RadcliffesLeBrasseur

BRIEFING

Number 2

Passive Smoking

CARE HOMES BRIEFING

Staff are increasingly concerned about the effect of passive smoking on their health. Specific smoking rooms may be provided for residents but they will often still smoke in their rooms unless this is expressly prohibited (and even then…!)

In the event that staff later develop medical conditions - such as cancer - attributable to their exposure to passive smoking, there is a real risk that such staff might commence legal action against their employer for damages for personal injury. Although it is impossible to estimate potential individual claims, it is realistic to assume that they may be substantial, particularly if staff later have to give up employment as a result of their medical condition. There is also the risk that staff might claim constructive dismissal, i.e. staff might terminate their employment but claim "dismissal" on the grounds of the employer's failure to ensure that their own health is protected. This will again put the employer at risk of legal claims, with possible awards of damages to be paid to staff, as a result of their exposure to passive smoking. Whether such claims would be successful will depend on the individual facts of each case.

Any policy of allowing residents to smoke in their own room will no doubt have been adopted to take into account the need to respect residents' individual choices. Indeed, such a policy could be said to accord with Article 8 of the Human Rights Act 1998 which provides the right to respect for a person's private and family life. However, that legislation only applies to "public bodies" and therefore arguably does not strictly apply to private care homes although this position is far from straightforward as recent case law establishes that where a private hospital is carrying out obligations imposed by statute, it then constitutes a "public body". Residents who wish to smoke may therefore be able to rely on the provisions of the human rights legislation. Nevertheless, Article 8 is a "qualified right" and can be overridden with reference to various criteria based on public interest issues, including the protection of health and the protection of the rights and freedoms of others. Therefore, these may justify a care home operator restricting the right of residents to smoke, for example, during times when staff are required to attend to the residents in their rooms.

Another aspect of human rights law is that any interference with a person's rights under the 1998 Act has to be "proportionate". Protecting the health of staff would probably be regarded as proportionate with regard to the restriction imposed on residents from smoking when a member of staff is in the room. However, it will sometimes be necessary for care homes to take a view on this issue with regard to individual cases. For example, if the restriction imposed on a patient smoking was likely to have a detrimental impact on that resident's mental state, it would be more difficult to justify the restriction.

To make the position plain, homes should have a clear policy document in place, and ensure that their contracts with residents incorporate the care home's operational policies.

RadcliffesLeBrasseur
5 Great College Street
Westminster
London SW1P 3SJ

Tel +44 (0)20 7222 7040
Fax +44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU

Tel +44 (0)113 234 1220
Fax +44 (0)113 234 1573
DX 14086 Leeds Park Square

25 Park Place
Cardiff CF10 3BA

Tel +44 (0)29 2034 3035
Fax +44 (0)29 2034 3045
DX 33063 Cardiff 1

info@rlb-law.com
www.rlb-law.com

Care Homes for Older People – National Minimum Standards amended

A consultation exercise was held on proposed amendments to certain physical environmental standards for care homes following a statement by the Secretary of State for Health, Alan Milburn in July 2002. The amendments are now in force. The key change affects homes which existed before April 2002. They will no longer be expected to change their homes to meet some of the physical environmental standards which came into force on 1 April 2002. Higher standards will still apply to new care homes, and should be regarded as best practice to which all care homes should aspire. The changes only affect a small number of physical environment standards (9 out of 246 care homes for older people standards and 8 of out 305 care homes for younger adults (18-65) standards).

NHS Funding for Long Term Care

Ann Abraham has published her first special report as Health Service Ombudsman. The report – *NHS Funding for Long Term Care* - contains the results of four investigations into complaints about the way in which health authorities set and applied their eligibility criteria for NHS funding for the continuing care of older and disabled people.

There is evidence that the Department of Health's guidance has been misinterpreted and misapplied by some health authorities and trusts, leading to hardship and injustice for some individuals. But there are also more fundamental problems with the system. In the view of the Ombudsman, the Department of Health's guidance and support has not provided the secure foundation needed to enable a fair and transparent system of eligibility for funding to be operated across the country.

March 2003

Addendum July 2007

The Briefing set out above was published in March 2003. Since then the Health Act 2006 has entered into force – see Briefing number 51.

As far as Briefing Number 2 on Passive Smoking is concerned, there are a number of points which merit revisiting in light of the Health Act, which should reduce staff exposure to passive smoke in any event.

With the arrival of the smoking ban in England at 6:00am on 1st July 2007 it is now illegal for care home residents to smoke in any enclosed or substantially enclosed area, unless it is a room properly designated for the purpose. From 1st July 2008 the sunset provision applicable to residential mental health units will expire and such facilities must become entirely smoke free.

While this is a divisive issue, in terms of the health benefits it may bestow upon non-smoking employees, the ban is arguably a justified and proportionate restriction on any rights to smoke which residents may argue are protected under Article 8 regarding private life.

