



Commissioner for Older People
for Northern Ireland

Respecting residents' rights in care homes

A Review of the Regional Care Home Contract
by the Commissioner for Older People for Northern Ireland



REPORT



Commissioner for **Older People**
for Northern Ireland

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Foreword



Throughout my term of office professionals within the health and social care sector have emphasised that the key element of care home living is that a care home be considered first and foremost a person's home. I have found many excellent examples of this approach and have been aware of the exemplary performance of some care homes in managing the wellbeing of their residents. I am acutely aware of the increased pressures in recent years on care home providers and staff. The legacy of the Covid 19 pandemic and its impacts on care home living, the workforce and financial pressures arising from cost-of-living increases, all present continuing challenges. Nevertheless, many residents feel at home in a care

home, surrounded by their personal belongings, in established friendship groups, with staff who are committed to their best interests.

Over 93 per cent of care home beds in Northern Ireland are provided by the private sector.¹ Such reliance on the private sector undoubtedly diminishes the ability of the Health and Social Care Trusts (HSCTs) to provide adequate alternative provision where a care home is underperforming. It is my view that this places pressure on Trusts to avoid serious interventions in care homes in instances of underperformance so as to prevent a reduction or removal of residential care in a given location.

The *Regional Care Home Contract*, (the *Contract*), is the legal agreement used by HSCTs to commission services from a range of private care home providers across Northern Ireland. Whilst the purpose of the *Contract* is to enable the placement of residents in care homes, the residents are not party to the *Contract*. Yet the functions and duties addressed in the *Contract* are crucial to the wellbeing of residents. So slim are the rights protections offered in the *Contract*, that residents in care homes are less protected in terms of security of tenure than a person in a private tenancy arrangement outside of a care home.

¹ Statistics on Community Care for Adults in Northern Ireland (2022 – 2023), Department of Health, 2023, p.32, available at: <https://www.health-ni.gov.uk/sites/default/files/publications/health/cc-adults-ni-22-23.pdf>

In some respects, the *Regional Care Home Contract* is a dry technical document establishing the legal relationship between a commissioning HSCT and a provider of residential care. Yet in another sense, the procurement of care services via commissioning contracts such as the *Regional Care Home Contract*, represents a manifesto of what government wants for the citizens it serves. In this light, the *Regional Care Home Contract* should be understood not as the legal basis for commissioning a care home placement but rather as the legal basis for commissioning a care home placement in a human rights compliant home.

For some time, I have been concerned by reports that clauses in the *Regional Care Home Contract* are being improperly used by care home providers. A series of complaints from older people, their families and friends led me to track occurrences where the *Contract's* conditions for terminating a residency in a care home were misused. On occasion, it is being used as a means of evicting residents who are complaining about the level of service they receive, or whose family is seen as difficult or undesirable.

This report contains anonymised case studies explaining the circumstances of several residents who were given limited or no notice to move from their care home, sometimes due to spurious reasons. In the cases mentioned here and in more instances that I am dealing with, the decision to terminate a resident's placement was taken solely by the care home provider. In these examples, the relevant Trust did not adequately challenge the provider, instead it simply sought a new placement for the resident without advocating on the resident's behalf to resolve the issue which initiated the eviction process.

Of course, there will be occasions when a resident's changing health or social care needs can no longer be met by the care home in which they were originally placed. This is a common scenario, with such a transfer occurring only after a full and substantial review of a resident's needs. In these cases, the Trust will work to secure a new placement that meets the resident's best interests. Such cases are not the subject of the current report. Rather, this report addresses cases where it is clear that the *Contract* is being misused because the resident is presenting a difficulty to the care home management.

The Department of Health has commenced a workstream to review the current *Regional Care Home Contract*. As part of this workstream, the Department of Health facilitated a workshop in October 2023. The event made little reference to the residents of care homes, the strengthening of human rights protections, or improving the security of tenure of residents. There is therefore a risk that the current review will not effectively address the concerns of care home residents and their families as articulated in this report.

This advice to government is not the first time I have brought the need to increase rights protections of older care home residents to the Department of Health. Following my 2018 investigation into failings in care and safeguarding at Dunmurry Manor Care Home, I recommended that:

The Regional Contract should be reviewed and training provided in relation to its content and the effective use of its terms. The Department of Health to conduct a review of why / whether this contract is adequate in terms of being able to enforce the performance obligations contained therein.²

The *Regional Care Home Contract* establishes the framework for the delivery of care to nearly 12000 people in care homes across Northern Ireland.³ Consequently, while addressing specific failings in care homes, I have consistently emphasised the need for systemic improvement, and specifically, meaningful change to the *Regional Care Home Contract* to put the needs of residents at the centre of service delivery.

For the compilation of this report, I am grateful to Monye Anyadike-Danes KC for providing legal opinion on the rights of residents of care homes, and to Professor Deirdre Heenan of Ulster University for her assessment of the care home sector in Northern Ireland. I am indebted to residents of care homes and their families who have trusted me to articulate their concerns about care provision. It is my hope that the exploration of these concerns in the following pages brings about systemic change in our care system.

Eddie Lynch

Commissioner for Older People for Northern Ireland

2 Home Truths: A Report on the Commissioner's Investigation into Dunmurry Manor Care Home, Summary Report, COPNI, 2018, p.63, available at: <https://www.copni.org/media/1444/copni-home-truths-summary-report-web.pdf>

3 Statistics on Community Care for Adults in Northern Ireland (2022 – 2023), Department of Health, 2023, p.32, available at: <https://www.health-ni.gov.uk/sites/default/files/publications/health/cc-adults-ni-22-23.pdf>

1. Executive summary and recommendations

Health and Social Care Trusts (HSCTs) deliver, or procure the delivery of, health and social care services across Northern Ireland, including nursing and residential care placements. These Trusts ‘provide community based health and personal social services’ arising from a statutory duty.⁴ The vast majority of the 470 residential and nursing facilities registered in Northern Ireland, providing most of the 15,837 care home beds, are operated by the independent sector.⁵

The legal framework by which a Trust commissions services from a care home provider is the *Regional Residential & Nursing Provider Specification and Contract*.^{6 7} This *Regional Care Home Contract* outlines the relationship (including duties and obligations), between the commissioning Trust and the contracted service provider. The resident of a care home is not a party to the *Regional Care Home Contract* even though the *Contract* establishes much of the parameters of the resident’s living conditions.

1.1 A legal duty to provide human rights protections

Clause 13 of the General Terms of the *Regional Care Home Contract* refers to ‘Human Rights Obligations’, specifying that the provider must act in compliance with the *European Convention on Human Rights*, incorporated into UK law by the *Human Rights Act 1998*.⁸

⁹ Neither this Clause nor any other section of the *Regional Care Home Contract* identify how the provider and Trust will ensure the protection of the residents’ human rights.

4 See for example, Western Health and Social Services Trust (Establishment) Order (Northern Ireland) 2006, Article 3.2, available at: <https://www.legislation.gov.uk/nisr/2006/296/article/3/made>

5 Statistics on Community Care for Adults in Northern Ireland (2022 – 2023), Department of Health, 2023, available at: <https://www.health-ni.gov.uk/sites/default/files/publications/health/cc-adults-ni-22-23.pdf>

6 Regional Residential & Nursing Provider Specification and Contract, October 2015, available at: https://www.northerntrust.hscni.net/wp-content/uploads/2017/07/REGIONAL_RESIDENTIAL__NURSING_PROVIDER_SPECIFICATION_AND_CONTRACT-1.pdf

7 The ‘Regional Residential & Nursing Provider Specification and Contract’ is more commonly known as ‘the Regional Care Home Contract’.

8 European Convention on Human Rights, Council of Europe, 1950, available at: https://www.echr.coe.int/documents/d/echr/convention_ENG

9 Human Rights Act 1998, available at: <https://www.legislation.gov.uk/ukpga/1998/42/contents>

Nevertheless, the Trust and the independent care provider each constitute in law ‘a public authority’ with the attendant obligations to protect human rights.^{10 11} That said, the provisions of the *Regional Care Home Contract* do not specify how these human rights (of residents), as outlined in Schedule 1 of the *Human Rights Act 1998*, should be upheld in the delivery of residential and nursing care. As it stands, the *Contract* merely notes the existence of a concept called ‘human rights’ but does not attempt to operationalise these principles in the daily lives of residents of care homes. In this practical sense, the *Regional Care Home Contract* does not meaningfully protect the human rights of care home residents.

1.2 A home but not ‘a home’

The United Nations describes the condition of being adequately housed with secure tenure—‘not having to worry about being evicted’—as a human right.^{12 13} The *Regional Care Home Contract* does not contain any provision in relation to the type of tenure which a provider should grant to a resident. Residents of care homes in Northern Ireland are currently considered to have only a contractual licence to occupy. As a result, they are not deemed tenants. Accordingly, they cannot avail of the protections under the *Private Tenancies (Northern Ireland) Order 2006* and essentially have no security of tenure.¹⁴ Therefore, while they remain licensees, residents of care homes in Northern Ireland have no statutory protection.

The Department of Health maintains that a care home is fundamentally a home for its residents, with all the security and comfort that the word ‘home’ connotes. The Department’s consultation document, *Reform of Adult Social Care Northern Ireland (2022)*¹⁵, states, ‘First and foremost, a care facility is a home. The understanding of a care facility as a person’s home is the fundamental principle on which all else should be based’.

10 Clause 13.1.1 of the General Terms of the Regional Care Home Contract states that: ‘The Provider shall comply with the Human Rights Act 1998 as if it were a ‘Public Authority’ within the meaning of the legislation’.

11 Under Section 6. 1 of the Human Rights Act 1998, ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right’.

12 ‘Housing is most importantly a Human Right. Under international law, to be adequately housed means having secure tenure— not having to worry about being evicted or having your home or lands taken away’, The Human Right to Adequate Housing, The Office of the High Commissioner for Human Rights, United Nations, available at: <https://www.ohchr.org/en/special-procedures/sr-housing/human-right-adequate-housing>

13 The United Nations Committee on Economic, Social and Cultural Rights has underlined that the right to adequate housing should be seen as the right to live somewhere in security, peace and dignity. The characteristics of the right to adequate housing are clarified mainly in the Committee’s general comments No. 4 (1991) on the right to adequate housing and No. 7 (1997) on forced evictions.

14 Private Tenancies (Northern Ireland) Order 2006, available at: <https://www.legislation.gov.uk/nisi/2006/1459/contents>

15 Reform of Adult Social Care Northern Ireland, Consultation Document, Department of Health, 2022, p.81, available at: <https://www.health-ni.gov.uk/sites/default/files/consultations/health/doh-rasc-consultation-document.pdf>

In spite of this 'fundamental principle', evictions, and compulsory transfers of residents from care homes regularly occur, with implicit or explicit reference to the following contractual provisions:

- Clause 6.12 of the Specific Conditions of the *Regional Care Home Contract* allows for compulsory transfer when 'the Provider considers themselves to no longer be able to meet the needs of a Resident';
- Clause 6.13 of the Specific Conditions of the *Regional Care Home Contract* allows for compulsory transfer 'where the behaviour of the Resident or any other circumstances relating to the Resident are materially detrimental to the safety and welfare of other Residents or the conduct of the Provider'; and
- Clause 5.1 of the Specific Conditions of the *Regional Care Home Contract* which requires the Provider to give residents an individual written agreement or '*Residency Agreement*', the specifics of which (including tenure rights) are left to the Provider.

Each of these clauses in the *Regional Care Home Contract* addressing evictions and compulsory transfers, place decision-making on a resident's tenure in the hands of the commissioned care provider. None of these clauses offer any specific protections to the resident from arbitrary decision-making as to where that resident lives. Transfer from one care home to another can be extremely distressing for residents, negatively impacting wellbeing, and quality of life.^{16 17 18} The resident may be suddenly removed from their home with its familiar environment, routine, staff, and community, often at a time when that person has reduced physical and/or mental capacity. Yet, despite the risk of unnecessary transfers causing substantial adverse consequences to residents, there is a remarkable absence of rights protections or specific safeguarding mechanisms within the *Regional Care Home Contract*.

16 See discussion of 'transfer trauma', *Achieving Closure: Good Practice in Supporting Older People During Residential Care Closures*, Glasby, J., Robinson, S., and Allen, K., 2011, p.6.

17 See discussion of 'increase in mortality after relocation', *Achieving Closure: Good Practice in Supporting Older People During Residential Care Closures*, Glasby, J., Robinson, S., and Allen, K., 2011, p.4.

