Amendment to the Mental Health Bill: British Institute of Human Rights Briefing for Peers

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The British Institute of Human Rights urges peers to support **Baroness Keeley's amendment after Clause 51 in the Mental Health Bill**:

"insert the following new Clause—
"Human Rights Act 1998: provision of treatment for a mental disorder as a public function
(1)This section applies where—
(a)a patient is receiving aftercare under section 117 of the Mental Health Act 1983,
(b)a patient is accommodated in a hospital for the purpose of being given medical treatment for mental disorder, or
(c)a person's health or social care arrangements in connection with their mental disorder give rise to a deprivation of their liberty, within the meaning of that term as under Article 5(1) of the European Convention on Human Rights.
(2)The provider of treatment or care under subsection (1) is to be taken for the purposes of section 6(3)(b) of the Human Rights Act 1998 (acts of public authorities) to be exercising a function of a public nature, if the treatment or care is arranged by or paid for (directly or indirectly, and in whole or in part) by a local authority in England, Wales or Scotland, or by a NHS Health Board, an NHS Integrated Care Board, or by a Health and Social Care Trust."

Summary of key points

- The Human Rights Act sets out legal duties which ensure staff in public bodies, including healthcare, must use other laws in a way that upholds human rights, so far as possible, and this includes mental health law.
- The Human Rights Act therefore provides important and practical checks in mental health care, where the use significant powers could otherwise risk a person's rights to be free from serious harm, to family life, to choice and involvement, to liberty and non-discrimination – risks which occur when people are at their most vulnerable.
- When Parliament passed the Human Rights Act, it was always intended that private bodies providing public services would be in scope, recognising the reality then and today that many such functions would be delivered by private providers.
- However, following a recent High Court case, a loophole in human rights protection has been exposed. Mental health care provided privately, contracted by the NHS as hospital aftercare, has been ruled out of scope of the Human Rights Act.
- This NHS power is not listed in Section 73 of the Care Act, where Parliament clarified when private care homes are covered by the Human Rights Act. Coverage of mental health aftercare was never in issue, and so it was not included.
- In BIHR's extensive experience, this loophole negatively impacts on people in need of mental health care, particularly people with learning disabilities and autistic people.
- Peers can restore Parliament's intent and close this loophole via Baroness Keeley's amendment

About this briefing

This rest of this briefing provides information in support of the proposed amendment, after Clause 51 to the Mental Health Bill, focused on ensuring human rights law loopholes are closed. It has been prepared for the Bill's Report Stage in the House of Lords on Monday 31st March.

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About BIHR

The British Institute of Human Rights (BIHR) is a charity working in communities across the UK to enable positive change through the practical use of human rights law. We work with people to provide the information they need to benefit from their rights; with community groups to advocate for social justice using human rights standards; and with staff across local and national public bodies and services to equip them to make rights-respecting decisions. This enables us to **provide policy analysis which is based both on human rights law, and people's experiences of their human rights, and those with duties to uphold rights**.

A significant amount of BIHR's work is in the health, care and social work sectors. We support several thousand people each year, who both receive and provide services. **Over the last 10 years we have trained over 10,000 staff including frontline doctors, nurses and healthcare professionals, senior managers, leaders, commissioners and regulators on human rights law**.

The Mental Health Bill and the Human Rights Act

The Human Rights Act takes 16 of the fundamental human rights written into the European Convention on Human Rights and puts them into UK law with a set of domestic law duties for securing people's rights. These duties include prioritising human rights in decision-making under other laws, including mental health.

Private bodies were always intended to owe human rights duties under section 6 HRA

Section 6 of the Human Rights Act (HRA) says "it is unlawful for a public authority [also known as a "public body"] to act in a way which is incompatible with a Convention right"; 16 of which are brought into UK law via the HRA.

The definition of "public authority" under the Human Rights Act includes:

- **core public bodies** i.e. organisations formally established and publicly funded to deliver a state service, **like the NHS** or police forces; and
- **"any person certain of whose functions are functions of a public nature"**. This is what's known as a "hybrid public body" and can include organisations such as **private companies and charities contracted by the State**.

