



Parliamentary Briefing

Health and Social Care Bill – House of Lords, Second Reading

Care Providers and the Human Rights Act

The Human Rights Act applies to all public authorities and to other bodies when they are performing ‘functions of a public nature.’ However, in 2002, the Court of Appeal ruled in the Leonard Cheshire case that private and voluntary sector care home providers, including those caring for local authority funded clients, should not be considered as performing public functions under the Act.

As a result of this loophole thousands of older and disabled people do not have access to the human rights protection they were promised, and which the Government intended them to have.

Bringing in the Human Rights Act, the then Home Secretary, Jack Straw MP said that public authorities should extend to private providers fulfilling public functions:

“The Government has a direct responsibility for core bodies, such as central government and the police, but they also have a responsibility for other public authorities in so far as the actions of such authorities impinge on private individuals. The [HRA] had to have a definition of a public authority that went at least as wide and took account of the fact that, over the past 20 years, an increasingly large number of private bodies, such as companies or charities, have come to exercise public functions that were previously exercised by public authorities.” (Hansard, Col 773, 16 February 1998)

As an intervener in the recent test case in the House of Lords *YL v Birmingham City Council and others*, the Government sought to close this loophole for private and voluntary sector care homes. But unfortunately their Lordships, by a small majority, upheld the narrow interpretation of the law established in the *Leonard Cheshire* case, confirming that the only way to restore direct redress under the Human Rights Act to older and disabled people in private or voluntary sector care settings would be through primary legislation.

Lord Neuberger, speaking for the majority in *YL*, said, *“it may well be thought to be desirable that residents in privately owned care homes should be given Convention rights against the proprietors... If the legislature considers such a course appropriate, then it would be right to spell it out...”*

We believe the Health and Social Care Bill provides an ideal vehicle to address this issue and are seeking an amendment.

We are delighted that Ben Bradshaw MP, Minister of State at the Department of Health confirmed, during the House of Commons report stage on the Bill that this was the Government’s intention:

“to consider the issue of publicly arranged health and adult social care and the Human Rights Act in the context of this Bill, with a view to the Government reporting back on that important issue during its passage in the other place.”

We warmly welcome the Government’s clear commitment to solving this problem, and its recognition that this Bill provides the ideal vehicle to tackle the pressing human rights concerns which arise in care settings. A simple amendment to this Bill could comprehensively tackle this urgent problem in relation to the way that the courts

have interpreted the definition of 'public function' under the Human Rights Act, whilst avoiding any wider or unintended consequences.

The recent report of the Joint Committee on Human Rights¹ highlighted that residents in care homes are amongst those most vulnerable to human rights abuses. The report raised numerous concerns including:

- Eviction from care homes and fear of making complaints
- Malnutrition and dehydration, including meals being taken away before a patient can eat them, or insufficient help with eating and drinking;
- Lack of privacy, dignity and confidentiality including individuals being left in their own urine or excrement;
- Neglect and carelessness, such as poor hygiene and rough handling of patients; and
- Bullying, patronising and infantilising attitudes towards older people.

With no legal remedies under the Human Rights Act against those providing their care, older and disabled people in private and voluntary sector care homes are unable to directly challenge these shocking violations of their rights. Of equal importance is the fact that these providers are not given any encouragement to develop a culture of respect for the human rights of their vulnerable residents.

We are seeking a clear statement of the Government's intention to bring forward amendments on this issue to remove this injustice.

We believe it is vital that any legislation brought forward is comprehensive and robust. This means:

- It should cover all four nations of the United Kingdom
- It should cover all voluntary and private sector care homes
- It should not make arbitrary distinctions between residents

We support the opinion of Lord Bingham in the YL case, usefully setting out the key indicators of a public function. In particular Lord Bingham drew attention to the public nature of care provision through the long-standing involvement of the state in ensuring its provision, and the risk that improper performance of that function might violate the individual's human rights as set out in the Human Rights Act.

Most care home residents are wholly dependent on their care providers, thus the protection of their fundamental rights is a pressing social need demanding urgent and robust action. This Bill provides the vehicle for that action.

If you would like further information on any aspect of the Human Rights loophole or clarification on this briefing please contact Hilary Evans, Government and Parliamentary Affairs Manager, Age Concern England on 020 8765 7509 or Hilary.Evans@ace.org.uk or Kate Jopling, Head of Public Affairs, Help the Aged on 020 7843 9426 or Kate.Jopling@helptheaged.org.uk

¹ JCHR, "The Human Rights of Older People in Healthcare", Eighteenth Report of Session 2006-07, Volume 1