18 Older people's experiences of transitions to care homes was summarised by the response: "You're at their Mercy" ... Participants felt that the move was out of their control and that they were "at the mercy" of others who made decisions about their long-term care' ("You're at their mercy": Older peoples' experiences of moving from home to a care home: A grounded theory study, in *International Journal of Older People Nursing*, O'Neill M., Ryan A., Tracey A., and Laird L., 2020).

Case study: Compulsory transfer

Client A was 83 years of age and living with dementia. My client was presented to hospital by ambulance following an incident in the nursing home during which challenging behaviours were exhibited, including throwing a cup of tea at a care worker. The nursing home refused to allow my client to return following the incident despite encouragement from the Trust and advocacy by COPNI. My client had resided at the nursing home for approximately a year and a half prior to this incident. The refusal to allow my client to return to the nursing home resulted in a six week stay in a hospital bed until the social worker could source an alternative nursing home which was willing to take my client.

1.3 Care home complaints procedures: marking their own homework

Effective complaints procedures are a key element of promoting and protecting rights, by enabling an individual or their representative to challenge a matter of concern. At its best, a complaints system ensures that an individual's voice is heard, listened to, and acted upon by the relevant stakeholders in a particular situation. In circumstances regularly involving people with reduced physical and/or mental capacity, significant support mechanisms are necessary for a complaints system to be fit for purpose. Without proactively facilitating and enabling a resident of a care home to engage with a complaints process, its value as an avenue of rights protection is limited.

Clause 10.1 of the Special Terms of the *Regional Care Home Contract* states that:

The Provider shall ensure that it has a complaints procedure in place which meets the requirements... All Residents and their Representative must be provided with information on making a complaint. Such information must be both in the admission

pack and on display in the Home. The Provider's Complaints Procedure must be shared with the Trust on request.^{19 20 21 22}

The complaints procedure described in the *Regional Care Home Contract* largely places responsibility for the investigation, determination, and oversight of complaints about issues involving the provider in the hands of the provider. Clause 10.2 of the Special Terms of the *Regional Care Home Contract* states that 'The Provider has responsibility to investigate and respond to complaints...'.^{19 20 21 22}

Regarding monitoring of complaints, Clauses 10.1 and 10.5 of the Special Terms of the *Regional Care Home Contract* provide that significant aspects of the complaints procedure need only be shared with the commissioning Trust 'on request'. Clause 10.2 does require that the 'record of complaints, the subsequent investigation and its outcome and any action taken as a result' be submitted by the provider to the Trust on a quarterly basis. However, such a 'record' provided to the Trust, is a record of how the provider views the complaint, what the provider considers an investigation, what the provider views as an outcome and result. The obligation in Clause 10.2 to report on complaints on a quarterly basis to the Trust, is merely an obligation on a corporate entity to provide its own assessment of its own (complaints) performance to a party with which it has a commercial relationship.

Professional independent advocacy services are a pre-requisite of any functioning complaints system for an at-risk demographic. The Department of Health has recently highlighted, as one of its strategic priorities, 'individual choice and control: to ensure the individual has control over the decisions affecting their social wellbeing and their care and support needs'.²³ Without advocacy support in care homes there cannot be systematic assurance of individual choice and control. Without advocacy support, people in care homes with significant physical and/or mental impairments such as quadriplegia or dementia, are highly unlikely to be able to access a complaints system.

19 The following guidance is cited at Clause 10.1 of the Special Terms of the Regional Care Home Contract: Guidance in Relation to the Health and Social Care Complaints Procedure, Department of Health, 2023, available at: <https://www.health-ni.gov.uk/sites/default/files/publications/health/doh-guidance-hsc-complaints-procedure.PDF>

20 The following standards are cited at Clause 10.1 of the Special Terms of the Regional Care Home Contract: Residential Care Home Minimum Standards, Department of Health, Social Services and Public Safety, 2022, available at: <https://www.rqia.org.uk/RQIA/files/ea/ea7c184c-8bb5-41e3-a270-db34fc2fad9a.pdf>

21 The following standards are cited at Clause 10.1 of the Special Terms of the Regional Care Home Contract: Care Standards for Nursing Homes, Department of Health, Social Services and Public Safety, Department of Health, Social Services and Public Safety, 2022, available at: <https://www.rqia.org.uk/RQIA/files/7d/7dec5d24-796a-440a-9a60-7deb7112c994.pdf>

22 The following guidance is cited at Clause 10.1 of the Special Terms of the Regional Care Home Contract: Complaints in Health and Social Care: Standards & Guidelines for Resolution & Learning, Department of Health, Social Services and Public Safety, 2009, available at: <https://www.rqia.org.uk/RQIA/media/RQIA/Resources/Complaints/HSC-complaints-standards-and-guidelines-Aug-10.pdf>

23 Reform of Adult Social Care Northern Ireland, Consultation Document, Department of Health, 2022, available at: <https://www.health-ni.gov.uk/sites/default/files/consultations/health/doh-rasc-consultation-document.pdf>

Clause 10.4 of the Special Terms of the *Regional Care Home Contract* makes reference to advocacy support. It states:

Providers should ensure that their complaints procedure includes appropriate signposting to available advocacy services e.g., advice centres or the Patient and Resident Council...

This lone reference to such provision within the *Regional Care Home Contract* obliges little from the commissioning Trust or the care home provider as regards independent advocacy, other than 'signposting to available advocacy services'. Unfortunately, in some instances this contractual provision is technically fulfilled by the inclusion of a leaflet or contact details of advocacy services in a resident's welcome pack. In the case of an individual with significant cognitive or physical impairments, such 'signposting' can prove valueless (even for those with engaged family, friends or other representatives).

1.4 Citizenship and good administration

The *Regional Care Home Contract* has significant failings highlighted above: i. The absence of realisable human rights protections; ii. The absence of protections of tenure; and iii. Inadequate complaints provisions. Yet there are broader societal reasons as to why changes to the *Contract* are needed.

Citizens of Northern Ireland, through our political and legislative framework, place responsibility for the provision of health and social care with the Department of Health and Health and Social Care Trusts. Trusts spend approximately £582 million of public money annually in the commissioning of residential and nursing care placements from care providers, mainly for older citizens.^{24 25 26} As citizens place responsibility and resources in the hands of these public authorities, there is a correlative expectation that the functions of these authorities will be conducted under the principles of Good Administration.²⁷

Under the current regime of commissioning residential and nursing care, it is not clear that the commissioning public authorities meet the standards of Good Administration

24 Belfast Health and Social Care Trust spent £114,450,120, Northern Health and Social Care Trust spent £161,553,087, South Eastern Health and Social Care Trust spent £101,105,027, and Western Health and Social Care Trust spent £86,200,000 on independent provision of residential care and nursing care placements in the 2022-2023 period.

25 While the Southern Health and Social Care Trust did not provide details of expenditure, extrapolating on the basis of the population of this Trust area, indicates an overall expenditure across all Trusts of approximately £582 million annually on independent provision of residential care and nursing care placements.

26 In response to a request for information on 'the annual expenditure by the Department [of Health] on independent provision of residential care and nursing care placements', the Department responded that 'we currently do not hold the most accurate cost information in a format which would allow us to provide a response to this part of your request' (20/12/23).

27 The UK Parliamentary and Health Service Ombudsman describes 'Good Administration by public bodies [as] 1. Getting it right 2. Being customer focused 3. Being open and accountable 4. Acting fairly and proportionately 5. Putting things right 6. Seeking continuous improvement' available at: <https://www.ombudsman.org.uk/sites/default/files/page/0188-Principles-of-Good-Administration-bookletweb.pdf>

which citizens are entitled to expect. In 2018, the Commissioner for Older People for Northern Ireland (COPNI), reported in detail on significant human rights failings, improper compulsory transfer of residents and a non-functioning complaints system at a care home in Belfast.²⁸ ²⁹ The Commissioner for Older People for Northern Ireland continues to receive complaints and advocacy requests from residents of various care homes and their representatives, pertaining to failings in rights protections, procedurally deficient compulsory transfers, and ineffective complaints practices (see *case studies*).

In light of COPNI's *Home Truths* investigation and COPNI's current care home-related caseload—the *Regional Care Home Contract* is not providing the rights protections that citizens require.³⁰ Responsibility for the failure to specify effective, operational, rights protections in the delivery of residential and nursing care lies with the Department of Health and commissioning Trusts. This is so because the contents of the *Regional Care Home Contract* are choices for the Department of Health and Trusts, albeit with consideration that any agreement need be commercially attractive for a prospective care provider.

Strikingly, the Department of Health describes its 'vision for the future' as being one in which 'we would have an adult social care system that delivers... [a] Human Rights based system of service provision'.³¹ Yet, the Department of Health (and Trusts) cannot embed a 'rights based system of service provision' through the *Regional Care Home Contract* without: a) specifying what human rights compliance should look like; b) establishing that residents have actionable rights starting with security of tenure; c) establishing how residents can protect their rights; and d) ensuring independent oversight of complaints procedures/rights protections mechanisms.

As public authorities the Department of Health and Health and Social Care Trusts assume responsibility for delivering health and social care services for the public. Their responsibility does not stop at simply providing a rudimentary service, it does not stop at simply funding a placement in a care home. As a public authority it is obliged to provide a service which embeds meaningful rights protections for the citizens on whose behalf it is procuring a service. In this light, a *Regional Care Home Contract* should be regarded not as the legal basis for commissioning a care home placement but rather as the legal basis for commissioning a care home placement in a human rights compliant home.

28 For details of failings in human rights protections at one care home see *Home Truths: A Report on the Commissioner's Investigation into Dunmurry Manor Care Home*, Commissioner for Older People for Northern Ireland, 2018, available at: <https://www.copni.org/media/1478/copni-home-truths-report-web-version.pdf>

29 For a discussion of system-wide protection failings in care homes see *Evidence Paper 1: Adult Safeguarding within a Human Rights Based Framework in Northern Ireland*, Independent Whole Systems Review into Safeguarding and Care at Dunmurry Manor Care Home, DoH & CPEA, 2020, available at: <https://www.health-ni.gov.uk/sites/default/files/publications/health/Adult-Safeguarding-Briefing-%20Dunmurry-Manor-Review-Team-Sept-2020.pdf>

30 See *Home Truths: A Report on the Commissioner's Investigation into Dunmurry Manor Care Home*, Commissioner for Older People for Northern Ireland, 2018, available at: <https://www.copni.org/media/1478/copni-home-truths-report-web-version.pdf>

31 *Reform of Adult Social Care Northern Ireland*, Consultation Document, Department of Health, 2022, p.15, available at: <https://www.health-ni.gov.uk/sites/default/files/consultations/health/doh-rasc-consultation-document.pdf>

Case study: Insecurity of tenure

Client B was 75 years of age. My client's family had raised significant issues regarding the level and standard of care being provided at the care home. Following a hospital admission, the provider refused to allow my client to return. Client B was transferred to another care home.

1.5 Recommendations

Human rights

1. The *Regional Care Home Contract* should be reviewed, amended, and utilised to embed a culture of human rights in care homes.
2. The *Regional Care Home Contract* should specify how a culture of human rights should be embedded in care homes.
3. The *Regional Care Home Contract* should specify how human rights protections are realisable for residents living in care homes.