This means a body doesn't need to be a traditional core public body to have legal duties under the Human Rights Act. **The emphasis is on the nature of the service being delivered** (is it "generally expected to be performed directly or indirectly by the State"?) and **not the nature of the body delivering it**.

As anticipated by parliament when passing the Human Rights Act, we no longer live in a time where functions traditionally associated with the State, such as education and healthcare, are always delivered directly by the State. The HRA definition deliberately seeks to prevent loopholes in protections where the State has contracted out delivery of one of its functions. A recent study by the Department of Social Policy and Intervention at Oxford University (Oct 2024) notes: "over the past two decades, the outsourcing of residential care services to private providers has surged. In **adult social care, 96% of residential services are now outsourced, primarily to for-profit providers**, up by over 20 percentage points since 2001."

> "If private providers weren't there, we wouldn't have a system. If they're taking on contracts that support people where statutory duties are in place and they're fulfilling some of those statutory duties, they absolutely should be public

authorities. Particularly in mental health where we've got really key Article 2 [right to life] and Article 3 [right to be free from inhuman or degrading treatment] duties, for them not to be [public authorities] is a really bad plan."

Daisy, BIHR RITES Committee Lived Experience Expert
Approved Mental Health Professional

Human rights protection loopholes: who is slipping through the cracks?

The previous care home human rights protection loophole closed

In 2006, 84-year-old YL was placed in a private care home by Birmingham City Council. When YL was told she had to leave the home within 28 days, she brought a court case arguing this interfered with her Article 8 right to private life and home. However, the Court said that the private care home was not carrying out a public function and so did not have a legal duty to protect YL's human rights.

Parliament sought to close this loophole for private care providers through various legislative means, leading to section 73 in the Care Act 2014. This states that a registered care provider, in the course of providing personal care at home or residential accommodation with nursing or personal care, is carrying out a public function for the purposes of the Human Rights Act if the care is arranged or paid for by a local authority, in part or in full, under a specific set of powers.

The Care Act list does not include the Mental Health Act. That law was not in contention at the time, therefore Parliament only responded to the loophole as it was following YL's case. However, a further crack has now appeared, and people in vulnerable situations now risk slipping through a protection gap.

Paul's story (the 2024 Sammut case)

Paul was detained in hospital under the Mental Health Act. He was then moved into a private care home for after-care. The NHS and his local council together arranged for and paid for this after-care under the Mental Health Act. In the care home, Paul was deprived of his liberty. He later died in the care home from pneumonia and intestinal issues related to a medication side effect. Paul's family brought a case against both the care home and the NHS, saying they had breached his human rights. The court said that the care home was not carrying out a public function and so didn't have a duty to protect Paul's human rights. (Sammut v Next Steps Mental Health Care [2024])

The wider implications for people

Paul's case shows that there is still a potential loophole in the law where the State contracts out public services to private providers. If Paul's care had been exactly the same but had been arranged under the Care Act, the care home would have had a legal duty to protect his human rights. As the care was arranged under the Mental Health Act, it didn't. In BIHR's extensive experience of working with health and care staff, particularly on the intersection of mental healthcare and social work, we know how vital aftercare provisions are in being able to contract support for people with learning disabilities and autistic people to ensure their discharge from inappropriate hospital detention into supported living in the community. It is vital that the law is clarified to ensure people in these positions have access to the same human rights protections from their care provider, whether that provider is the NHS or a private provider, no matter which law was used in the contracting.

Human rights protections cannot, and should not, be based on how the State fulfils its duties and whether services are delivered directly or contracted out – which could differ region-by-region or even person-by-person. Not only would this undermine the Human Rights Act's aim to improve accountability in public services, but it could also create a two-tier system whereby some people who are owed a duty by the State have weaker human rights protections than others purely because of the law a public authority has chosen to use for contracting out the care services that person needs.

