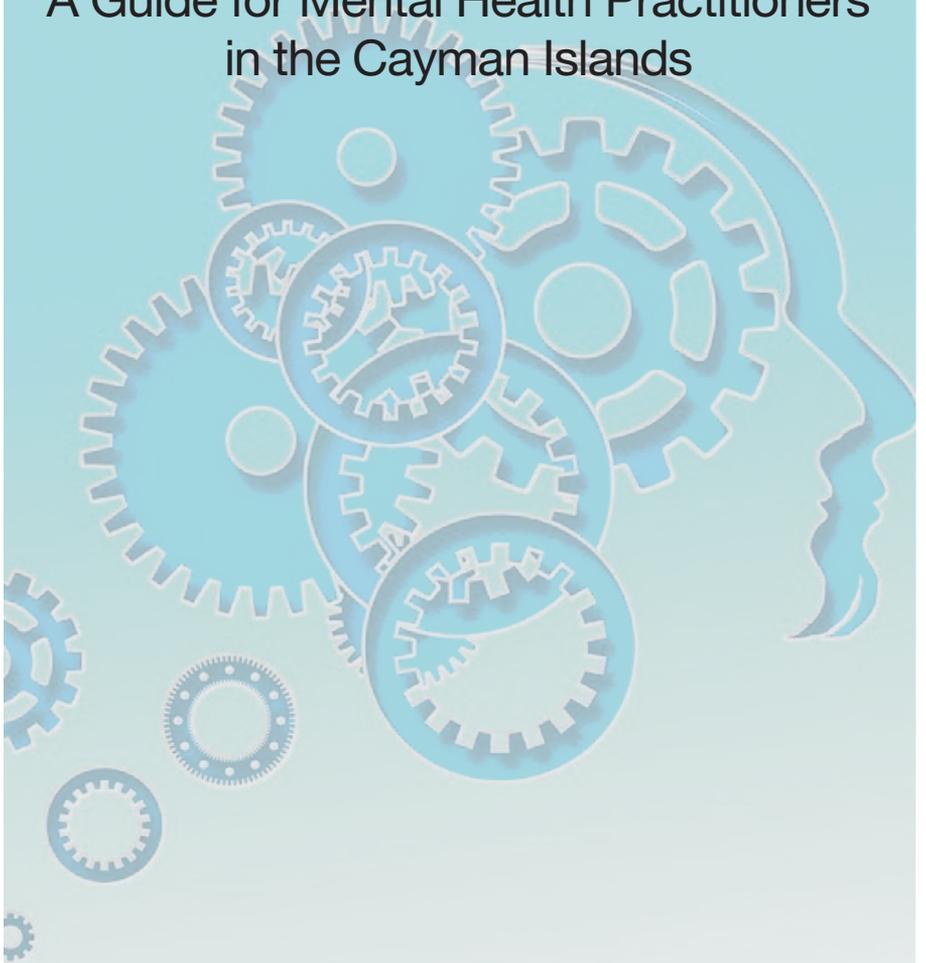




Cayman Islands Human Rights Commission

promoting, protecting and preserving human rights

Human Rights Essentials: A Guide for Mental Health Practitioners in the Cayman Islands



"To deny people their human rights is to challenge their very humanity."

- Nelson Mandela

Message from the Human Rights Commission

The Human Rights Commission (“the Commission”) commends the Ministry of Health (“the Ministry”) and the relevant stakeholders, for the work that has been undertaken in the area of mental health to date, especially the passage of updated mental health legislation, the creation of the Mental Health Commission (“the MHC”), and added protections for these vulnerable people.

Mental health services consumers are entitled to be treated as every other individual in the Cayman Islands, with dignity and respect.

This guide has been developed by the Commission, at the request of the MHC, in order to provide appropriate human rights training for stakeholders in the mental health field.

James Austin Smith
Chairman, Human Rights Commission

Cayman Islands Constitution Order 2009

Part One—Bill of Rights, Freedoms and Responsibilities

What is the Bill of Rights?