Tenure rights

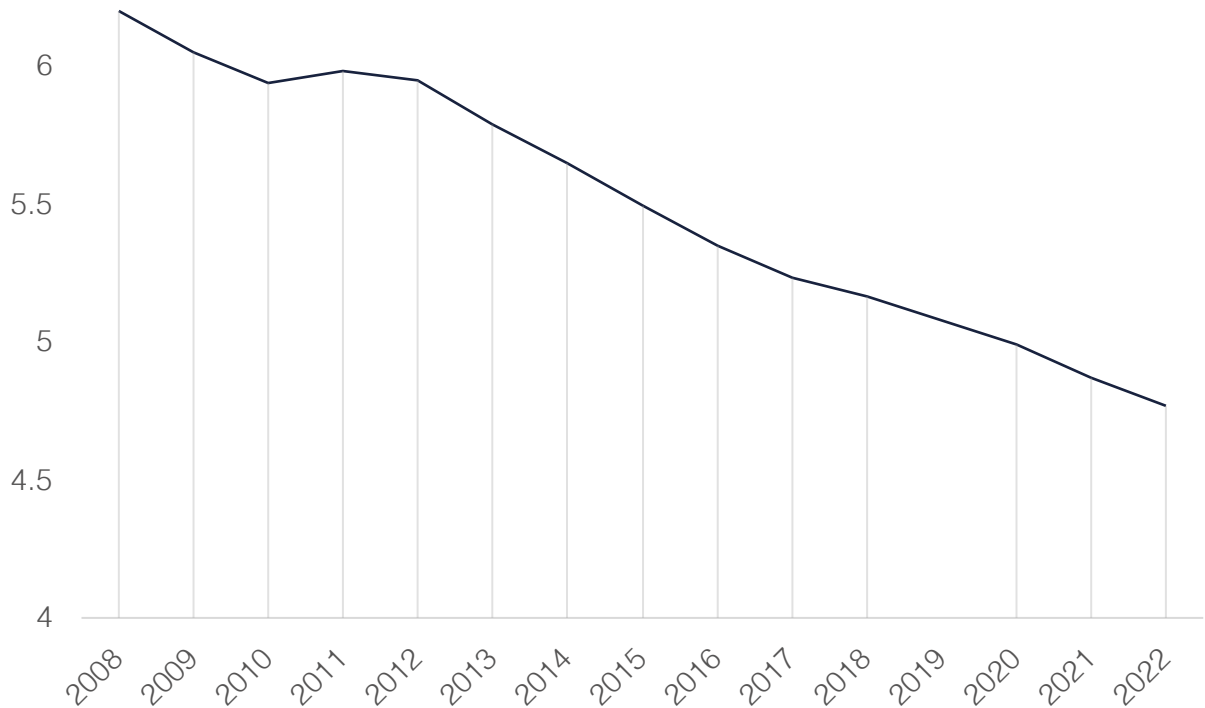
4. The residential protections available to residents of care homes should be made explicit in the *Regional Care Home Contract*.
5. The *Regional Care Home Contract* should specify the conditions in which a provider can properly determine that they can no longer 'meet the needs' of a specific resident.
6. The *Regional Care Home Contract* should specify mechanisms for monitoring the process by which a provider determines that they can no longer meet the needs of a resident.
7. The *Regional Care Home Contract* should specify what are the conditions by which a resident's behaviour is considered 'materially detrimental to the safety and welfare of other residents or the conduct of the provider'.
8. The *Regional Care Home Contract* should include a definition of 'reasonable due cause', which would be required to establish the grounds by which a provider may propose the termination of a *Residency Agreement* with a resident.

9. The *Regional Care Home Contract* should include details of the process by which a *Residency Agreement* can be terminated, and a resident evicted. These obligations should address: how a decision is reached, evaluated, and monitored; how a notice of eviction is delivered; a specified minimum notice period; details of avenues to appeal a decision; details of advocacy services to appeal a decision and if necessary, to assist in locating alternative accommodation.
10. The Department of Health should collate and regularly publish statistics on the number and bases for compulsory transfers of residents from care homes.
11. The Department of Health should collate and regularly publish statistics on the number and bases of terminations of *Residency Agreements* by care homes.

Complaints procedures

12. The *Regional Care Home Contract* should include provisions to strengthen the complaints procedure. Provisions in the *Contract* should include steps to ensure:
 - residents and their representatives are aware, and reminded (via prominent visual and documentary notification), of internal and external complaints systems;
 - regular monitoring of the provider's complaints procedures involving firsthand engagement with complainants and/or their representatives; and
 - residents and their representatives who wish to complain are supported through a professional, independent advocacy service which retains a regular presence in the facility.

Figure 1: Number of residential and nursing beds per 100 older people (65+)



Source: These figures have been calculated by dividing the number of residential and nursing beds in Northern Ireland by the population aged 65+ each year, multiplied by 100.^{32 33 34}

How to read this infographic: The pressure on care home providers and staff is increasing, as the number of registered beds in Northern Ireland is decreasing in relation to the older population. In 2008, there were 6.2 nursing or residential beds for every 100 older people in Northern Ireland. In 2022, there were only 4.7 beds for every 100 older people. Therefore, the proportion of beds per population of older people has decreased 23 per cent in this period.

32 The population of people aged 65+ is sourced from Mid-Year Population Estimates, NISRA, 2023, available at: <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.nisra.gov.uk%2Fsystem%2Ffiles%2Fstatistics%2FMYE22-AGE-BANDS.xlsx&wdOrigin=BROWSELINK>

33 The number of registered beds in Care Homes in Northern Ireland is sourced from: Registered Nursing and Residential Homes and Beds Trend Report 2008- 2018, RQIA, 2019, available at: <https://www.rqia.org.uk/RQIA/files/0f/0ff745be-514f-4013-8309-7d63de74bbc1.pdf> ; and Census of Bed Availability in Registered Care Homes in Northern Ireland on 27 September 2023, RQIA, 2023, available at: <https://www.rqia.org.uk/RQIA/files/4d/4d5d1f7f-93a0-4812-b966-a073e1a333ed.pdf> .

34 The number of registered beds in the YEAR 2019 is missing from these reports.

2. Introduction

Respecting Residents' Rights in Care Homes is advice to government on the protection of older people's rights in care homes. It examines the security of a resident's tenure in a care home and whether there are adequate protections from 'eviction' or involuntary transfer to a different home.³⁵ This report is based on evidence from consultation with professionals working in the residential care system, casework managed by COPNI's advocacy and legal services unit showing these emerging problems, commissioned academic research and Counsel's legal opinion.

The purpose of this paper is to promote awareness of key issues of rights protection for residents of care homes in Northern Ireland, specifically, in relation to the *Regional Residential & Nursing Provider Specification and Contract*.^{36 37} The report is not an attempt to address contractual issues other than those relating to rights, safeguarding, and quality of care, nor is it an attempt to offer an alternative contractual framework. This paper is an examination of the extent to which the *Regional Care Home Contract* does, and should, provide rights protections to residents of care homes in Northern Ireland.

Residents of care homes, like all citizens of Northern Ireland, can seek rights protection and redress under human rights legislation.³⁸ Yet, residents of care homes are, by the nature of their relationship to the care provider (the owner of the home and care home staff), especially dependent on this other party to ensure their quality of life.³⁹ For the effective protection of rights, special consideration of this imbalanced relationship must

35 The Commissioner for Older People Act (Northern Ireland) 2011 states, '(1) The Commissioner must promote an awareness of matters relating to the interests of older persons and of the need to safeguard those interests. (2) The Commissioner must keep under review the adequacy and effectiveness of law and practice relating to the interests of older persons. (3) The Commissioner must keep under review the adequacy and effectiveness of services provided for older persons by relevant authorities.' Available at: <https://www.legislation.gov.uk/nia/2011/1/contents>

36 See Regional Residential & Nursing Provider Specification and Contract, October 2015, available at: https://www.northerntrust.hscni.net/wp-content/uploads/2017/07/REGIONAL_RESIDENTIAL__NURSING_PROVIDER_SPECIFICATION_AND_CONTRACT-1.pdf

37 The 'Regional Residential & Nursing Provider Specification and Contract' is more commonly known as 'the Regional Care Home Contract'.

38 For example, people in Northern Ireland possess human rights protections under the Human Rights Act 1998, available at: <https://www.legislation.gov.uk/ukpga/1998/42/contents>

39 In a review of literature on human rights protections in care settings, 'care homes were mostly viewed as inherently risky places for the protection of human rights, especially in the light of perceptions of residents as 'vulnerable' and 'disadvantaged'(Human rights and care homes for older people: a typology of approaches from academic literature as a starting point for activist scholarship in human rights and institutional care, in *The International Journal of Human Rights*, C. Green, A. Tinker and J. Manthorpe, 2021, p.733).

be made by stakeholders, not least in the procurement of care services by government from independent providers through the *Regional Care Home Contract*. There is a specific duty on government departments in Northern Ireland to ensure the inclusion of rights protections within a service procurement process.^{40 41 42} In light of an annual expenditure of approximately £582 million on residential care by the Department of Health and Health and Social Care Trusts, this obligation should be treated seriously.^{43 44 45} The Department of Finance's 'mandatory' procurement policy note, *Human Rights in Public Procurement* (2021) requires that:

*When entering into any commercial contracts, Departments must assess the level of risk involved in each contract and produce a procurement/sourcing strategy that identifies potential Human Rights breaches and put measures in place to mitigate them. They should incorporate these considerations into the contract documentation, where appropriate, to require that: a Contractor's practices meet, or exceed, minimum Human Rights standards;... the protection of Human Rights must be maintained in the delivery of public services;... processes are in place to prevent unequal treatment or harassment...*⁴⁶

40 Human Rights in Public Procurement, Procurement Policy Note, PPN 05/21, Department of Finance, 2021, available at: <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/PPN%2005%2021%20Human%20Rights%20in%20Public%20Procurement%20%28pdf%20Internet%20Version%2022%20Nov%2021%29.PDF>

41 Contract Management: Human Rights Policy and Due Diligence, Social Value, 2021, available at: <https://socialvalueni.org/app/uploads/2021/03/Buy-Social-Contract-Management-Human-Rights.pdf>

42 There are other relevant duties on public authorities which are discussed below in detail, including those arising from Section 6.1 of the Human Rights Act 1998 available at: <https://www.legislation.gov.uk/ukpga/1998/42/contents>

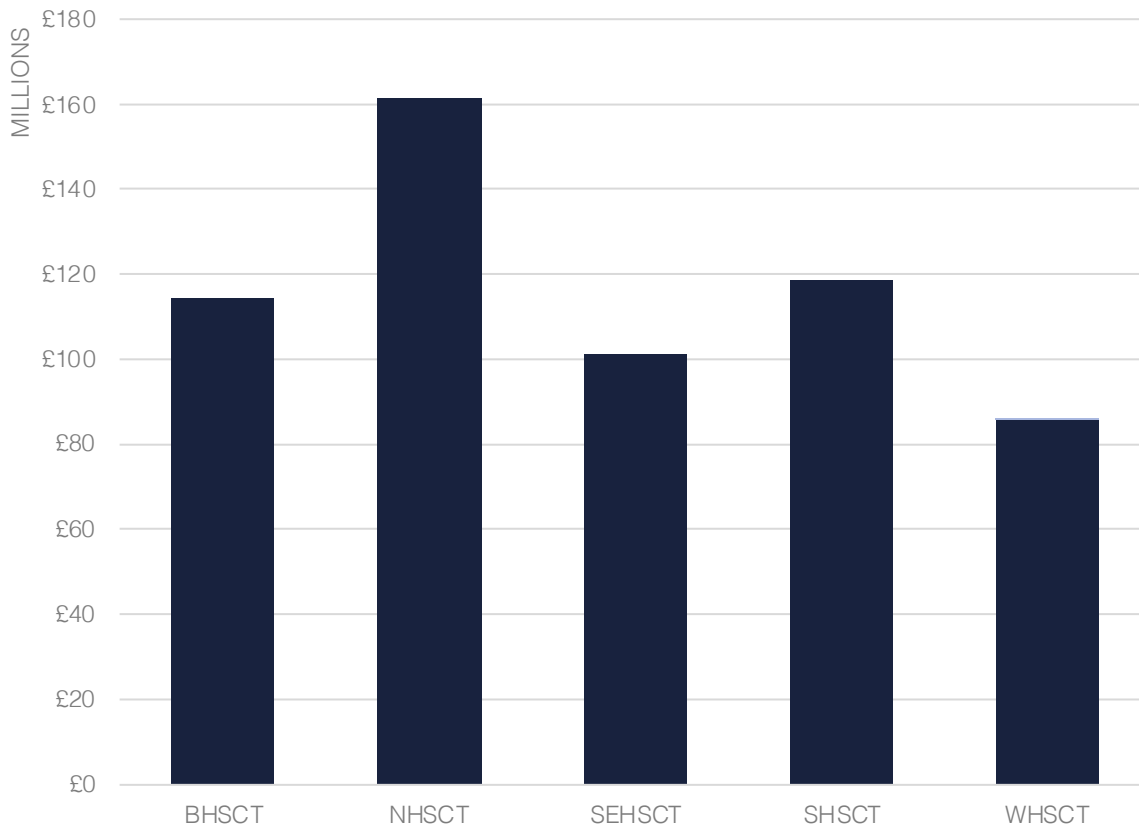
43 Belfast Health and Social Care Trust spent £114,450,120, Northern Health and Social Care Trust spent £161,553,087, South Eastern Health and Social Care Trust spent £101,105,027, and Western Health and Social Care Trust spent £86,200,000 on independent provision of residential care and nursing care placements in the 2022-2023 period.

44 While the Southern Health and Social Care Trust did not provide details of expenditure, extrapolating on the basis of the population of this Trust area, indicates an overall expenditure across all Trusts of approximately £582 million annually on independent provision of residential care and nursing care placements.

45 In response to a request for information on 'the annual expenditure by the Department [of Health] on independent provision of residential care and nursing care placements', the Department responded that 'we currently do not hold the most accurate cost information in a format which would allow us to provide a response to this part of your request' (20/12/23).

