JUSTICE

Children's Wellbeing and Schools Bill

Briefing on extending human rights protections for outsourced children's care

House of Lords, Second Reading, 1 May 2025

Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to make the justice system fairer for all. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.

2. In November 2024, the Secretary of State for Education Bridget Phillipson acknowledged that *'the quality and safety of children's homes in England is simply not good enough'* and that there was *'much more that we need to do together to put the rights and needs of vulnerable children at the heart of our policymaking'*.[1]

3. However, a recent High Court decision highlights how the law is unclear as to the human rights obligations of publicly funded care and/or treatment in private facilities. The Children's Wellbeing and Schools Bill ('the Bill') is an important opportunity to address this in relation to children's social care. We would urge Peers to raise this issue in the Second Reading debate on Thursday 1 May 2025.

Background

4. The Human Rights Act is an essential tool for individuals to hold public bodies to account. It requires "public authorities" to act compatibility with the rights set out in the European Convention on Human Rights ('ECHR'). It defines "public authority" as 'a court or tribunal, and any person certain of whose functions are functions of a public nature'.[2]

[1] Hansard, 'House of Commons: Children's Social Care' (18 November 2024)

[2] Human Rights Act, s6(3)

5. This definition has been narrowly interpreted by the courts. In the leading case of *YL v Birmingham City Council*, it was found that a private care home was not a public authority despite YL's placement being funded by a local authority.[3]

6. Following this, there has been a large expansion of core Government services contracted out to the private sector, leading to an accountability gap in our human rights legislation. In the care sector, more than 80% of children's homes are run by private companies (up by 20% since 2010).[4]

7. Successive Governments attempted to fix this accountability gap in our human rights framework for care provision with section 73 Care Act 2014. The then Coalition Government made clear that it *'wishes all providers of publicly arranged care services to consider themselves bound by the Human Rights Act, including private providers under contracts with local authorities'*.[5] However, the recent case of *Sammut*[6] demonstrates that this was not sufficient, and individuals are slipping through the cracks.

Sammut & Ors v Next Steps Mental Healthcare Ltd & Anor [2024]

Mr. Sammut, a man with chronic and treatment resistant schizophrenia, was transferred from a secure hospital to a private nursing facility where he was deprived of his liberty without proper authorisation. He sadly died and an inquest found that his death was related to the side effects of an atypical anti-psychotic medication. His care and treatment were funded by a combination of Manchester City Council and an NHS Trust. [7]

Mr. Sammut's family brought a claim against Next Steps - the private nursing home provider - and the NHS Trust. They sought to argue that Mr. Sammut's death had resulted from the private provider's breaches of the Human Rights Act. However, the High Court struck out the human rights aspects of the claim against the private nursing home. Mr. Sammut's circumstances fell outside the scope of the provisions of section 73 Care Act 2014 and the Court concluded that the principles of *YL*[8] meant that the provider was not a public authority.

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[3] *YL v Birmingham City Council and others* [2007] UKHL 27

[4] Oxford University Department of Social Policy and Intervention, 'Evidencing the outsourcing of social care provision in England' (October 2024)

[5] Joint Committee on Human Rights 'Parliament should ensure Human Rights Act covers all publicly arranged or paid-for care' (27 January 2014)

[6] *Sammut & Ors v Next Steps Mental Healthcare Ltd & Anor* [2024] EWHC 2265

[7] *Sammut & Ors v Next Steps Mental Healthcare Ltd & Anor* [2024] EWHC 2265

[8] *YL v Birmingham City Council and others* [2007] UKHL 27

Why an amendment is needed

8. **The *Sammut* ruling raises significant concerns for commissioned children's health and social care services. Unless the service is governed by the Care Act 2014, there is a serious risk that a private provider will not have human rights obligations to children in their publicly funded care.**

9. This is particularly important given the scale of outsourcing in the chidlren's social care market. 90% of children's social care services shut down by Ofsted (for not meeting standards to protect children or where there is evidence of harm) are operated by private organisations.[9]

10. Children's care settings provide services to some of the most vulnerable children in our society. As the Children's Commissioner highlighted last year, *'children in care have the most proscribed rights in law, and yet these rights are often the least reflected in their experience'* and *'we cannot meet children's rights unless our public services are of sufficient quality to provide what children need'.*[10]

11. The Government has stated this Bill will *'stop vulnerable children falling through the cracks in our services'.*[11] In light of the *Sammut* decision, there is currently a potentially serious accountability gap. This Bill is an important opportunity to extend human rights protections to all those in commissioned children's care, irrespective of who the provider is.

12. The Human Rights Act is a crucial safeguard for individuals up and down this country on a day-to-day basis, especially for those with vulnerabilities who rely on the State. As the Care Quality Commission set out, *'a focus on human rights ensures people receive good care and helps us fulfill our duties and purpose by meeting our legal obligations…it helps us prevent failures in care that are usually related to risks to human rights'.*[12] The case of Mr. Sammut clearly demonstrates the serious issues at stake.

13. It is no answer that a separate claim may be able to be brought against local authorities. The Joint Committee on Human Rights dealt with this during the passage of the Care Act 2014 making clear that *'the inadequacy of such indirect protection has long been a matter of consensus in debates and reports around this issue'.*[13] **It has been a cross-party position for many years that those in publicly funded care deserve full human rights protections and that providers must be directly accountable for breaching**

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[9] Tom Wall, 'Private firms ran almost all care homes forced to shut for breaches in England' (The Guardian, 6 October 2024)

[10] Children's Commissioner 'Giving evidence to the Joint Committee on Human Rights' (19 January 2023)

[11] Hansard, 'Children's Wellbeing and Schools Bill' (8 January 2025)

[12] Care Quality Commission, 'Our updated human rights approach' (11 December 2023)

[13] Joint Committee on Human Rights, 'Legislative Scrutiny: Care Bill' (22 January 2014), para 75

human rights.

14. Without a change in the law, the rationale behind the *Sammut* decision could restrict the ability of children to challenge breaches of their human rights in commissioned children's care facilties. This would undermine the important aims of this Bill to better protect such children.

15. During the Report stage of the Mental Health Bill, where an amendment was proposed by Baroness Keeley in relation to adult mental health care and treatment, the Minister said that the Government were *'particularly concscious of the references to children's services'* and that it was *'an issue that we have, of course, been discussing with the DfE'.*[14]

16. The Children's Wellbeing and Schools Bill is an important opportunity to ensure that **all private providers of children's services commissioned by local authorities – whether in social care, education, or disability-related services – are treated as public authorities under the Human Rights Act.** We urge Peers to raise this issue in the Second Reading debate on Thursday 1 May 2025.

For more information, please contact:

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[14] Hansard, 'Mental Health Bill' (2 April 2025)