

Number 34

Human Rights and Mental Health

The Human Rights Act has been said to be the most important legislation for over 100 years. It is anticipated to have a significant effect on mental health law and practice. This Briefing Note contains an easily digested summary of the most relevant provisions to enable staff to have an overview of the Act's potential implications

Q. What is the Human Rights Act?

A. The Human Rights Act came into force on 2nd October 2000. It incorporates directly into English law most of the provisions of the European Convention on Human Rights.

Q. What does the Act do?

A. The Act gives all persons certain basic human rights (which are known as “Articles” and listed at the end of the Act). Some are absolute rights and others are qualified which means there may be situations where infringement of rights are justified.

Q. Who does the Act apply to?

A. The Act applies to all authorities undertaking functions of a public nature. This will certainly include the NHS and will probably also include private sector mental health care providers looking after NHS patients.

Q. What rights are relevant to mental health law?

A. The rights most likely to be relevant to mental health law are:

- Article 2 - Right to life
- Article 3 - Prohibition of inhuman and degrading treatment
- Article 5 - Right to liberty
- Article 6 - Right to a fair hearing
- Article 8 - Right to a private family life
- First Protocol - Right peacefully to enjoy possessions

Q. So why are these rights relevant to mental health law?

A. Article 5 – The Right to Liberty

The right to liberty has an exception for the detention of persons of unsound mind. However, the European Court has already held that to be lawful such a detention must:

- (a) Be based on medical opinion,
- (b) Be confinement for mental disorder,

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- (c) Continue only for as long as mental disorder persists,
- (d) Be in accordance with the law – in this country it must therefore be in compliance with the Mental Health Act.

Detention of patients under Sections 2 and 3 Mental Health Act for example is likely to comply with this but there is doubt as to whether detention under Section 136 or Bournewood will be Human Rights Act compliant.

Article 3 – Prohibition of Inhuman and Degrading Treatment

Whether any particular treatment is likely to breach this Article will depend on the facts of the case. Circumstances that have already been before the European Court of Human Rights have included whether force feeding a patient is inhuman and degrading (the Court held it was not) and whether giving a cheaper psychiatric drug with worse side effects than a more expensive one was inhuman treatment (and the Court held it was).

Article 8 – Right to Private and Family Life

This Article is likely to have implications for mental health in several areas. Patients are likely to rely on this Article to ensure that they obtain visits by family and children, that long-term in-patients have the ability to exercise conjugal rights and that children are not detained without the parents' consent. This Article may also be used to seek to challenge powers of search (in conjunction with the right to peaceable enjoyment of possessions).

Article 6 – Right to a Fair Hearing

This Article will clearly be applicable to Mental Health Review Tribunal Hearings, but it is likely that it will also be relevant to Hospital Managers' Hearings. Although intended to be an informal procedure, there will be an increased need to ensure that the principles of natural justice are observed and that the hearings are conducted on the basis that the parties are on a level playing field, for example ensuring reports are available to everyone in sufficient time (and where they are not, that the hearing is adjourned).

Article 2 – Right to Life

The most obvious implication of this Article is around the issue of suicide. The European Court has already held that the Article requires hospital authorities to take positive steps to secure an individual's right to life. Where clinical practice permits attempted or actual suicide, this Article is likely to be relied on as an additional or further basis for a claim.

Q So what will the Courts do? Can't I just rely on the Mental Health Act?

- A. The Courts are required to interpret all existing English law in order to give effect to the rights set out in the Human Rights Act. In doing so they must take account of the existing case law from cases previously decided by the European Court of Human Rights in Strasbourg. Existing English law (including the Mental Health Act) may, therefore, be interpreted differently now.

In order to give effect to human rights, the Courts may make orders requiring authorities to do or stop doing something in breach of the Human Rights Act, and where this is an insufficient remedy, may also award damages. However, if the Judge finds that it is impossible to construe existing English law to give effect to the Human Rights Act, he may make what is known as a "declaration of

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incompatibility” which authorises the relevant Minister of State to change the existing law by Statutory Instrument.

Q. What should I do about the Act?

A. It is important that staff know the implications of the Act. Initial steps should include a review of all policies and procedures to ensure that they are compliant with the Human Rights Act, seeking legal advice where appropriate. Staff should receive training in the Act and its implications.

Q. Are there any other implications of the Human Rights Act?

A. Yes, but this article seeks to focus on the most important ones.

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For more information on Mental Health Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: andrew.parsons@rlb-law.com.

Out of office emergency advice available 24hrs on 07802 506 306.

Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

Future editions can be received by email. Please e-mail: marketing@rlb-law.com or telephone 020 7227 7476.

This article first appeared on www.SocietyGuardian.co.uk, the Guardian’s website for staff and public services.

Lectures and seminars on the Human Rights Act and its implications for Mental Health are available from RadcliffesLeBrasseur who have been running a programme of training on Human Rights issues at the premises of several NHS Trusts and private providers.

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