The Bill of Rights:

- is contained in Part One of the Cayman Islands Constitution Order 2009;
- recognises the distinct history, culture, Christian values and socio-economic frame-work of the Cayman Islands, and it affirms the rule of law and the democratic values of human dignity, equality and freedom;
- confirms or creates certain responsibilities of the government and corresponding rights of every person against the government; and
- does not affect, directly or indirectly, rights against anyone other than the government except as expressly stated.

The preamble to the 2009 Constitution details the values of the Cayman Islands upon which this legislation was drafted.

What rights are contained in the Bill of Rights?

1. Guarantee of Rights, Freedoms and Responsibilities
2. Life
3. Torture and inhuman treatment
4. Slavery or forced or compulsory labour
5. Personal liberty
6. Treatment of prisoners
7. Fair trial
8. No punishment without law
9. Private and family life
10. Conscience and religion
11. Expression
12. Assembly and association
13. Movement
14. Marriage
15. Property
16. Non-discrimination
17. Protection of children
18. Protection of the environment
19. Lawful administrative action
20. Education
21. Public emergencies
22. Protection of persons detained under emergency laws
23. Declaration of incompatibility
24. Duty of public officials

What are human rights?

Human rights are the essential rights and freedoms that belong to all individuals regardless of their nationality and citizenship. These rights are considered fundamental to maintaining a fair and just society.

What types of rights are there?

- **Limited rights** — Government can interfere with, restrict, limit or amend such rights (e.g. liberty, expression, movement) because these rights come with expressed or implied exceptions.
- **Absolute Rights** — Government cannot interfere with, restrict or limit these rights in any way (e.g. torture, inhumane or degrading treatment, slavery).
- **Qualified Rights** — Government interference with these rights would be allowed in special circumstances, and only when necessary in a democratic society. The interference must fulfil a pressing social need; pursue a legitimate aim; and be proportionate to the aims being pursued. An example would be government restrictions on the right to assembly and association, in order to calm a riot.

How are the rights applied?

A person's rights are only applied vertically in the Cayman Islands; they are enforced only against the Government and not against private individuals.

What does the Bill of Rights mean for me as a public official?

- Public authorities have an obligation to act in accordance with the Bill of Rights when delivering a service directly to the public; and devising policies, procedures, and legislation.
- It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights, Freedoms and Responsibilities.
- Government may restrict/limit some of your rights in cases where the restrictions are not greater than is needed to achieve the objective; and they have used proportionality as a guide, i.e. government cannot use a “sledgehammer to crack a nut”.
- In general, the rights of one person cannot be used to ‘trump’ the right of the general public to be kept safe from a real risk of serious injury or loss of life.

What are my responsibilities as a public official?

Your responsibilities as a public official are clearly laid out in the following sections:

- S.19. (1) All decisions and acts of public officials must be lawful, rational, proportionate, and procedurally fair.
- (2) Every person whose interests have been adversely affected by such a decision or act has the right to request and be given written reasons for that decision or act.
- S.24. It is unlawful for a public official to make a decision or to act in a way that is incompatible with the Bill of Rights unless the public official is required or authorised to do so by primary legislation, in which case the legislation shall be declared incompatible with the Bill of Rights.

Mental Health Law, 2013 Revision

Basic Principles*

- Encourage voluntary admission and treatment
- Encourage community-based treatments
- Enforce confidentiality and anonymity where possible
- Balance and prioritise the human rights and safety of patients and the public
- Use involuntary treatment settings only in critical circumstances
- Utilise the least restrictive (or alternative) treatment and detention

Rationale for Legislation*

- Balance safety and protection for individuals and society
- Provide integration into community
- Improve provision of services
- Increase access to care services
- Enhance Human Rights
- Promote rights in other critical areas such as housing, education and employment
- Increase overall productivity
- Encourage collaboration
- Empower families & caregivers
- Provide multiple checks and balances
- Promote mental health and prevent serious mental illness

** Taken from the training Initiative of The Mental Health Commission pursuant to section 9 (c) of the Mental Health Commission Law 2013*

Which human rights are relevant for people living with mental health concerns?

All of the human rights protected by the Bill of Rights belong to and may be relevant for people living with mental health issues.

