



CARE BILL – Lords Amendment on Human Rights

May 2014

The Care Bill will come before the Lords again on 7th May when members will be asked to vote on Clause 48 (Commons Amendment no. 11) introduced by the government. This important amendment would make a significant difference to users of care services, ensuring that their care is provided with dignity and that they are able to hold providers who fail to meet that standard to account. We strongly support this amendment and urge Peers to vote in favour of it.

We have been working on this issue for several years and are pleased that the Government has now agreed to address our concerns by tabling this new amendment.

The issue

The Care Bill is a landmark piece of legislation setting the legal framework for social care for a generation. It introduces England's first primary legislation to protect adults at risk of abuse and neglect (similar legislation is in place in Scotland and in process in Wales). This is an important step forward in offering better protection to people receiving care services in England. However, the legislative framework needs to offer protection in all social care settings.

In 2007, the *YL* case - a decision of the then House of Lords – narrowed the legal obligation on certain care providers to respect people's rights. According to this decision, whether an individual is directly protected by the Human Rights Act 1998 depends on how their care is provided and funded. Those who self-fund or receive care services in their own home from a private or third sector provider are not directly covered by the Human Rights Act. This is the case even if care is being provided under contract to a local authority to meet statutory needs, or if the person was sufficiently vulnerable to have qualified, but for means testing, for local authority arranged care. Those receiving social care that is provided directly by the local authority are covered.

For residential care that is publically arranged, the Health and Social Care Act 2008 closed the protection gap that was created by the *YL* decision. However the Care Bill is expected to make this provision ineffective by repealing certain statutory provisions which define what is 'publically arranged'. In contrast, the *YL* loophole has never been closed for home care when it is provided by private or third sector organisations.



As the Bill currently stands, it fails to rectify this legal loophole. This means that when people receive care from the independent sector, either because it is contracted out by the local authority or because, due to means testing, they arrange care themselves they have no direct right of redress if their human rights have been neglected or violated.

The poor standard of care is a very real problem which was illustrated only this week by the graphic and distressing Panorama film on ill-treatment in care homes. We know that currently when an individual makes a complaint, some care providers have responded by evicting the complainant from residential accommodation or withdrawing their home care. It has not been possible for people to challenge this response effectively as long as the care provider fulfils the terms of their contract. We know that people often feel unable to complain and fear the outcome if they do so because there is a lack of available protection based on fundamental rights - such as freedom from inhuman or degrading treatment or their right to respect for their private or family life. This both acts as a disincentive to the individual to complain about care, and provides little incentive for the care providers to improve standards. It is also makes no practical or logical sense for two people in the same setting to be entitled to different levels of legal protection, depending on how their care is funded or arranged.

The purpose of the amendment

The amendment is an important measure to help ensure people using care services are treated with dignity and have the ability to hold service providers to account anywhere in the UK (as a result of agreement with the administrations in Wales, Scotland and Northern Ireland). It will give legal clarity on the original intention of Parliament when passing the Human Rights Act. During the parliamentary debates it was clear that the law was to apply not only to local authority services but also to take “account of the fact that, over the past 20 years, an increasingly large number of private bodies, such as companies or charities, have come to exercise public functions that were previously exercised by public authorities.”¹ Clarifying that such services are covered by the HRA can help ensure that services are developed and delivered in ways which treat people with dignity and respect. Importantly, the amendment will secure human rights protection for residential care that is currently guaranteed by the Health and Social Care Act 2008.

¹ Jack Straw MP, Secretary of State for Home Affairs, Hansard, Col 773, 16 February 1998



The impact

If agreed, this amendment will clarify that when an individual receives care and support provided by any regulated social care provider and the care is arranged or paid for publically, they have the direct protection of the HRA to ensure the care respects their human rights. These are things too easily taken for granted – such as being treated with dignity, having their autonomy respected, being allowed a family life, or expressing personal beliefs. Social care users should feel empowered in raising these issues without the fear of eviction or having care services withdrawn.

Clarifying this legal duty is not about opening floodgates to rafts of litigation. It is about ensuring people using care services are able to raise issues and negotiate directly with service providers to resolve problems/concerns about care at a local level (although with the back-up of a legal challenge if necessary). This should give care users and their families reassurance and drive up standards on basic rights for all those providing care. This change should also have the positive impact that care providers see the value of using human rights as a basis for training their staff and for service delivery.