One aim of the legislation is to protect the health of employees, however if staff are providing care in private homes or 'personal accommodation' they are not protected under the Health Act and can therefore continue attending to patients in their designated bedrooms or smoking rooms. Nevertheless, over and above the statutory restrictions on them, residents could still be required to refrain from smoking even here when staff are present. Indeed, the fact that care home providers are

RadcliffesLeBrasseur
5 Great College Street
Westminster
London SW1P 3SJ

Tel +44 (0)20 7222 7040
Fax +44 (0)20 7222 6208
LDE 113

6-7 Park Place
Leeds LS1 2RU

Tel +44 (0)113 234 1220
Fax +44 (0)113 234 1573
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25 Park Place
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Fax +44 (0)29 2034 3045
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under no obligation to designate any room as rooms for smokers, supports the reasonableness of such requests. The protection of employee's health seems to make a legitimate inroad into a resident's qualified Article 8 rights.

The right to life conferred by Article 2 is absolute and states that "everyone's right to life shall be protected by law." Absent the freedom to request that a resident refrains from smoking, an employee's inalienable right to life would potentially be threatened by the effects of second hand smoke.

It is worth noting that the House of Lords have recently upheld a ruling[1] that a privately owned care home does not amount to a public body for the purposes of the Human Rights Act and therefore a service user would be unable to establish an Article 8 claim for violation of this right in the private provision of services. A psychiatric hospital detaining patients under the Mental Health Act would not however be able to run this argument as the operation of the MHA makes them a public authority.

Interestingly, a patient at Rampton high security psychiatric hospital, where the average stay is 7-8 years, is bringing a test case challenging the legality of a smoking ban which was introduced by the Nottinghamshire Healthcare NHS Trust in March, although similar arguments could be applied to the compulsory ban.

The Claimant argues that Rampton is the patients' home and that forbidding them from smoking when they are not free to go elsewhere is a disproportionate infringement of their right to do as they wish in their own home. The Claimant is also challenging Regulations made under the Health Act 2006 on the basis that they discriminate against psychiatric patients. It cannot therefore be said with certainty that the Human Rights issues have been concluded by the Lords and we can only wait to see what potential impact new case law will have upon the respective rights enjoyed by staff.

The Health and Safety at Work Act 1974 also affords employees protection from passive smoking, conferring a duty of care upon employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work of their staff. This includes providing and maintaining a working environment free from health risks, with adequate facilities and arrangements in place for their welfare.

The key words here are 'reasonably practicable,' so for example, where staff are on 1:1 observations with a resident who smokes, or at other times, their exposure to second hand smoke need only be minimised so far as is reasonably practicable. Carrying out and retaining records of a risk assessment, addressing how this may be best achieved, would be advisable.

The Royal College of Nursing also advises that patients and residents could be asked not to smoke while staff attend them in their bedrooms. Rooms should be ventilated prior to staff gaining access, through opening windows, but not through propping open the mechanically closing doors which lead onto smoke free areas, a simple mistake which would of course fall foul of the smoking ban legislation.

Our previous Briefing acknowledged the need to strike a balance between protecting people from passive smoking and the potentially detrimental impact on an individual's mental health if they are unable to smoke. Equally, relationships between staff and residents at some units can be fragile and there are fears over loss of trust and rapport in the face of such requests. Arguably, these are not relevant considerations under the ban in its current form, with regards to enclosed or substantially enclosed spaces and anyone smoking or allowing smoking in such areas will face immediate fines. This balancing act would be something for staff and management to consider when deciding whether it is reasonable to ask a resident to refrain from smoking in designated rooms for the sake of staff's physical health.

[1] YL v. Birmingham City Council and Others [2007] UKHL 27

RadcliffesLeBrasseur
5 Great College Street
Westminster
London SW1P 3SJ

Tel +44 (0)20 7222 7040
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LDE 113

6-7 Park Place
Leeds LS1 2RU

Tel +44 (0)113 234 1220
Fax +44 (0)113 234 1573
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Cardiff CF10 3BA

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Fax +44 (0)29 2034 3045
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We previously advised that care homes should adopt a clear policy statement and ensure that contracts with residents incorporate the home's operational policies. This is also the advice emanating from the NHS in conjunction with the Government and the Smokefree England campaign. Distinct policies on smoking could now usefully be drafted and circulated, setting out the respective rights and responsibilities of staff and residents under the Health Act and subordinate legislation. Such internal policies could also prove an effective mechanism for preventing congestion around external doorways, defining a smoke free perimeter around the building if they choose.

Any complaints from staff expressing concerns over their level of exposure to second hand smoke should be treated seriously and the usual grievance procedures invoked, to avoid any unnecessary constructive dismissal or potential personal injury claims.

Kate Olpin

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For more information on Care Home Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: andrew.parsons@rlb-law.com.

Out of office emergency advice available 24hrs on 07802 506 306.

RadcliffesLeBrasseur
5 Great College Street
Westminster
London SW1P 3SJ

Tel +44 (0)20 7222 7040
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LDE 113

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