However, this guide will concentrate on the eight human rights that are most relevant:

- the right not to be tortured or treated in an inhuman or degrading way,
- the right to personal liberty,
- the right to respect for private and family life,
- freedom of thought and religion,
- the right for a consenting, unmarried man and woman to get married,
- the right to a fair trial,
- the right to not be treated in a biased way with respect to other of your constitutional rights, and
- the responsibility of government to protect children.

Each right has been summarised and presented in the form of a case study, which serves to both a) provide a concrete example of how the rights are applied in mental health contexts, and b) in most cases establish case-law at the highest level (from the European Court of Human Rights) as guidelines for good practice for each of the rights under examination.

Torture and Inhuman Treatment



Original work by John Broad

In Simple Terms

Protection against torture means you cannot be subjected to acts that intentionally inflict severe pain or suffering, whether physical or mental. Protection against inhuman and degrading treatment or punishment means you cannot be subjected to acts that intentionally inflict mental or physical suffering, anguish, humiliation, fear or debasement (falling short of torture).

Government could not torture or degrade you, or allow anyone else to torture or degrade you, at any time – whether in times of war, or other public emergencies.

Persons with mental health issues have the right to receive treatment which is proportionate to and appropriate for their condition, as well as the right to maintain a dignified state of being while in mandated care or detention.

This right is an absolute right.

CASE STUDY:

M.S. v. THE UNITED KINGDOM (2012)

Police were called to a scene in Birmingham, England in 2004 where a man, M.S., exhibiting signs of mental illness was sitting in a car in a residential neighbourhood sounding the horn and acting agitated; he was arrested shortly thereafter. At his home address they found his aunt, who lived with him, had sustained serious and extensive injuries. M.S.'s detention at a place of safety was authorised under s.136 of the UK Mental Health Act 1983 for a maximum of 72 hours.

Over the course of the next several hours M.S. was taken to a police station and examined by 3 different qualified mental health professionals who were of the opinion that M.S. was not fit to be interviewed by the police or charged with any offence. They found M.S. to be suffering from a mental illness which warranted detention in hospital in the interests of his health and safety and for the protection of other persons. In endeavouring to find a suitable institution for transfer, the medium security hospital Reaside was selected.

The consultant forensic psychiatrist at Reaside, Dr. M., under the impression that M.S. may be charged and interviewed before he was transferred to Reaside (due to the suspected assault on his aunt), did not act in haste to have any direct consultation with M.S.

The next day the Crown Prosecution Service concluded that there was insufficient evidence to charge M.S. with assault. Moreover, Reaside confirmed that the resources to move M.S. would not be available for another 2 days, or after the 72-hour detention limit.

During his detention, M.S.'s situation deteriorated to the point where he was refusing food, drinking water from the toilet in his cell, had stripped himself naked and appeared to have smeared his body with food and/or faeces. At Reaside his diagnosis was of a manic episode with psychotic features requiring seclusion and rapid tranquillisation due to his bizarre behaviour and aggressive, threatening manner. His total time at the police station without treatment was 75 hours.

M.S. initially lodged complaints of violations of ECHR Articles 3 and 8 to the UK courts. After a series of appeals the European Court of Human Rights found that there had been a violation of Article 3 (Torture) of the Convention by the U.K. Government.

Personal Liberty



Original work by Avril Ward

In Simple Terms

You are free to do what you want, as long as you obey the law and respect the rights of others.

- If you are detained by the Government you have the right to remain silent;
- to be promptly informed of the reasons for the arrest and any charge against you, in a language that you understand; and
- to have a court speedily examine and decide the lawfulness of your detention and be released if the detention is not lawful. You shall be entitled to compensation if unlawfully arrested or detained.

This right is a limited right.

CASE STUDY:

D.D. v. LITHUANIA (2012)

A female Lithuanian national (D.D.) who suffered from schizophrenia was placed in a home for people with learning disabilities on the grounds that she was unable to care for herself. D.D. had been stripped of her legal capacity in court, which was initiated by her adoptive father (with whom she had a difficult relationship). He proceeded to place her in a care home some years later.