46 Human Rights in Public Procurement, Procurement Policy Note, PPN 05/21, Department of Finance, 2021, p. 6, available at: <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/PPN%2005%2021%20Human%20Rights%20in%20Public%20Procurement%20%28pdf%20Internet%20Version%2022%20Nov%2021%29.PDF>

Figure 2: Expenditure on independent provision of residential and nursing care placements by Trust, 2022-2023



Source: Derived from responses to requests for information on ‘the annual expenditure on the independent provision of residential care and nursing care placements’ by Health and Social Care Trusts.⁴⁷

The *Regional Care Home Contract* is the primary legal framework for the delivery of government commissioned services by independent providers for members of the public relying on residential care. The *Contract* sets out the relationship between the commissioning Trusts and the independent providers. Older people who reside in the care homes and receive the commissioned care services are not party to the *Contract*. The *Contract*, aside from its various routine, operational functions, serves as a statement document about how our government believes its citizens should be treated when accessing residential care. Given the fundamental role that the *Contract* plays in the delivery of public services, it is vital for the purposes of the protection of rights, reform

⁴⁷ Belfast Health and Social Care Trust spent £114,450,120, Northern Health and Social Care Trust spent £161,553,087, South Eastern Health and Social Care Trust spent £101,105,027, and Western Health and Social Care Trust spent £86,200,000 on independent provision of residential care and nursing care placements in the 2022-2023 period. The Southern Health and Social Care Trust did not provide details of expenditure. An estimate of the expenditure of this Trust has been calculated on the basis of the average spending in relation to the population of all Trusts (£118,526,905). The total expenditure for all Trusts has been estimated at £581,835,139.

of adult social care and good administration to consider its effectiveness in ensuring citizens in care settings are treated appropriately.⁴⁸

The support needs of care home residents do not remain unchanged. Commonly, when there are indications of a resident's changing needs, often evident in deteriorating health, the resident's care needs will be fully reassessed. The process of reassessment on the basis of care need engages the resident (and representatives), Trust and care home, to ensure that the resident and representatives are fully involved in any proposed change of care home, if this is required. This process is well established and works in a relatively smooth fashion. However, there is an emerging trend in complaints from residents and their families, that providers are enforcing the transfer of residents not because of a change in the care needs of a resident but because there has been a breakdown in the relationship between resident (or family) and care home provider.

The Commissioner for Older People for Northern Ireland has long been concerned by the broad implications of an imbalance of power between a service provider and a person who may be wholly dependent on that entity for their care and quality of life. Yet, COPNI has particular concerns over evictions and compulsory transfers arising from the fact that a care home is likely a resident's only home, and their residency status may not grant them the type of security of tenure they would wish. Complaints by or on behalf of older people have highlighted instances in which there was: no engagement of the resident in the decision-making process to pursue an eviction; no process of appealing a decision to evict; and poor notification of an eviction (see *case studies*). Accordingly, the residency status of older residents of care homes and the significance for security of tenure, are central considerations of COPNI's work and this report.

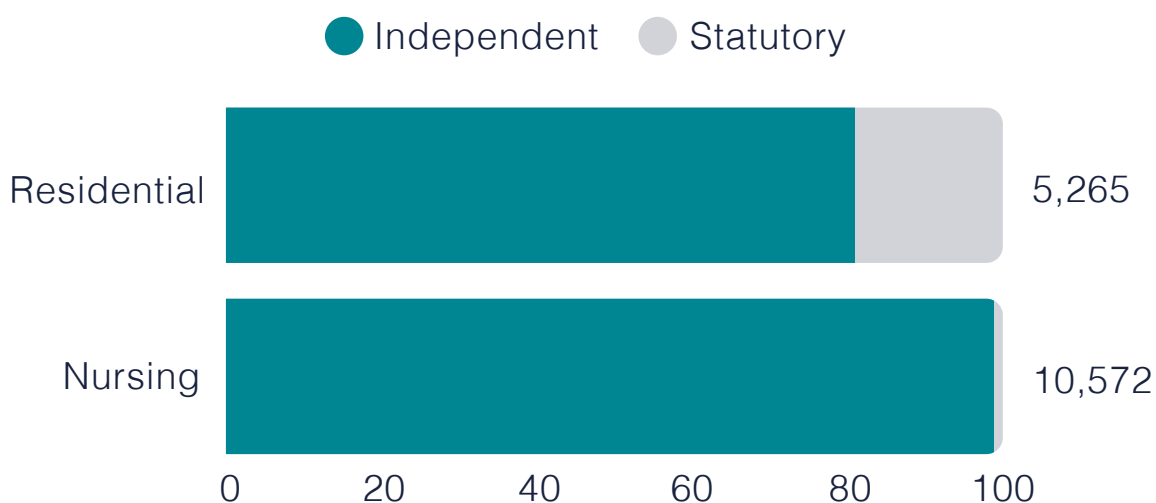
While it may be argued that the specific residency status of people living in a care home is not and should not be the concern of the *Regional Care Home Contract* which frames the relationship between Health and Social Care Trusts and providers, COPNI maintains that it should be. The expenditure of significant sums of public money on residential care in Northern Ireland is in large part underpinned by obligations and duties assumed by parties to the *Regional Care Home Contract*. These contractual obligations and duties should in fact, explicitly promote, embed, and protect the principle that a care home is a resident's home, with all the security, safety and reassurance connoted by the word 'home'.⁴⁹

48 The UK Parliamentary and Health Service Ombudsman describes 'Good Administration by public bodies [as] 1. Getting it right 2. Being customer focused 3. Being open and accountable 4. Acting fairly and proportionately 5. Putting things right 6. Seeking continuous improvement' available at: <https://www.ombudsman.org.uk/sites/default/files/page/0188-Principles-of-Good-Administration-bookletweb.pdf>

49 The Department of Health maintains that 'First and foremost, a care facility is a home. The understanding of a care facility as a person's home is the fundamental principle on which all else should be based' (Reform of Adult Social Care Northern Ireland, Department of Health, 2022, p.81), available at: <https://www.health-ni.gov.uk/sites/default/files/consultations/health/doh-rasc-consultation-document.pdf>

There are 470 residential and nursing facilities registered in Northern Ireland, providing 15,837 care home beds, largely maintained by the independent sector.^{50 51} All of the residents of these care homes deserve full, effective rights protections as citizens of Northern Ireland; and the framework of the *Regional Care Home Contract* is the proper vehicle for ensuring the establishment of such a human rights culture in all care homes. The following advice identifies gaps in the *Regional Care Home Contract* as regards rights protections of residents and in turn, offers recommendations for placing the needs of residents at the core of residential care provision.

Figure 3a: Level of private / public ownership of residential and nursing beds in Northern Ireland



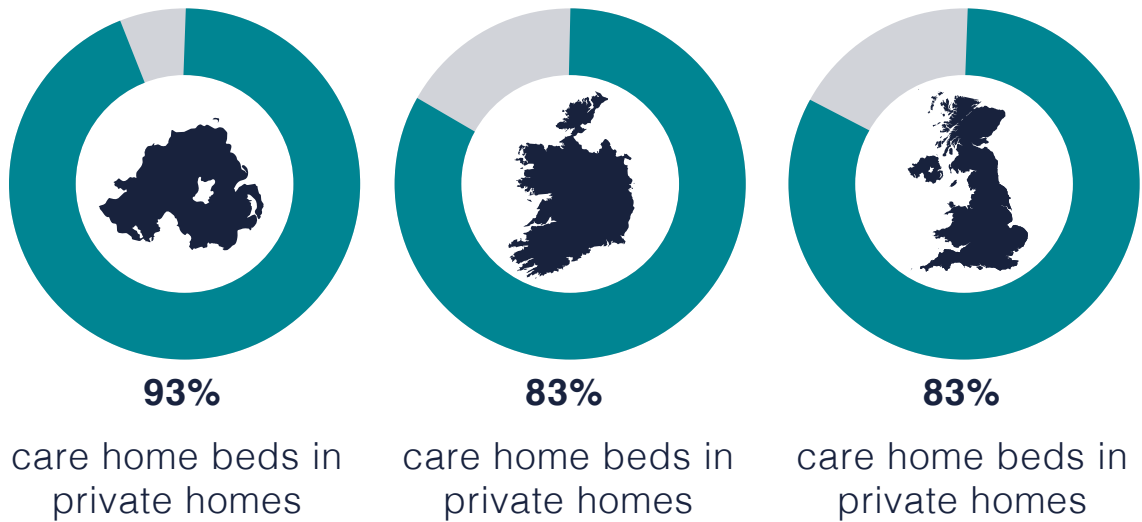
Source: Department of Health⁵²

50 Statistics on Community Care for Adults in Northern Ireland (2022 – 2023), Department of Health, 2023, p.29-45, available at: <https://www.health-ni.gov.uk/sites/default/files/publications/health/cc-adults-ni-22-23.pdf>

51 Only 1% of nursing care beds are in the statutory sector (Statistics on Community Care for Adults in Northern Ireland (2022 – 2023), Department of Health, 2023, p.31, available at: <https://www.health-ni.gov.uk/sites/default/files/publications/health/cc-adults-ni-22-23.pdf>).

52 Statistics on Community Care for Adults in Northern Ireland (2022 – 2023), Department of Health, 2023, p.31, available at: <https://www.health-ni.gov.uk/sites/default/files/publications/health/cc-adults-ni-22-23.pdf>

Figure 3b: Level of private / public ownership of residential and nursing beds in Northern Ireland, Republic of Ireland, and United Kingdom



Source: Department of Health, ESRI, Competitions and Market Authority^{53 54 55}

53 Statistics on Community Care for Adults in Northern Ireland (2022 – 2023), Department of Health, 2023, p.31, available at: <https://www.health-ni.gov.uk/sites/default/files/publications/health/cc-adults-ni-22-23.pdf>

54 Long-Term Residential Care in Ireland: Developments Since the Onset of the COVID-19 Pandemic, Economic and Social Research Institute, 2024, p. 18, available at: <https://www.esri.ie/system/files/publications/RS174.pdf>

55 Care Homes Market Study: Final Report, Competitions and Market Authority, 2017, p.33, available at: <https://assets.publishing.service.gov.uk/media/5a1fdf30e5274a750b82533a/care-homes-market-study-final-report.pdf>

3. The Regional Care Home Contract

The rights, quality of life, dignity and care needs of vulnerable older people should be at the heart of planning, delivery, regulation and inspection of care services; it is their needs that must matter the most.

(Changing the Culture of Care Provision in Northern Ireland, COPNI, 2014, p.2)⁵⁶

The *Regional Care Home Contract*, between individual Health and Social Care Trusts and individual care home providers, sets out the terms and conditions which apply to the provision of residential and nursing home services. The *Regional Care Home Contract* is the contractual basis for the placement of people in care homes whether partially or fully funded by the Trust. The resident of the care home—the recipient of the care provision—is not a party to the *Contract*.

The *Regional Care Home Contract*, which has been in operation since October 2015, is comprised of 73 pages containing 34 general terms and conditions of contract; 16 specific conditions of contract and service specifications; and six appendices.

As the *Contract* is an agreement between a Trust and a provider, (creating obligations that are enforceable by law), acceptance of the contents of the *Contract* is a volitional act by the parties to the *Contract*. The contents of the *Contract*, the acceptance of the *Contract* and adherence to the *Contract* are choices made by the commissioning Trust and the service provider. In the case of the proposed service provider, that entity may conclude that the terms and conditions are unsuitable for a variety of reasons including that the obligations are so onerous as to remove their commercial incentivisation. The situation in which a prospective service provider chooses not to enter into agreement through the *Regional Care Home Contract* is entirely reasonable and legitimate.

However, a Trust is a public authority tasked with, among other functions, providing appropriate residential care to qualifying persons. A Trust has a responsibility to provide or secure provision of appropriate residential care—the Trust must either provide, or arrange through contracting out, such services. Moreover, the Trust must do so in a way that is wholly compatible with its duties as a public authority. In UK law, under Section 6.

⁵⁶ Changing the Culture of Care Provision in Northern Ireland, COPNI, 2014, p.2, available at: https://www.copni.org/media/1122/changing_the_culture_of_care_provision_in_northern_ireland_pdf.pdf

1 of the *Human Rights Act 1998*, 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.'⁵⁷ The articles of the *European Convention on Human Rights* (ECHR) to which this refers, are embedded in Schedule 1 of the *Human Rights Act 1998*, and include Article 2: *Right to Life*; Article 3: *Prohibition of Torture*; Article 5: *Right to Liberty and Security*; Article 6: *Right to a Fair Trial*; Article 8: *Right to Respect for Private and Family Life*; and Article 10: *Freedom of Expression*.^{58 59} The Trust in all its functions—including in the commissioning of services, participation in contractual agreements and contract management—has a legal obligation to uphold these specific human rights protections as outlined in the *Human Rights Act 1998*.

