

# Human rights and private care homes



**The aim of this briefing is to highlight how the newly introduced section 145 affects private and voluntary sector providers of residential care or nursing home accommodation.**

Section 145 of the Health and Social Care Act 2008 came into force on 1 December 2008. Most of the Act does not apply to Northern Ireland but section 145 specifically does.

As a result, private providers of residential care must not act in contravention of the rights of residents under the European Convention on Human Rights. A resident may now take a provider to court under the Human Rights Act 1998 if the provider breaches his or her human rights.

This is because, under section 145, a private or voluntary sector provider of residential care or nursing home accommodation is to be taken as exercising a function of a public nature for the purposes of the Human Rights Act if the accommodation is arranged under articles 15 and 36 of the Health and Personal Social Services (Northern Ireland) Order 1972.

This provision applies to all residents in private or voluntary residential care home or nursing home placements arranged by the trust, regardless of how the residents fund their care.

## 1. Background to the statutory provision

In the controversial case of *YL v Birmingham City Council*, the House of Lords, by a majority decision, held that private care home providers were not exercising functions of a public nature and were not, therefore, subject to the Human Rights Act.

YL was an 84 year old woman who had been placed in a privately run care home by her local authority. The private care company sought to end the placement after disputes with YL's family. This decision was challenged as a breach of YL's rights to respect for her private life and home under article 8 of the European Convention on Human Rights. The majority of the court held that the private care company, although it entered into socially useful transactions with the local authority, carried out its business for profit and was governed primarily by private con-

tractual law. Following this decision, residents of privately run care homes could not bring legal proceedings on human rights grounds against home providers. The decision did not affect the ability of residents to bring legal proceedings on human rights grounds against the local authority which had arranged their placements.

Following this court ruling, section 145 was passed to ensure that residents in private care homes can directly rely on the protection of the Human Rights Act.

## 2. Examples of human rights issues

The Human Rights Act gives direct effect to most of the rights under the European Convention on Human Rights but the rights most likely to be applicable to residents of residential care or nursing homes are articles 3, 5, 8 and 14.

### 2.1 Respect for family life and home

**Article 8** is the most significant right for residents of residential care or nursing homes.

Article 8 gives everyone the right to respect for private and family life, home and correspondence. This right may be interfered with by a public authority if the interference is in accordance with the law, pursues a defined legitimate aim and is necessary and is proportionate. The defined legitimate aims include the economic well-being of the country, which would include certain resource implications, and the protection of the rights and freedoms of others, which would refer to balancing competing human rights.

Article 8 is a very broad right, which cannot be exhaustively defined. There are many examples of how it could be engaged in a residential care setting. Private life refers not only to privacy but also extends to other matters including the ability to form relationships with the outside world, personal development, autonomy and physical and mental well-being. Article 8 rights to respect for private life could be infringed where a resident was placed in a care home when she or he had formed a psychological attachment to another care home and this had a

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detrimental effect on her/his emotional well-being. Family life does not merely include biological or formalized relatives. The right to respect for family life could be engaged when residents are placed in care homes which are very far away from those relatives with whom they have close personal ties and regular visits are difficult.

The right to respect for home does not guarantee a right to a house but rather respect for an existing home. It may be possible, under certain limited circumstances, for care home residents to use the right to respect for home to challenge the closure of their care home.

## 2.2. Degrading treatment

**Article 3** contains an absolute prohibition on degrading treatment. Degrading treatment has been defined by the courts as lowering, undignified or humiliating treatment. It must reach a minimum degree of severity. In determining whether this right has been violated, all the circumstances of the case must be taken into account, including the age, sex and health of the individual. Therefore, the threshold for the minimum degree of severity may be more readily met by a resident in a care home who may be infirm because of age or disability.

Inhuman or degrading treatment could arise where a care home has insufficient staff to change bed linen and, as a result, residents are left for prolonged periods in soiled sheets, possibly suffering degrading treatment. Article 3 may also be infringed where residents receive grossly humiliating personal care, for example, being fed whilst being toileted.

## 2.3 Liberty and security of person

**Article 5** gives everyone the right to liberty and security of person, but may be limited in certain circumstances and in accordance with the law.

The right to liberty and security of person could be infringed where a resident is excessively restrained, for example, by being tied to a chair for prolonged periods. This right could also be engaged where a person who does not have the capacity to decide where s/he would like to live is informally detained in a care home.

## 2.4 Discrimination

**Article 14** prohibits discrimination on any ground in the enjoyment of the Convention rights. In order to rely on this right, a claim must raise an issue within the scope of one of the other rights.

An example of a possible contravention of article 14 could occur where residents in a care home are re-

fused services solely on the basis of their age. The refusal of services could fall within the scope of, for example, articles 3 or 8. Even if it were decided that these articles were not violated, it would still be possible to challenge any refusal as discriminatory using article 14.

## Conclusion

Trusts and private providers can help to ensure their compliance with the Human Rights Act if they also comply with the relevant legislation, regulations<sup>2</sup> and Departmental guidance, particularly the Residential Care Home Minimum Standards January 2008<sup>3</sup> and the Nursing Home Minimum Standards January 2008<sup>4</sup>.

For further guidance on the duties of public authorities and those exercising a function of a public nature, see ***Law Centre (NI) Community Care Briefing No 13 Human rights in public authorities' decision making***<sup>5</sup>.

## Footnotes

1. YL (by her litigation friend the Official Solicitor) v Birmingham City Council & others [2007] UKHL 27
2. Including the Nursing Home Regulations (Northern Ireland) 2005 & Residential Care Home Regulations (Northern Ireland) 2005
3. [www.dhsspsni.gov.uk/care\\_standards - residential-care-homes.pdf](http://www.dhsspsni.gov.uk/care_standards - residential-care-homes.pdf)
4. [www.dhsspsni.gov.uk/care\\_standards - nursing-homes.pdf](http://www.dhsspsni.gov.uk/care_standards - nursing-homes.pdf)
5. [www.lawcentreni.org/Publications/Publications.htm](http://www.lawcentreni.org/Publications/Publications.htm)

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