When assessing whether she had been deprived of her liberty, the Court took into account the fact that the care home had exercised complete and effective control over her through medication and by supervising her treatment, care, residence and movement for over seven years.

As D.D. had been stripped of her legal capacity, she was not allowed to participate in her guardianship hearings. Her assigned guardian changed multiple times over the course of several years.

The proceedings show that despite the fact that she no longer had legal capacity, she was still able to express an opinion on her situation and had unequivocally objected to her stay in the home throughout, having requested her discharge on several occasions.

However, the Court went on to find that no violation of ECHR Article 5 (Personal liberty) was found in respect of her initial deprivation of liberty on the basis that her mental health was impaired, though her inability to obtain her release from the home was indeed a violation. They also noted that there was a breach of ECHR Article 6 (Fair trial) in the context of the proceedings concerning the appointment her guardian, which were deemed to be unfair.

Fair Trial



In Simple Terms

People charged with breaking the law have the right to a fair and public trial. A trial is when someone, such as a judge, listens to what happened before deciding whether or not you have done something wrong.

The trial must be conducted by an independent and impartial court within a reasonable time.

All decisions of the court shall be announced publicly.

Under this right, you would not be compelled to give evidence at trial and could not be re-tried for an offence after you have been legally pardoned for it unless a higher court so orders.

This right is a mixed right, meaning that some sections are absolute, while others are limited, and others are qualified.

CASE STUDY: ---

STANEV V. BULGARIA (2012)

In 2002, a Bulgarian national, Stanev, was placed under partial guardianship against his will and admitted to a social care home for people with mental disorders. He had been diagnosed with schizophrenia in 1975. Stanev complained in particular to the European Court of Human Rights that no mechanism was available to him in his situation to apply to a court to seek release from partial guardianship.

Domestic law attached a certain weight to his wishes and it appeared that he was well aware of his situation. At least from 2004, he explicitly expressed his desire to leave the institution, both to psychiatrists and through his applications to the authorities to have his legal capacity restored.

The Court concluded that there had indeed been a violation of Article 6 (1) (Fair trial) of the Convention in this case, in that Stanev had been denied access to a court to review a declaration of incapacity. They further concluded that this was one of the most important rights for the person concerned. It followed that such persons should, in principle, enjoy direct access to the courts in this sphere.

Private and Family Life



Original work by Gordon Solomon

In Simple Terms

Under this right, the respect for your private and family life, your home and your correspondence is protected.

The concept of “private life” is broad. In general, it would mean you have the right to live your own life, with reasonable personal privacy in a democratic society, taking into account the rights and freedom of others.

In cases of mental health this right may (depending on the case) be engaged in a number of ways: public determination of homes for persons in full-time care, failure of public officials to provide information about the right to challenge detention orders, disclosure of an individual’s medical details to unapproved persons, and prevention by a public official of a person’s access to family members during hospitalisation or detention without just cause.

This right is a qualified right.

CASE STUDY:

H V. UNITED KINGDOM (1987)

A mother, H (aged 27), who suffered with mental health problems which included periodic bouts of drug overdose and violence, and stints in and out of mental hospitals, had her daughter taken into care after a safety order was made to protect the child.

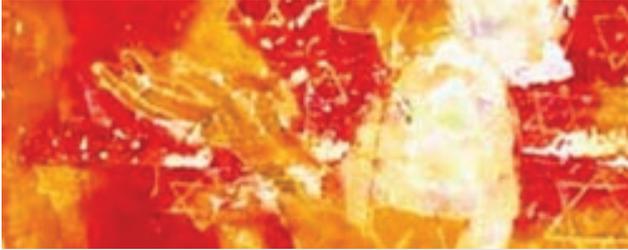
Within two years after this, H got married, her mental health improved and she made applications to the courts for staying access and then for care and control, both of which were refused. The court then terminated the mother's access to the child with a view to putting the child up for adoption.

Over a period of two years and seven months H and her husband persistently but unsuccessfully approached the local county council, which provided social services to the mother and her child, via the courts, seeking to re-establish contact. Over the years H had continued to demonstrate increasing improvement in her mental health and home life. The council delayed considerably in providing their evidence and did not notify the mother and her husband that the child had already been placed with an adoptive family. An adoption order was subsequently made, which ended all connections between the child and the natural parents. Procedural delays had meant that by the time of the adoption hearing the child had been with her adoptive parents for 19 months and the mother had not had access to the child for over three years.