As key functions of the Trust, procurement of services and contract management processes, are appropriate loci for actively upholding human rights protections. The *Regional Care Home Contract* offers such an opportunity for the commissioning Trust to place human rights protections at the core of the service delivery it requires for citizens and residents living in care homes in Northern Ireland.

57 Human Rights Act 1998, available at: <https://www.legislation.gov.uk/ukpga/1998/42/contents>

58 European Convention on Human Rights, Council of Europe, 1950, available at: https://www.echr.coe.int/documents/d/echr/convention_ENG

59 Human Rights Act 1998, available at: <https://www.legislation.gov.uk/ukpga/1998/42/contents>

PERFORMANCE NOTICES

'How many Performance Notices (Clause 8 General Terms, Regional Contract) have been issued by the Department / Trust to Care Homes citing Human Rights issues and/or citing Clause 13 of the Regional Contract 'Human Rights Obligations'? Please provide an annual figure and an overall figure as far as records go.'

Freedom of Information Request issued by COPNI, November 2023.

Department of Health	'The Department of Health is not in receipt of information in relation to these queries'
Belfast Health and Social Care Trust	'Zero'
Northern Health and Social Care Trust	'None'
South Eastern Health and Social Care Trust	'No performance notices have been issued citing those issues'
Western Health and Social Care Trust	'None'
Southern Health and Social Care Trust	No response

3.1 Human rights in the Regional Care Home Contract

The *Regional Care Home Contract* in its current form, references human rights under its General Terms and Conditions as follows:

13. Human rights obligations

13.1 The Provider acknowledges that:-

13.1.1 The Provider shall comply with the Human Rights Act 1998 as if it were a 'Public Authority' within the meaning of the legislation; and

13.1.2 It is unlawful to exercise functions deemed to be of a public nature in a way that is incompatible with those rights contained in the European Convention of Human Rights and incorporated into UK Law by the Human Rights Act 1998; and

13.1.3 In providing the Services the Provider shall throughout the duration of the Contract and at its own cost be subject to the same duty in respect of human rights in the same way as if it were the Trust.

13.2 The Provider shall undertake or refrain from undertaking such actions as the Trust may request so as to enable the Trust to discharge its duty under the Human Rights Act 1998.⁶⁰

The reference to human rights in Clause 13 of the General Terms of the *Regional Care Home Contract* is significant in terms of rights protections in that it makes explicit that the commissioned services outlined in the *Contract* must be human rights compliant. All activities undertaken by the provider in the delivery of the commissioned service must be undertaken in a manner that adheres to the obligations detailed in the *Human Rights Act 1998 (Regional Care Home Contract, General Terms, Clause 13.1.2)*.

Case study: An absence of rights protections

Client C was 85 years of age and living with dementia. My client's family had raised significant concerns over a 3-month period in relation to the standard of care being provided, including issues with multiple falls causing injury and poor hygiene standards. After the family raised a formal complaint, my client was served with a 28-day Notice of Termination. Required to find alternative accommodation, the family decided to take Client C home.

Clause 13.1.1 of the General Terms of the *Regional Care Home Contract* recognises that a provider delivering a service for a 'Public Authority' (the Trust), retains the legal obligations pertaining to a public authority, as specified in Section 6.1 of the *Human Rights Act 1998*. In effect, the provider cannot avoid the far-reaching legal obligations attached to being a 'Public Authority' when the provider has agreed to provide a service on behalf of a public authority, in this case the Trust. It is also the case that the Trust does not divest itself of its responsibilities as a public authority by 'commissioning out' services under the *Regional Care Home Contract*; the Trust retains a legal responsibility for human rights compliance across services which it commissions from independent providers.

When considering the commissioning of public services, including the drafting of contracts for services such as the *Regional Care Home Contract*, public authorities have to do more than simply 'the minimum' in order to comply with the *European Convention on Human Rights* and the *Human Rights Act 1998*. The European Court of Human Rights has clarified that the state has 'positive obligations' to actively promote and protect the rights guaranteed by the *Convention*.⁶¹ As a consequence, these positive obligations must be taken into account by public authorities when considering their duties. These positive obligations include duties to:

- i. protect individuals' ECHR rights in emergencies;
- ii. establish legal and administrative frameworks to protect ECHR rights;
- iii. provide information or resources to individuals to protect ECHR rights; and
- iv. provide redress for breaches of ECHR rights.⁶²

Given the concept of positive obligations on public authorities, it is notable that the *Regional Care Home Contract*, at Clause 13 of the General Terms, while referring to human rights, does not clarify the practical implications of those rights, including how providers are expected to ensure the protection of such rights. Strikingly, there is no mention in Clause 13 to the individual at the centre of this contract—the resident—and why and how individual and collective rights must be protected.

The *Human Rights Act 1998* was designed to provide a floor, rather than a ceiling, for human rights protection; to do more than provide legal entitlements that can be enforced in the courts. In the words of Alexander Irvine, the Lord Chancellor from 1997 to 2003, the

61 We Need to Give Greater Attention to Positive Obligations Under Human Rights Law, Legal Cheek, Jordan Briggs, 2022, available at: <https://www.legalcheek.com/lc-journal-posts/we-need-to-give-more-attention-to-positive-obligations-under-human-rights-law/>

62 We Need to Give Greater Attention to Positive Obligations Under Human Rights Law, Legal Cheek, Jordan Briggs, 2022, available at: <https://www.legalcheek.com/lc-journal-posts/we-need-to-give-more-attention-to-positive-obligations-under-human-rights-law/>

Human Rights Act 1998 was intended to create:

*a culture of respect for Human Rights across the whole of society... to create a society in which our public institutions are habitually, automatically responsive to Human Rights considerations in relation to every procedure they follow, in relation to every practice they follow, in relation to every decision they take...*⁶³

The *Regional Care Home Contract* refers to the *Human Rights Act 1998* but the absence of detail on human rights principles and practice means that the *Contract* does little to embed ‘a culture of respect for human rights’. The *Contract* does not outline to the parties how human rights considerations should in Lord Irvine’s words shape ‘every procedure they follow’, ‘every practice they follow’ and ‘every decision they take’.⁶⁴

The *Regional Care Home Contract* does not explain how the commissioning Trust expects the provider (the operator of the care home) to create and maintain a culture of human rights compliance. There is no clarity in the *Contract* regarding processes for monitoring, quality assurance and addressing non-compliance with rights obligations. The *Contract* does not emphasise the centrality of rights protections for individual residents using commissioned care home services. In its current guise the *Regional Care Home Contract* does not make explicit what constitutes human rights compliance in the delivery of services, does not state how a culture of human rights should be embedded in a service, nor does it state how compliance should be monitored.

The *Contract* on its own does not provide any right of redress for a resident against a provider who breaches their human rights. For this to be possible, there would need to be an express contract term giving the resident ‘third party’ rights to sue the provider for any human rights breach. Individuals, in certain circumstances, may use the *Human Rights Act 1998* to challenge ill-treatment considered serious enough to be a breach of ECHR rights. In practice, there are considerable barriers facing residents in care homes accessing such legal options. Cases taken under the *Human Rights Act 1998* on behalf of care home residents remain relatively rare, due to legal complexity, lack of access to legal aid, and personal stress.⁶⁵

63 Examination of Witnesses, The Rt Hon Lord Irvine of Lairg and The Rt Hon Lord Williams of Mostyn, Minutes of Evidence, Joint Committee On Human Rights, 19/03/2001, available at: <https://publications.parliament.uk/pa/jt200001/jtselect/jtrights/66/1031906.htm>

64 Examination of Witnesses, The Rt Hon Lord Irvine of Lairg and The Rt Hon Lord Williams of Mostyn, Minutes of Evidence, Joint Committee On Human Rights, 19/03/2001, available at: <https://publications.parliament.uk/pa/jt200001/jtselect/jtrights/66/1031906.htm>

65 Human rights and care homes for older people: a typology of approaches from academic literature as a starting point for activist scholarship in human rights and institutional care, in *The International Journal of Human Rights*, C. Green, A. Tinker and J. Manthorpe, 2021, p.721.

These are all facets of a key failing in the current *Regional Care Home Contract*—the protection of human rights in the delivery of residential and nursing care appears tangential to the overall commissioning of placements. Human rights obligations comprise one clause out of 34 terms and conditions. A human rights informed *Regional Care Home Contract* would ensure that human rights principles shape the entirety of the *Contract*; that specific processes were established to embed a culture of human rights in a care home; and that the subject of the *Contract*—the resident—gained appropriate protections through the *Contract*. By simply noting in Clause 13 of the General Terms of the *Regional Care Home Contract* the general existence of relevant human rights standards (though without mentioning persons who would be protected by such standards—the residents), the *Contract* conveys an impression that the obligations are vague, ambiguous, and aspirational.

Nevertheless, under Clause 7.2 of the General Terms, the Trust can address serious breaches of the *Contract* (which may include Clause 13 ‘Human Rights obligations’):

The Trust may terminate this contract (in whole or in part) forthwith by notice in writing if the Provider is in material breach of this contract and shall have failed to remedy the breach within 30 days of receipt of a request in writing from the Trust to remedy such breach such request indicating that failure to remedy the breach may result in termination of this contract.

In cases of sub-standard provision that the Trust deems to be less serious, the Trust can address the issue through the *Contract*’s performance management provisions. Clause 8 of the General Terms states that if the provider ‘fail[s] to provide the Service or any part thereof to a standard which is fully in compliance with the *Contract*’, the Trust can treat this as ‘unsatisfactory performance’. This initiates a performance management process allowing for a range of outcomes including remediation of the issue by the provider, suspension of the *Contract* or termination of the *Contract*.

Therefore, a commissioning Trust could use a provision of the *Regional Care Home Contract* (Clause 8) to promote human rights compliance in the delivery of residential and nursing care services. However, because the *Contract* does not specify exactly what human rights compliance means in the everyday delivery of care in a care home, expecting the Trust to rely on such a performance management provision to promote rights protections seems misguided. In practice, Trusts do not issue performance notices

to care homes citing human rights issues and/or Clause 13 human rights obligations.^{66 67} This situation suggests a fundamental weakness at the core of the *Regional Care Home Contract*. That weakness is that, despite the recognition that there have been, are and will likely be, rights abuses in care homes, the contract to provide services to residents does not at the same time offer effective rights protections to residents.^{68 69}

3.2 Conclusion

The *Regional Care Home Contract* contains some detail as to how the commissioning Trust can hold the provider to account for inadequate performance. The *Regional Care Home Contract* contains no details as to how the resident can hold the provider to account for inadequate performance. The provisions in the *Contract* on unsatisfactory performance, suspension and termination of the *Contract* do not mention human rights. Relevant human rights legislation is simply listed as if it were tangential rather than the necessary context for the delivery of the service as a whole. Specific human rights obligations or key principles such as 'dignity' and 'respect' are not mentioned or referenced within the *Regional Care Home Contract*. There is no discussion of how the rights mentioned in Clause 13 of the General Terms might be realised nor are substantive requirements placed on the commissioner or provider of the service. The *Regional Care Home Contract* provides no detail on how providers of residential and nursing care should address human rights in the daily functioning of their care homes.

As it currently stands, the *Regional Care Home Contract* does not enable or empower the resident of a care home to uphold their human rights. As it currently stands, the *Regional Care Home Contract* is not used by commissioning Trusts to legally enforce the human rights of care home residents.⁷⁰

66 In response to a request to the Department of Health for information regarding the number of Performance Notices which have been issued to care homes citing human rights issues and/or citing Clause 13 of the Regional Contract 'Human Rights Obligations', the Department responded that 'the DoH is not in receipt of information in relation to these queries' (20/12/23).

67 In response to requests for information regarding the number of Performance Notices which have been issued to care homes citing human rights issues and/or citing Clause 13 of the Regional Contract 'Human Rights Obligations' (annually and 'as far as records go'), the Belfast Trust stated 'zero'; the Northern Trust stated 'none'; the South Eastern Trust stated, 'no performance notices have been issued citing those issues'; and the Western Trust stated 'none'. The Southern Trust did not give a response.

