making choices about their own life and participating in decisions about their care and treatment. People detained under the MHA still have a right to autonomy and a human rights approach would involve the person in all decisions about their care and treatment, to encourage people to play an active part in their recovery plan. This includes the person being involved in their discharge plan from the outset and considering all options with them (and their family/carer if appropriate).

If the person doesn't agree with the discharge plan, explore the reasons for this (for example, is the suggested placement making them feel anxious due to a previous experience, or are they concerned about contact with someone outside the hospital which might cause them to relapse?). Discuss other options or transition phases / interim measures with the person, such as visits to the suggested placement or trial periods at home.

Discharge from hospital into an inappropriate setting

A key issue raised by practitioners, as well as advocates and service users, is the discharge of someone from a mental health hospital to an inappropriate setting. This could mean discharging someone to a place where there are barriers to their recovery, for instance to a building where there is known drug use, or to a place where it's probable that they will not get the support needed. It could also mean that the person poses a risk to themselves or others because their setting after discharge hasn't been properly considered. This could put the person at risk of relapse, but could also put their human rights at risk.

"Staff training on human rights made it tangible for us. We moved from thinking human rights were concepts we couldn't make concrete, to something we could really use."

Advocate on BIHR's project 'Care and Support: A Human Rights Approach to Advocacy'

Potential human rights issues for practice

- Discharging a person to a temporary inappropriate setting, such as a B&B, to ease pressure on beds.
- A person being discharged to a setting where they may face risks to their safety or well-being, such as a location which causes trauma due to their personal history.
- A person being discharged to a setting where they are not happy or comfortable, without any choice.
- Obtaining consent of a person to discharge as a 'tick-box exercise', with only limited information about the placement and no choice.
- A person being discharged without proper consideration of their or other people's safety.
- Failing to involve the person in their care plan or discharge arrangements, particularly about where they are going to live.
- No prior planning, or funding, in place for when a person is discharged.

Key rights for discharge from hospital into an inappropriate setting

Right to respect for private and family life, home and correspondence

(protected by Article 8 in the Human Rights Act)

The **right to private life** protects people's privacy, autonomy (choice, control, independence) and their well-being (mental and physical).

This includes:

- a person making their own choices and participating in decisions about their care, including where they live
- a person being able to participate in their community as they choose
- a person living somewhere they feel safe and comfortable

The **right to family life** protects people's relationships with family and those close to them. This will be relevant on discharge, if the person is placed miles away from their family or friends.

The right to home will be relevant to decisions about moving a resident or tenant from a place they consider to be home, which can include supported housing.

Relevant practitioners' duties:

To respect this right: not interfering where possible unless it is lawful, for a legitimate reason and proportionate.

To protect this right: taking action to protect where necessary.

See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide' page 17** for more information, including your other duties.

Right to be free from inhuman or degrading treatment

(protected by Article 3 in the Human Rights Act)

This right is relevant where a person is at risk of serious mental or physical harm. This could include:

- a person discharged being at risk of serious self-harm or neglect because they don't have enough support
- a person being put at serious risk of harm by discharging them to a place where they may be in danger from other people (including other individuals such as family, friends or other residents).

Relevant practitioners' duties:

To respect this right: not breaching in any circumstances.

To protect this right: taking reasonable steps to protect someone from a known and immediate risk of serious harm, often called **safeguarding.**

See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide' page 12** for more information, including your other duties.

Right to life

(protected by Article 2 in the Human Rights Act)

This right is relevant where discharge leads to a risk to life. This could include:

- a person being at risk because of an inappropriate setting which causes them to relapse into suicidal thoughts
- a person being discharged to a setting where other people put their life at risk.

Relevant practitioners' duties:

To protect this right: taking reasonable steps to protect where there is a known and immediate risk to a person's life.

See our other booklet **'Mental Health, Mental Capacity and Human Rights: A practitioner's guide' page 10** for more information, including your other duties.

A human rights approach to discharge from hospital into an appropriate setting

This could include:

- ✔ the person being involved in writing their own background report, to protect their autonomy and ensure they are in control of their own narrative
- ✔ ensuring assessments for aftercare are carried out in a sensitive way, by someone who knows the person, to respect their private life
- ✔ at the earliest opportunity, consulting the patient (and family/carer if appropriate) about their discharge, including giving a choice about where they want to be discharged to
- ✔ consent to and choice of discharge placement by the person should be based on detailed information about the placement including visiting the service and meeting staff
- ✔ where it is not possible to ascertain the wishes of the person in advance about discharge, or to respect their wishes immediately, arranging a temporary placement for a period to allow for future care planning with the person
- ✔ liaising with practitioners at the chosen discharge location at the earliest opportunity, to begin arrangements for a smooth discharge, including safe arrival and being met by staff
- ✔ avoiding discharge to places where relapse is likely where possible, and ensuring the person has appropriate support, to protect their well-being.

Worked example:
agreeing an appropriate placement for discharge

Shareef is 27 years old and has been detained in a secure hospital after a relapse in his psychosis. He has a history of alcohol abuse which has contributed towards relapses in the past, although he hasn't drunk alcohol for a number of months. This is mainly due to the fact that he has moved to a new area of London.

Shareef's psychosis has improved and staff are making arrangements for discharge. His social worker, Nesta, arranges for Shareef to be placed with a housing association. Shareef is not happy about this because the supported flat he is offered is in the area where he used to live and drink. There are similar supported flats in other areas but Nesta thought that it would be better for him to be in a familiar area. Shareef tells Nesta, "If you put me in that place, I'll start drinking again".

Nesta feels under pressure to discharge Shareef, and to the same local authority area, so continues with the arrangements. Jess, who works for the housing association and has worked with Shareef previously, attends the discharge meeting. Jess knows that the area is inappropriate for Shareef due to his history and the local residents, who are known to pressure others into drinking alcohol. In the discharge meeting she raises this as a possible interference with Shareef's right to autonomy, due to his clearly expressed wish not to be placed there.

Nesta now understands the seriousness of Shareef's concerns and the impact the placement could have on him. Nesta speaks to Shareef and he agrees to stay one more night at the hospital, to give Nesta time to find a place for him in an alternative area.

"I was able to use human rights arguments to get appropriate care for a patient who was relapsing in our service. There was a delay in getting him transferred to an appropriate setting due to a disagreement between two Trusts about funding. I was able to point out the delay caused by this disagreement meant that he was being left in circumstances that were degrading. We used human rights arguments to get the matter resolved urgently."

Paul Holden, Operations Manager, St. Martin of Tours Housing Association

The rights protected by our Human Rights Act:

Right to life
(Article 2)

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

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

Right to liberty
(Article 5)

Right to a fair trial
(Article 6)

Right not to be punished for something which wasn't against the law
(Article 7)

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

Right to freedom of thought, conscience and religion
(Article 9)

Right to freedom of expression
(Article 10)

Right to freedom of assembly and association
(Article 11)

Right to marry and found a family
(Article 12)

Right not be discriminated against in relation to any of the rights contained in the Human Rights Act
(Article 14)

Right to peaceful enjoyment of possessions
(Article 1, Protocol 1)

Right to education
(Article 2, Protocol 1)

Right to free elections
(Article 3, Protocol 1)

Abolition of the death penalty
(Article 1, Protocol 13)

This booklet has been produced for staff delivering health and care services. If it has helped you to deliver rights-respecting care BIHR would love to hear your examples. You can email your real life examples of positive changes to your practice on info@bihr.org.uk.

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