The European Commission found that the issue in question was the council's management of the dissolution of all natural ties between the mother and child by instituting access and adoption orders, which, in its opinion, did indeed engage Article 8 (Privacy) of the European Convention on Human Rights.

The Commission determined that the delay by the county council was a violation of Article 8 (Privacy) and Article 6 (Fair trial) of the ECHR, particularly given the stabilisation in the mother's situation, the high stakes of child guardianship and the irreversibility of adoption.

Conscience and Religion



Original artwork by Nasaria Suckoo Chollette

In Simple Terms

You are free to hold particular beliefs, and to practice your religion.

No one can tell you what to think or believe about God or religion, unless your beliefs could harm others.

You have a choice. You should take the time to understand the differences among religions and respect the choices of other people.

This right protects you, and your children, from being forced to receive religious instruction that does not follow your, or their, personal beliefs.

This right is a qualified right.

CASE STUDY:

NOTTINGHAMSHIRE HEALTHCARE NHS v R.C. (2014)

A detained patient with a severe personality disorder was self-harming by cutting and had to be mechanically restrained to prevent this. He had made an advanced decision, with the capacity to do so, of refusing blood transfusions because of his religious beliefs; i.e. he had made a conscious decision to embrace the religion of Jehovah's Witnesses and therefore refused blood products.

The court ruled that this was valid and applicable, but only on an interim basis since the document did not state that it was signed by the maker and the witness in each other's presence. The responsible clinician accepted that a blood transfusion would be medical treatment for mental disorder under s.63 of the Mental Health Act 1983 which speaks to Treatment Not Requiring Consent, and therefore the advanced decision could be overridden. However, because the patient's wishes were religious, the physician did not want to impose treatment. The NHS Trust therefore sought the protection of a court declaration that the physician's decision was lawful. The court was unwilling to make this declaration, without hearing both sides of the argument, because of the importance of the issues.

The Court of Protection was completely satisfied to declare that the patient had full capacity to refuse the administration of blood products and, furthermore, a decision by the patient's doctor to not impose a blood transfusion despite of the Mental Capacity Act 2005 was lawful.

Marriage



Original artwork by Monte Lee Thornton

In Simple Terms

A consenting unmarried man or consenting unmarried woman, has the right to marry a person of the opposite sex.

However, you cannot be forced to marry.

If you choose to get married, you will share equal rights and responsibilities in relation to your spouse and your children.

Sometimes a judge will help decide what is in the best interests of your children if you no longer live with your spouse.

In a mental health context the right to marriage may be engaged if a person is detained, and may raise issues of ability to consent.

This right is a qualified right.

CASE STUDY:

LUTON BOROUGH COUNCIL V. (1) S.B. (2) R.S. (2015)

R.S. was a 25 year old man with an intellectual disability and autism spectrum disorder. He lived with his mother (SB) and six of his seven siblings.

Proceedings were commenced by the local authority seeking a Forced Marriage Protection Order for R.S. The application was designed to forestall an anticipated marriage. However, it subsequently transpired that a marriage between the applicant and a female had taken place in Pakistan. The proceedings were reconstituted under the inherent jurisdiction of the High Court.

The issues included:

- Did the applicant lack capacity to consent to marriage?
- Did the applicant lack capacity to consent to sexual relations?
- If the applicant lacked capacity to consent to marriage and/or sexual relations, should the court exercise its discretion under the inherent jurisdiction to make a declaration that the marriage was not recognised in English law?

Following a series of capacity tests, the judge concluded that the applicant lacked capacity to marry and consent to sexual relations, and that there was no real prospect of the applicant gaining the capacity. Following his findings that the applicant lacked capacity to consent to marriage and sexual relations, the judge was invited to make a declaration of non-recognition of the Pakistani marriage.

Non-discrimination



Original artwork by Natasha Kozaily

In Simple Terms

Discrimination means treating people differently, without justification, when they are in similar situations.