68 For details of failings in human rights protections at one care home see Home Truths: A Report on the Commissioner's Investigation into Dunmurry Manor Care Home, Commissioner for Older People for Northern Ireland, 2018, available at: <https://www.copni.org/media/1478/copni-home-truths-report-web-version.pdf>

69 For a discussion of system-wide protection failings in care homes see Evidence Paper 1: Adult Safeguarding within a Human Rights Based Framework in Northern Ireland, Independent Whole Systems Review into Safeguarding and Care at Dunmurry Manor Care Home, DoH & CPEA, 2020, available at: <https://www.health-ni.gov.uk/sites/default/files/publications/health/Adult-Safeguarding-Briefing-%20Dunmurry-Manor-Review-Team-Sept-2020.pdf>

70 In response to requests for information regarding the number of Performance Notices which have been issued to care homes citing human rights issues and/or citing Clause 13 of the Regional Contract 'Human Rights Obligations' (annually and 'as far as records go'), the Belfast Trust stated 'zero'; the Northern Trust stated 'none'; the South Eastern Trust stated, 'no performance notices have been issued citing those issues'; and the Western Trust stated 'none'. The Southern Trust did not give a response.

A human rights approach to care planning, commissioning, and delivery, when properly understood and applied, can transform care home services, making them better for residents and staff, driving up standards and providing a useful philosophy of behaviour for organisations. A human rights approach to contracting services can provide organisations and staff with a useful framework for enabling ‘person-centred’ decision-making by ensuring that rights are only restricted when proportionate and necessary.

Adopting a comprehensive human rights approach within the *Regional Care Home Contract* would assist in creating a more dynamic residential care system in Northern Ireland by giving voice to the person at the centre of the contract—the resident of the care home. Crucially, proper consideration of the resident’s voice in the *Contract* would also assist the Trust, the care provider and staff in understanding their responsibilities and limits to their responsibilities as regards care provision.

4. Evictions and compulsory transfers

Housing is most importantly a Human Right. Under international law, to be adequately housed means having secure tenure—not having to worry about being evicted or having your home or lands taken away.
(The Office of the High Commissioner for Human Rights, United Nations)^{71 72}

The most obvious example of the inadequacy of the current *Regional Care Home Contract* in terms of human rights protections relates to procedures for terminating a person's placement in a care home. Evictions and compulsory transfers of residents from care homes regularly occur, with implicit or explicit reference to the following contractual provisions:

- Clause 6.12 of the Specific Conditions of the *Regional Care Home Contract* allows for compulsory transfer when 'the Provider considers themselves to no longer be able to meet the needs of a resident';
- Clause 6.13 of the Specific Conditions of the *Regional Care Home Contract* allows for compulsory transfer 'where the behaviour of the Resident or any other circumstances relating to the Resident are materially detrimental to the safety and welfare of other Residents or the conduct of the Provider'; and
- Clause 5.1 of the Specific Conditions of the *Regional Care Home Contract* requires the Provider to give residents an individual written agreement or '*Residency Agreement*', the specifics of which (including tenure rights) are left to the Provider.

Complaints brought to the Commissioner for Older People for Northern Ireland by older people or their families/friends, indicate that some older residents are being involuntarily removed from care homes, with little or no engagement with the decision-making process, often at short notice (see *case studies*). In some cases, the individual resident was unaware that they could be moved from their care home (and community) without an effective process of appealing the decision.

71 The Human Right to Adequate Housing, The Office of the High Commissioner for Human Rights, United Nations, available at: <https://www.ohchr.org/en/special-procedures/sr-housing/human-right-adequate-housing>

72 The United Nations Committee on Economic, Social and Cultural Rights has underlined that the right to adequate housing should be seen as the right to live somewhere in security, peace and dignity. The characteristics of the right to adequate housing are clarified in the Committee's general comments No. 4 (1991) on the right to adequate housing and No. 7 (1997) on forced evictions.

Case study: Selective admissions

Client D was 89 years of age and suffering from mental health difficulties. Following a hospital admission, my client was discharged to a nursing home. Prior to any placement, the home in question will assess an individual's needs and determine whether they can meet them. In this case, the placement was confirmed, and the discharge from hospital carried out. Four days later my client required readmission to hospital due to dehydration. When my client was well enough for discharge, the nursing home refused to allow them to return.

The decision to prohibit my client's return was justified on the basis that my client required one-to-one care to mitigate fall risks, which the home could not facilitate. This decision was contrary to the earlier determination that the home could meet my client's care needs. On further investigation, the nursing home accepted that the decision was based on my client's behaviour, not the inability to meet my client's care needs. Ultimately an alternative placement, a significant distance from Client D's family and friends, was found.

The issues pertaining to eviction and compulsory transfer are central to the rights of residents because they engage concepts such as autonomy, personal choice and respect for private and family life.⁷³ In sum, eviction and compulsory transfer are actions which, when left unregulated or improperly regulated, can undermine the very notion of a care home being a resident's home.⁷⁴ The evidence indicates that compulsory transfers from a care home are often 'traumatic' for the resident impacting on their quality of life and wellbeing; that such transfers can result in increased mortality after relocation; and that transitions without the individual's engagement undermine the person's sense of autonomy.^{75 76 77}

73 See 'Article 8 Right to Respect for Private and Family Life', Human Rights Act 1998, available at: <https://www.legislation.gov.uk/ukpga/1998/42/contents>

74 The Department of Health maintains that 'First and foremost, a care facility is a home. The understanding of a care facility as a person's home is the fundamental principle on which all else should be based' (Reform of Adult Social Care Northern Ireland, Department of Health, 2022, p.81), available at: <https://www.health-ni.gov.uk/sites/default/files/consultations/health/doh-rasc-consultation-document.pdf>

75 See discussion of 'transfer trauma', Achieving Closure: Good Practice in Supporting Older People During Residential Care Closures, Glasby, J., Robinson, S., and Allen, K., 2011, p.6.

76 See discussion of 'increase in mortality after relocation', Achieving Closure: Good Practice in Supporting Older People During Residential Care Closures, Glasby, J., Robinson, S., and Allen, K., 2011, p.4.

77 Older people's experiences of transitions to care homes was summarised by the response: "You're at their Mercy" ... Participants felt that the move was out of their control and that they were "at the mercy" of others who made decisions about their long-term care' ("You're at their mercy": Older peoples' experiences of moving from home to a care home: A grounded theory study, in International Journal of Older People Nursing, O'Neill M., Ryan A., Tracey A., and Laird L., 2020).

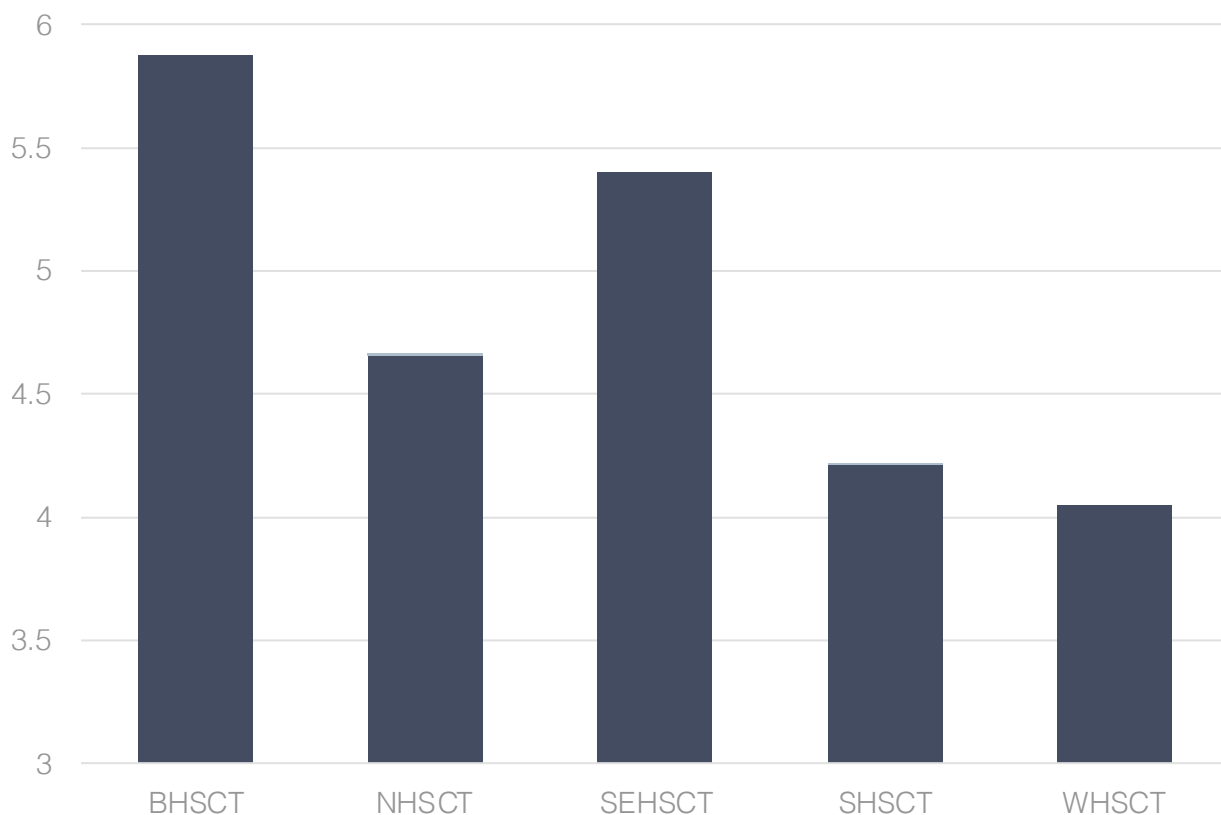
From a contractual perspective, the *Regional Care Home Contract* does not afford proper protection to older people in relation to eviction. The *Contract* does not contain any provision in relation to the type of tenure which a provider should grant to a resident. Residents of care homes in Northern Ireland are currently considered to have only a contractual licence to occupy. As a result, they are not deemed tenants. Accordingly, they cannot avail of the protections under the *Private Tenancies (Northern Ireland) Order 2006* and essentially have no security of tenure.⁷⁸ Therefore, while they remain licensees, residents of care homes in Northern Ireland have no statutory protection and must rely on either their contractual rights or equity for protection in the event of eviction.

Despite the current arrangement providing 'less legal protection than a tenancy or a lease would, especially in relation to eviction', no steps appear to have been taken to strengthen the protection afforded to people living in care homes.⁷⁹

78 Private Tenancies (Northern Ireland) Order 2006, available at: <https://www.legislation.gov.uk/nisi/2006/1459/contents>

79 Changing the Culture of Care Provision in Northern Ireland, COPNI, 2014, p.39, available at: https://www.copni.org/media/1122/changing_the_culture_of_care_provision_in_northern_ireland_pdf.pdf

Figure 4: Number of registered care beds per 100 older people by Trust



Source: The figures have been calculated by dividing the number of registered (nursing and residential) beds in each Trust by the population of people aged 65+ in each Trust multiplied by 100.^{80 81}

How to read this infographic: In the Belfast Health and Social Care Trust (BHSCT) area there are 5.8 registered beds per 100 older people, while in the Western Health and Social Care Trust (WHSCT) there are only 4.04 registered beds per 100 older people. This means that the number of registered beds per 100 older people is 31 per cent greater in the BHSCT area than in the WHSCT area.

80 Census of Bed Availability in Registered Care Homes in Northern Ireland on 27 September 2023, RQIA, 2023, available at: <https://www.rqia.org.uk/RQIA/files/4d/4d5d1f7f-93a0-4812-b966-a073e1a333ed.pdf>

81 Population of 65+ by Health and Social Care Trust, Census 2021, available at: https://build.nisra.gov.uk/en/custom/data?d=PEOPLE&v=HEALTH_TRUST&v=AGE_BAND_BROAD

4.1 The Regional Care Home Contract: no longer able to meet the needs of a resident

Clause 6.12 of the Specific Conditions of the *Regional Care Home Contract* offers a very broad legal basis for a provider proposing the removal of a resident of a care home. It states:

If the Provider considers themselves to no longer be able to meet the needs of a Resident, they must inform the Trust as soon as possible to ensure that the interests of the Resident are fully considered when alternative accommodation is being sought. Until alternative accommodation is available, the Trust and the Provider will work together to ensure the needs of the Resident are met...

Whilst this provision envisages that the transfer of a resident will involve a consensual decision in which the needs of the resident are carefully assessed and addressed, it is open to abuse.⁸² The provider can decide, unilaterally, to cease the provision of care for a resident without consultation with the Trust or the resident or their representatives. The *Regional Care Home Contract* contains no mechanisms to ensure that the provider is making such a decision based solely on an accurate assessment of the resident's needs and the provider's capacity to meet them.