> "[The decisions private care providers are making] are not any different to the ones the NHS are making…It's often the same staff too who move between [services] just with different hats on.
>
> Daisy, BIHR RITES Committee Lived Experience Expert, Approved Mental Health Professional

> "Private services like residential homes and supported living are common placements for autistic people and people with learning disabilities especially, and this is likely to increase again if these groups are not able to be detained, so these spaces need to fall under the Human Rights Act and be truly supportive, not just places to dump these individuals."
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> Charli, BIHR RITES Committee Lived Experience Expert Ex-inpatient on a Child and Adolescent Mental Health Services ward

Amendment to the Mental Health Bill

The Mental Health Bill provides Parliament with the opportunity to clarify this situation and reinstitute its original intent to ensure adults and children receiving regulated health and care services are not excluded from human rights protections.

Baroness Keeley's proposed an addition after clause 51 of the Mental Health Bill that would explicitly state that when services are providing after-care under the Mental Health Act (section 117), they are carrying out a public function and so have legal duties to uphold people's human rights.

It also confirms that providers owe human rights duties to people accommodated in hospital for mental health treatment or where they deprive someone of their liberty as part of health and social care arrangements connected to mental health care. Article 5 in the Human Rights Act protects our right to liberty. If somebody is under continuous supervision and control; is not free to leave (whether or not they have tried); hasn't or can't give their consent; and the State knows or should know about their situation, it is likely that person has been deprived of their liberty. This right is a non-absolute right, which means that it can only be limited by a public authority if it is lawful (e.g. permitted under mental health law), legitimate (for a specific reasons set in the Human Rights Act) and proportionate (the least restrictive option) to do so.

Closing human rights loopholes supports health and care services

We know **from our work supporting public body staff including health, care and social work staff how important it is to provide clarity on their human rights duties in order for them to best support the people they work with**. We see the difference that knowledge and confidence in applying human rights law can have. As well as a better understanding of their legal duties and what these look like in their day-to-day work, **staff have reported positive outcomes for the people they are supporting and an improved therapeutic relationship**.

> **"The Human Rights Act matters to me because it puts services users at the heart of everything we do – we should always be asking the question about patient safety alongside what is in the best interests of that individual, what that person wants, is that what they need, what do they**

> **think, how would you like to be treated in a similar situation. Using a rights-respecting approach supports practitioners to hold the Human Rights Act in mind when we deliver care and this enables patients to be safe from harm without using a blanket restrictions."** - Paul, Mental Health Nurse, Why Our Human Rights Act Matters blog

Our training programmes enable public body workers to understand their legal duties under the Human Rights Act. We consistently see that after joining our programmes, health and care staff are increasingly supportive of human rights. **A recent programme with health and social care professionals showed 100% of participants said they were supportive of the Human Rights Act whereas beforehand 6.7% were mostly against it and 13.3% were more for than against it.**

This is just one example of what we see every day; **the Human Rights Act is not a burden but a tool for public body workers. The greater clarity they have on their duties and how to apply these in practice, the more positive they feel about them**.

> **"the Human Rights Act has given us a legal, objective, decision making framework, provided by no other law or policy, to ensure rights are protected and people and staff are safe."** – Sarah, NHS worker

Training and guidance alone cannot ensure protection; the law must also be clear

Practical expert human rights training (which is not currently mandatory) and guidance such as the Mental Health Act Code of Practice can and should support staff to understand the law, including how the Mental Health Act must be interpreted in-line with the Human Rights Act. **However, the law itself must first be clear and explicit about staff's human rights duties.**

> **"Human rights act training is needed for more of the care providers that we work with. Care providers need to have the confidence to make difficult decisions and promote positive risk rather than the automatic solution be increasing support to manage risk which imposed on right to liberty"** - Participant in our recent workshop series for staff supporting autistic young people and young people with learning disabilities

Further information

- The Human Rights Act & Outsourcing Public Services
- Hybrid public bodies: What is a "public authority" under the Human Rights Act?
- Human rights duties in health, care and social work