This right gives you protection from the government acting in a discriminatory manner in relation to all other rights that the Bill of Rights guarantees. This right cannot be applied on its own and must be considered in conjunction with another right.

“Discriminatory” means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status.

This right is a mixed right, meaning that some sections are limited while other sections are qualified.

CASE STUDY:

MUDRIC V. THE REPUBLIC OF MOLDOVA (2013)

Mudric (aged 72) had previously divorced her husband of 22 years, A.M., and they were living in separate houses next door to each other. A.M. was determined to be suffering from chronic paranoid schizophrenia and was under mandatory psychiatric treatment as a danger to society. Additionally, he was observed to have strong negative feelings towards his former wife whom he believed wanted to poison him.

Beginning on 31 December 2009, A.M. broke into his former wife's house multiple times and beat her up, and eventually took up residence there without Mudric's permission. Mudric often fled to another neighbour's house to seek refuge. This occurred multiple times over the course of more than a year and several complaints were filed by Mudric, her lawyer and another neighbour before any effective measure was taken by the police or the State to protect Mudric from her ex-husband's attacks.

Three separate protective orders were issued by the courts compelling Ms Mudric's husband to leave the house but none were enforced by the police. In responding to Mudric's complaints the police claimed they could not punish A.M. because he was mentally ill and had nowhere else to live if they evicted him. Eventually, over one year after the initial attack, the police escorted A.M. to a psychiatric hospital for medical treatment.

The European Court on Human Rights found that there had been a violation of Article 3 (Torture) in conjunction with Article 14 (Discrimination) on the basis that the State intentionally applied laws discriminatorily against Mudric as a woman, resulting in her unnecessary suffering at the hands of her ex-husband.

Protection of Children



*Original artwork by Alexander Bodden,
Matthew Bodden, Lily Foster, Anthony Catalanotto,
Erica Powell, Nina Richards, Noah Whittaker,
Tom Byrne and RaMiyah Ebanks*

In Simple Terms

Children are protected under the Bill of Rights just as adults are. However, the Bill of Rights specifically outlines a section of rights pertaining just to children.

A “child” is defined as a young person under the age of eighteen years old.

When the legislature undertakes to enact laws that provide every child with facilities as to aid in their growth and development, law-makers shall proceed on the basis that a child’s best interests are of paramount importance in every matter concerning the child.

This right is a mixed right meaning that some sections are absolute, while others are limited.

CASE STUDY: ---

Z. AND OTHERS V. THE UNITED KINGDOM (1995)

Four very young children/infants were only taken into care four and a half years after concerns about their family were reported to social services. The children were subjected to appalling long-term neglect and emotional abuse by their parents during that time and suffered physical and psychological injury. It was reported that the children had been seen taking food from bins at their school and were often hungry, dirty and unkempt.

The Court found that the system in place had failed to protect the children and that there had been no effective remedy, in violation of Articles 3 (prohibition of inhuman or degrading treatment) and 13 (right to an effective remedy) of the Convention.

What is the Human Rights Commission?

The Commission was established under section 116 of the 2009 Constitution as an independent body responsible for promoting understanding and observance of human rights in the Cayman Islands.

What do I do if my rights have been breached or infringed?

The Commission will receive:

- 1) all complaints of breaches or infringements of any section of the Bill of Rights, Freedoms and Responsibilities committed by a public official;
- 2) all complaints of breaches or infringements of common law and statutory human rights and freedoms committed by public officials; and
- 3) all complaints that any international human rights treaty extended to the Cayman Islands has been breached or infringed by the actions of public officials or by legislation to which the treaty applies.

It is important to note that the Commission will only accept complaints of alleged breaches of the Bill of Rights, Freedoms and Responsibilities which have occurred after 6 November, 2012. This may be a one off event that has occurred after 6 November 2012 or may be a continuing infringement of a right. In all cases, unless there is clear evidence that the alleged infringement is continuing, the Commission will not accept a complaint in relation to an alleged infringement that has taken place more than one (1) year prior to the date of the complaint.

Cayman Islands Human Rights Commission

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