Clause 6.13 of the Specific Conditions of the *Contract* provides that:

In extreme cases where the behaviour of the Resident or any other circumstances relating to the Resident are materially detrimental to the safety and welfare of other Residents or the conduct of the Provider, the Provider will be entitled to terminate the placement by giving the Trust 48 hours written notice.

Much like the preceding clause, this provision leaves open the possibility of unfair compulsory transfer, as it relies on the determination of an 'extreme case' by the provider, who is then entitled to terminate the placement.⁸³

⁸² Following requests for information in November 2023, the Department of Health and HSC Trusts did not supply statistics on transfers of people from care homes under Clause 6.12 of the Special Terms of the Regional Care Home Contract.

⁸³ Following requests for information in November 2023, the Department of Health and HSC Trusts did not supply statistics on transfers of people from care homes under Clause 6.13 of the Special Terms of the Regional Care Home Contract.

4.2 The Residency Agreement: an inferior protection

Clause 5.1 of the Specific Conditions of the *Regional Care Home Contract* states that:

The Provider shall provide each Resident who is the subject of Care Management by the Trust with an individual written agreement (“Residency Agreement”) which must be consistent with the terms and conditions of this Contract and the requirements of the Minimum Standards. If any difference or conflict arises between a Residency Agreement and this Contract relating to the Resident, this Contract will take precedence.

The contents of the ‘individual written agreement’ (or ‘*Residency Agreement*’) between the provider and resident varies from provider to provider, and according to the specific needs of the resident. However, Standard 4 of the *Residential Care Home Minimum Standards* (2022) and Standard 2 of the *Care Standards for Nursing Homes* (2022) outline what should be included in these agreements.^{84 85} The required contents of the ‘written agreement’, as specified in the *Standards*, are broad, including details of fees and ‘general terms and conditions of residency’. Both residential and nursing homes *Standards* state that the written agreement between the provider and the resident must include: ‘The notice period for terminating the agreement’. The length of the notice period required is not specified in the *Standards* or in the *Regional Care Home Contract*.

A resident’s licence to occupy a care home may be terminated by an alleged breach of a term in the *Residency Agreement* between the resident and the provider. A care home provider may, for the purpose of evicting a resident, rely on a ‘bad behaviour’ or ‘detrimental behaviour’ clause in a *Residency Agreement* where the resident or a member of the resident’s family is allegedly responsible for bad behaviour. However, if as in most available examples the *Residency Agreement* does not define what constitutes ‘bad behaviour’, such ‘bad behaviour’ clauses afford ample scope for abuse. While allowing that bad behaviour may be a reasonable basis for compelling a resident to leave a care home, the status quo—outlined in the *Residential Care Home Minimum Standards* (2022) and *Care Standards for Nursing Homes* (2022)—gives the provider almost unrestricted powers to evict a resident, should they so wish.

84 Residential Care Home Minimum Standards, Department of Health, Social Services and Public Safety, 2022, available at: <https://www.rqia.org.uk/RQIA/files/ea/ea7c184c-8bb5-41e3-a270-db34fc2fad9a.pdf>

85 Care Standards for Nursing Homes, Department of Health, Social Services and Public Safety, 2022, available at: <https://www.rqia.org.uk/RQIA/files/7d/7dec5d24-796a-440a-9a60-7deb7112c994.pdf>

Case study: Insecurity of tenure

Client E was 97 years of age and had been resident in a residential home for 2 years. My client's family raised concerns with COPNI in relation to the standard and level of care being provided.

Following a fall from bed, my client was presented to hospital with severe bruising to the face, arms and hand. A best interest meeting was arranged and ultimately, a four week Notice of Termination was served on my client stating the reason to be the 'approach and conduct of family members'.

The Notice of Termination was challenged by the family and assurances were given by the care home that my client would not be evicted at the expiration of the four-week period and could remain until such times as an alternative home had been found. My client was admitted to hospital with sepsis and a UTI shortly after the assurances were given. Following my client's recuperation, the care home refused to allow Client E to return.

The *Regional Care Home Contract* provides no obligations regarding, or direction as to what would constitute, reasonable due cause for a provider to terminate a *Residency Agreement* with a resident. Similarly, neither the *Regional Care Home Contract* nor the *Standards (Residential Care Home Minimum Standards, (2022); Care Standards for Nursing Homes (2022))*, specify the process of terminating the *Residency Agreement*. In the absence of the *Regional Care Home Contract* or *Standards* establishing the basis and process by which a provider can evict, a resident is at risk of arbitrary removal from their home. Without explicit mechanisms to provide checks and balances, the process of evicting a resident becomes a unilateral and often, unchallengeable decision by the provider (see *case studies*).

Currently, the resident subject to eviction from the care home is entitled to 'a period of notice for terminating the agreement' (*Regional Care Home Contract*, Specific Conditions, Clause 5). Legislation provides that 'reasonable notice' must be given to the resident, the resident's next of kin and the Trust.^{86 87} With regards to what constitutes reasonable

86 Nursing Homes Regulations (Northern Ireland) 2005, Regulation 33, available at: <https://www.legislation.gov.uk/nisr/2005/160/regulation/33/made>

87 Residential Care Homes Regulations (Northern Ireland) 2005, Regulation 33, available at: <https://www.legislation.gov.uk/nisr/2005/161/regulation/33/made>

notice, it was held in *Greater London Council v Jenkins* that:

What is a reasonable time depends upon all the circumstances of the case, and where the licence has been to occupy premises for residential purposes the reasonable time has reference to enabling the licensee to have an opportunity of taking his effects away from the property.⁸⁸

In effect, even the notice period for a resident of a care home subject to eviction under the terms of a *Residency Agreement*, offers little succour as it can be remarkably short. Within the current legal framework, a resident of a care home, often one who is experiencing health issues, can be removed at short notice from the only home they have (see *case studies*).

Standard 5 of the *Care Standards for Nursing Homes (2022)* states:

Residents' human and individual rights are respected and protected through care which is person-centred; focused on individual outcomes; and promotes and supports rights, dignity, privacy, choice and control.

It is not clear how such a standard can be achieved in the context of an eviction process without the commissioning Trust establishing explicitly what such a process should entail. A reasonable rights compliant process would establish how a decision should be reached, evaluated, and monitored; how the notice of eviction will be delivered; a minimum notice period; details of avenues to appeal the decision; details of advocacy services to appeal the decision and if necessary, to locate alternative accommodation.

4.3 Complaints, monitoring and advocacy

The *Regional Care Home Contract* does afford some potential avenues of protection from eviction for residents. With regards to the handling of complaints, Clause 10.1 of the Special Terms of the *Regional Care Home Contract* states:

The Provider shall ensure that it has a complaints procedure in place which meets the requirements of Guidance on Complaints Handling in Regulated Establishments and Agencies issued by the DHSS&PS (Circular HSC (SQSD) 23/2009, the Minimum Standards and the HSC Complaints Procedure. The Provider's complaints procedure must be notified to all new and current Residents and their Representative. All Residents and their Representative must be provided with information on making a

⁸⁸ *Greater London Council v Jenkins* [1975] 1 W.L.R. 155 at 158C per Diplock LJ

complaint. Such information must be both in the admission pack and on display in the Home. The Provider's Complaints Procedure must be shared with the Trust on request.^{89 90 91 92}

The complaints procedure described in the *Regional Care Home Contract* largely places responsibility for the investigation, determination, and oversight of complaints about issues involving the provider in the hands of the provider. Clause 10.2 of the Special Terms of the *Regional Care Home Contract* states that 'The Provider has responsibility to investigate and respond to complaints...'. Strikingly, at Clauses 10.1 and 10.5, the *Contract* provides that significant aspects of the complaints procedure need only be shared with the commissioning Trust 'on request'.

Case study: Counterproductive complaints

Client F was 84 years of age and living with dementia. My client's family raised safeguarding concerns in relation to the standard of care received, causing a breakdown in the relationship between the family and the care home. Management advised the family that they had jeopardised the placement and issued a Notice of Termination.

The complaints process outlined in the *Regional Care Home Contract* places an emphasis on the care provider leading on the processing of complaints by residents. In many complaints scenarios, especially those that are relatively minor and easily rectifiable, such a complaints management role will be entirely appropriate. Indeed, in more serious cases, one would hope that the provider would process complaints in a fair and objective manner, advising the complainant/resident of their rights, identifying advocacy support and highlighting options for further action. However, hoping that a party to a contract conducts themselves in a manner that one would wish, is less desirable than specifying obligations of conduct to which a party must adhere. Procedurally, the provisions in the *Contract* leave open the risk of violating a fundamental legal principle—'nemo iudex in causa sua'—that no one should be judge in their own case.⁹³ Indeed, Article 6 of the

89 Complaints in Health and Social Care: Standards & Guidelines for Resolution & Learning, Department of Health, Social Services and Public Safety, 2009, available at: <https://www.rqia.org.uk/RQIA/media/RQIA/Resources/Complaints/HSC-complaints-standards-and-guidelines-Aug-10.pdf>

90 Residential Care Home Minimum Standards, Department of Health, Social Services and Public Safety, 2022, available at: <https://www.rqia.org.uk/RQIA/files/ea/ea7c184c-8bb5-41e3-a270-db34fc2fad9a.pdf>

91 Care Standards for Nursing Homes, Department of Health, Social Services and Public Safety, 2022, available at: <https://www.rqia.org.uk/RQIA/files/7d/7dec5d24-796a-440a-9a60-7deb7112c994.pdf>

92 Guidance in Relation to the Health and Social Care Complaints Procedure, Department of Health, 2023, available at: <https://www.health-ni.gov.uk/sites/default/files/publications/health/doh-guidance-hsc-complaints-procedure.PDF>

93 See Nemo Iudex In Causa Sua, Incorporated Council of Law Reporting for England and Wales, available at: [https://www.iclr.co.uk/knowledge/glossary/nemo-iudex-in-causa-sua/#:~:text=Latin%20for%20%20E2%80%9Cno%20one%20should,a%20personal%20\(vested\)%20interest](https://www.iclr.co.uk/knowledge/glossary/nemo-iudex-in-causa-sua/#:~:text=Latin%20for%20%20E2%80%9Cno%20one%20should,a%20personal%20(vested)%20interest).

European Convention on Human Rights, enshrined in UK law in Schedule 1 of the *Human Rights Act 1998*, states that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

Furthermore, it is not clear that the submission of a complaint objecting to compulsory transfer and using the established complaints procedure will pause that transfer until such a time as a determination has been made. A resident who has been notified of a decision to terminate the *Residency Agreement* might rely on the complaints procedures referred to at Clause 10.1 of the Special Terms of the *Regional Care Home Contract* to challenge the decision to evict.⁹⁴ However, the adjudication of a complaint about a threatened transfer may not be concluded before such action takes place. In effect, a complaint under current procedures could prove successful, and yet, the resident could be relocated by the time such a determination has been made. While an injunction could prevent a transfer before a decision on the merits of the complaint is concluded, this option places a significant burden on the resident to actively protect their rights notably outside any mechanisms prescribed in the *Regional Care Home Contract*.

It may be argued that Clause 10.2 of the Special Terms of the *Regional Care Home Contract* by providing for the monitoring of the complaints process, thereby ensures that the process is 'independent and objective'. The logic of this argument being that as the Trust is furnished with details of the complaints on a quarterly basis, it can ensure the overall equity of the process. The Clause states:

The Provider shall keep a record of complaints, the subsequent investigation and its outcome and any action taken as a result. This record must be submitted to the Trust no longer than 10 working days after the end of each Quarter for complaints closed in that period.

However, the 'record of complaints, the subsequent investigation and its outcome and any action taken as a result' which are submitted to the Trust, are all framed by the perspective of the provider. The 'record' that is provided to the Trust, is a record of how the provider views the complaint, what the provider considers an investigation, what the provider views as an outcome and result. The obligation in Clause 10.2 to report on complaints on a quarterly basis to the Trust, is merely an obligation on a corporate entity

⁹⁴ The Department of Health commissioned CPEA report, Independent Whole Systems Review into Safeguarding and Care at Dunmurry Manor Care Home, Evidence Paper: 2 Complaints (March 2022) noted that 'on the receipt of a complaint sometimes the presenting problems receive superficial attention, without reference to a full investigation and consideration of underlying matters. This signals a gap between the procedures' aspirations and practice', (p.12). Available at: <https://www.health-ni.gov.uk/sites/default/files/publications/health/doh-paper2-complaints-dunmurry-manor-review-team-march-2022.pdf>

to provide its own assessment of its own (complaints) performance to a party with which it has a commercial relationship.

Case study: Ineffective oversight of decision making

Client G was 88 years of age and a long-term resident in a residential home. Following a fall which resulted in a fracture, my client was moved to an alternative home without any consultation with my client, or my client's family. COPNI was approached by the family to provide advocacy support. Following discussions with the social worker, it was advised that my client's care needs had changed from residential to nursing and that the move was to ensure that my client's care needs were being appropriately met.

However, on request, the Trust reassessed my client and determined that nursing care was not required and therefore, the original provider could have continued to meet my client's care needs. Client G had already been relocated to an alternative care home.

When considering complaints procedures in care homes, it is useful to recall the ambition of Standard 5 of the *Care Standards for Nursing Homes* (2022), for 'care which is person-centred...and promotes and supports...choice and control.' Similarly, Standard 1.2 of the *Residential Care Homes Minimum Standards* (2022) requires that:

Residents' views are taken into account in all matters affecting them, and the home has forums or systems where residents and their representatives can express their views and be consulted about the running of the home.

Fairness, service standards, and legislation require that a person who lives in a care home be facilitated and empowered to engage in a complaints process to ensure their 'views are taken into account in all matters affecting them'.^{95 96} A central element of an equitable complaints process is ensuring that the individual seeking redress has the resources to navigate that process. The most effective approach for supporting at risk individuals to navigate a complaints process is access to quality, independent advocacy

95 For obligations outlined in service standards, see Residential Care Home Minimum Standards, Department of Health, Social Services and Public Safety, 2022, available at: <https://www.rqia.org.uk/RQIA/files/ea/ea7c184c-8bb5-41e3-a270-db34fc2fad9a.pdf> ; and Care Standards for Nursing Homes, Department of Health, Social Services and Public Safety, 2022, available at: <https://www.rqia.org.uk/RQIA/files/7d/7dec5d24-796a-440a-9a60-7deb7112c994.pdf> .

96 For obligations outlined in legislation, see Nursing Homes Regulations (Northern Ireland) 2005, available at: <https://www.legislation.gov.uk/nisr/2005/160/contents/made> ; and Residential Care Homes Regulations (Northern Ireland) 2005, available at: <https://www.legislation.gov.uk/nisr/2005/161/regulation/33/made>

services. In 2014, the Commissioner for Older People for Northern Ireland remarked on the necessity for appropriate services in residential settings:

There should be stronger access to advocacy and support as part of this process, in instances where there is the possibility of an older person being moved from the home they are resident in. Advocacy and support would mean that the process would be fairer, with the older service user given a fair and transparent opportunity to have their views heard as part of the decision making process.⁹⁷

For a complaints system to function properly, there must be an effective pathway of raising concerns with a provider and if necessary, to progress a complaint to an appropriate third party. In a scenario in which a resident who has serious physical and/or mental impairments and depends on the provider for all their daily requirements, the obligation to ensure an equitable complaints process must by its very nature be onerous. Among other considerations, it is vital that the individual (or their representative): is aware of their rights; knows how to complain; can give information in a manner appropriate to their capacity; receives information in an accessible manner; is confident that there will be no negative repercussions; and is aware of avenues of appeal and/or avenues for further progressing their complaint. Given that the needs of residents are often so complex, in order to ensure equitable access to a complaints process (and rights protections more generally), an accessible well-resourced, advocacy regime must be present, in some form, in all care homes. Without such advocacy support for would-be complainants, even an otherwise functional system is rendered unfit for purpose, as those most in need of support cannot participate in the complaints process effectively.

There is a recognition in the *Regional Care Home Contract* of the role of independent advocacy within the complaints process. Clause 10.4 of the Special Terms states that:

Providers should ensure that their complaints procedure includes appropriate signposting to available advocacy services e.g., advice centres or the Patient and Resident Council and must ensure that their complaints procedure includes information on options if the complainant is dissatisfied with the Provider's investigation, i.e. approach the Trust and/or Ombudsman.

However, this reference to 'advocacy services' is the lone reference to such provision within the *Regional Care Home Contract*. So, in effect, the *Contract* obliges little from the commissioning Trust or the care home provider as regards independent advocacy other than 'signposting to available advocacy services'. Indeed, confirmation that this interpretation is accurate is supported by the *Standards* referred to in the *Regional Care Home Contract*. Standard 5.5 of *Care Standards for Nursing Homes* provides that:

⁹⁷ Changing the Culture of Care Provision in Northern Ireland, COPNI, 2014, p.40, available at: https://www.copni.org/media/1122/changing_the_culture_of_care_provision_in_northern_ireland_pdf.pdf

Staff know how to access independent advocacy services in their area and facilitate access for any resident who requires it. Residents and their relatives are made aware of how to access such services.⁹⁸

Unfortunately, in some cases the contractual provision (10.4) and attainment of the *Standards* (5.5), is technically fulfilled by the inclusion of a leaflet or contact details of advocacy services in a resident's welcome pack. In the case of an individual with significant cognitive or physical impairments, such 'signposting' can prove valueless (even for those with engaged family, friends, or other representatives). In 2022, the Department of Health stated that:

Care Homes should operate a participative decision making model where residents and family carers have as much say in the operational running of the home as possible. This should include decision making about activities, meals, décor, visiting arrangements and staffing. Where possible, residents and/or family carers should play a role in staff recruitment.⁹⁹

For the development of 'participative decision-making' with an acutely vulnerable demographic, the provision of quality, independent advocacy services is vital, otherwise such terms and ambitions are only meaningless jargon. As to the nature of such provision, advocacy services must be visible, active, and engaged within a care home, if they are to be an effective support in terms of complaints and rights protections.

98 Care Standards for Nursing Homes, Department of Health, Social Services and Public Safety, 2022, p.25, available at: <https://www.rqia.org.uk/RQIA/files/7d/7dec5d24-796a-440a-9a60-7deb7112c994.pdf>

99 Reform of Adult Social Care Northern Ireland, Consultation Document, Department of Health, 2022, p.81, available at: <https://www.health-ni.gov.uk/sites/default/files/consultations/health/doh-rasc-consultation-document.pdf>

4.4 Conclusion

Evictions and compulsory transfers from a care home can be extremely distressing for residents, negatively impacting wellbeing, and quality of life.^{100 101 102} The resident is suddenly removed from their home with its familiar environment, routine, staff, and community, often at a time when that person has reduced physical and/or mental capacity. In light of the risk of evictions or compulsory transfers causing substantial adverse consequences to residents, the absence of rights protections or specific safeguarding mechanisms within the *Regional Care Home Contract* is remarkable.

Given that eviction and compulsory transfer are contradictory to the principle that a care home is a resident's home, the absence of security of tenure or at least, ameliorative mechanisms in the *Contract* demonstrates the reduced status accorded residents.¹⁰³ Undoubtedly, there are instances in which a resident should be transferred despite their opposition, for example, because their assessed needs would be better met by a different type of service, or where they are a danger to themselves or others. It is entirely rational that providers contribute to the decision-making in such cases and indeed, that involuntary transfers can occur when absolutely necessary. Yet without checks and balances, the operation of Clauses 6.12 and 6.13 of the Special Terms of the *Regional Care Home Contract* (and similar provisions within a *Residency Agreement*) risks undermining key rights such as the *Right to Respect for Private and Family Life*, and the *Right to Adequate Housing*.^{104 105}

100 See discussion of 'transfer trauma', *Achieving Closure: Good Practice in Supporting Older People During Residential Care Closures*, Glasby, J., Robinson, S., and Allen, K., 2011, p.6.

101 See discussion of 'increase in mortality after relocation', *Achieving Closure: Good Practice in Supporting Older People During Residential Care Closures*, Glasby, J., Robinson, S., and Allen, K., 2011, p.4.

102 Older people's experiences of transitions to care homes was summarised by the response: "You're at their Mercy" ... Participants felt that the move was out of their control and that they were "at the mercy" of others who made decisions about their long-term care' ("You're at their mercy": Older peoples' experiences of moving from home to a care home: A grounded theory study, in *International Journal of Older People Nursing*, O'Neill M., Ryan A., Tracey A., and Laird L., 2020).

103 The Department of Health maintains that 'First and foremost, a care facility is a home. The understanding of a care facility as a person's home is the fundamental principle on which all else should be based' (*Reform of Adult Social Care Northern Ireland*, Department of Health, 2022, p.81).

104 See Article 8 Right to Respect for Private and Family Life, Human Rights Act 1998, available at: <https://www.legislation.gov.uk/ukpga/1998/42/contents>

105 The United Nations Committee on Economic, Social and Cultural Rights has underlined that the right to adequate housing should be seen as the right to live somewhere in security, peace and dignity. The characteristics of the right to adequate housing are clarified mainly in the Committee's general comments No. 4 (1991) on the right to adequate housing and No. 7 (1997) on forced evictions.

The Department of Health's 2022 consultation document entitled, *Reform of Adult Social Care Northern Ireland* includes in its six strategic priorities:

Individual Choice and Control: To ensure the individual has control over the decisions affecting their social wellbeing and their care and support needs...

*Primacy of Home: The purpose of adult social care, including group care services, is to support citizens to live well in their own home in connection to their families, social networks and communities, providing maximum choice and control of their daily living arrangements and their care and support provision.*¹⁰⁶

Despite the avowed centrality of these principles in the view of the Department of Health, residents do not in many instances have 'choice and control' over where they live, nor in many cases, are they supported in treating a care home as their own home (see *case studies*). Indeed, not only do residents in care homes live without the security and protections of tenancy rights, the risk of eviction itself skews the relationship with the care home provider as residents are likely to be reluctant to raise concerns about any aspect of care for fear of being moved.¹⁰⁷

Insecurity of tenure affects not only residents who are being transferred against their wishes, but all residents of care homes because their current home life depends largely on whether or not 'the Provider considers themselves to...be able to meet the needs of a Resident' (*Regional Care Home Contract*, Clause 6.12). Indisputably, whether or not an involuntary transfer directly involves an individual resident, the current provisions in the *Contract* mean that all residents of commissioned services continue to live in care homes dependent on the forbearance of the provider. Crucially, this absence of security of tenure in the *Contract* is fundamentally at odds with the Department of Health's 'vision for the future [of] adult social care', and the creation of 'a human rights based system of service provision'.¹⁰⁸

The concept of human rights rests on a belief that certain fundamental rights are inherent to all humans. The Office of the High Commissioner for Human Rights at the United Nations states that:

106 Reform of Adult Social Care Northern Ireland, Consultation Document, Department of Health, 2022, p.6, available at: <https://www.health-ni.gov.uk/sites/default/files/consultations/health/doh-rasc-consultation-document.pdf>

107 'Residents living in care homes, and their relatives, should feel safe to raise any issues they have with the level of care provided without feeling threatened by eviction or visitation bans', The Human Rights Questions Care Homes Must Consider Before Restricting Family Contact, E. Turnbull, 2019 available at: <https://www.communitycare.co.uk/2019/05/14/human-rights-questions-care-homes-must-consider-restricting-family-contact/>

108 Reform of Adult Social Care Northern Ireland, Consultation Document, Department of Health, 2022, p.15, available at: <https://www.health-ni.gov.uk/sites/default/files/consultations/health/doh-rasc-consultation-document.pdf>

*Human Rights are rights we have simply because we exist as human beings - they are not granted by any state. These universal rights are inherent to us all, regardless of nationality, sex, national or ethnic origin, colour, religion, language, or any other status. They range from the most fundamental - the right to life - to those that make life worth living, such as the rights to food, education, work, health, and liberty.*¹⁰⁹

This technical characterisation of human rights shows why any attempt to create ‘a human rights based system of service provision’ without reimagining the commissioning of services in a human rights context, (in this case, the *Regional Care Home Contract*), is doomed to failure. The *Regional Care Home Contract* in its current form cannot deliver ‘a human rights based system of service provision’ because as the current chapter illustrates there are only vague obligations assigned to the parties to the *Contract* as regards protecting rights, empowering complainants and monitoring grievances. The current *Regional Care Home Contract* simply fails to provide reasonable mechanisms to protect a most basic right—the right to a home, at a uniquely vulnerable stage of life.¹¹⁰

109 What are Human Rights?, The Office of the High Commissioner for Human Rights at the United Nations, accessed November 2023, available at: <https://www.ohchr.org/en/what-are-human-rights>

110 ‘Housing is most importantly a Human Right. Under international law, to be adequately housed means having secure tenure—not having to worry about being evicted or having your home or lands taken away’, The Human Right to Adequate Housing, The Office of the High Commissioner for Human Rights, United Nations, available at: <https://www.ohchr.org/en/special-procedures/sr-housing/human-right-adequate-housing>



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