We urge members of the House of Lords to vote in favour of this amendment on 7th May. If you would like further information, please contact Angela Kitching, Head of Public Affairs, Age UK, angela.kitching@ageuk.org.uk



Amendment

Clause 48 (COMMONS AMENDMENT NO. 11)

EARL HOWE

Earl Howe to move, That this House do agree with the Commons in their Amendment 11 and do propose the following amendments in lieu of the words so left out of the Bill—

Insert the following new Clause—

“Human Rights Act 1998: provision of regulated care or support etc to be public function

(1) This section applies where—

(a) in England, a registered care provider provides care and support to an adult or support to a carer, in the course of providing—

(i) personal care in a place where the adult receiving the personal care is living when the personal care is provided,
or

(ii) residential accommodation together with nursing or personal care;

(b) in Wales, a person registered under Part 2 of the Care Standards Act 2000 provides care and support to an adult, or support to a carer, in the course of providing—

(i) personal care in a place where the adult receiving the personal care is living when the personal care is provided,
or

(ii) residential accommodation together with nursing or personal care;



(c) in Scotland, a person provides advice, guidance or assistance to an adult or support to a carer, in the course of a care service which is registered under section 59 of the Public Services Reform (Scotland) Act 2010 and which consists of the provision of—

(i) personal care in a place where the adult receiving the personal care is living when the personal care is provided, or

(ii) residential accommodation together with nursing or personal care;

(d) in Northern Ireland, a person registered under Part 3 of the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 provides advice, guidance or assistance to an adult or services to a carer, in the course of providing—

(i) personal care in a place where the adult receiving the personal care is living when the personal care is provided, or

(ii) residential accommodation together with nursing or personal care.

In this section “the care or support” means the care and support, support, advice, guidance, assistance or services provided as mentioned above, and “the provider” means the person who provides the care or support.

(2) The provider is to be taken for the purposes of section 6(3)(b) of the Human Rights Act 1998 (acts of public authorities) to be exercising a function of a public nature in providing the care or support, if the requirements of subsection (3) are met.

(3) The requirements are that—

(a) the care or support is arranged by an authority listed in column 1 of



the Table below, or paid for (directly or indirectly, and in whole or in part) by such an authority, and

(b) the authority arranges or pays for the care or support under a provision listed in the corresponding entry in column 2 of the Table.

TABLE

<i>Authority</i>	<i>Provisions imposing duty or conferring power to meet needs</i>
Local authority in England	Sections 2, 18, 19, 20, 38 and 49 of this Act.
Local authority in Wales	Part 4 and section 189 of the Social Services and Well-being (Wales) Act 2014.
Local authority in Scotland	Section 51 of this Act.
Local authority in Scotland	Sections 12, 13A, 13B and 14 of the Social Work (Scotland) Act 1968.
Local authority in Scotland	Section 3 of the Social Care (Self-directed Support) (Scotland) Act 2013.



Health and Social
Care trust

Article 15 of the Health and
Personal Social
Services (Northern Ireland) Order
1972.

Section 52 of this Act.

Authority (within
the meaning of
section 10 of the
Carers and Direct
Payments Act
(Northern Ireland)
2002)

Section 2 of the Carers and Direct
Payments Act
(Northern Ireland) 2002.

(4) In this section—

“local authority in England” means a local authority for the purposes
of this Part;

“local authority in Wales” means a local authority for the purposes of
the Social Services and Well-being (Wales) Act 2014;

“local authority in Scotland” means a council constituted under
section 2 of the Local Government etc. (Scotland) Act 1994;

“nursing care”, for England, Wales and Northern Ireland, has the
same meaning as in the Health and Social Care Act 2008 (Regulated
Activities) Regulations 2010, as amended from time to time;

“personal care”—

(a) for England, Wales and Northern Ireland, has the same
meaning as in the Health and Social Care Act 2008



(Regulated Activities) Regulations 2010, as amended from time to time;

(b) for Scotland, has the same meaning as in Part 5 of the Public Services Reform (Scotland) Act 2010, as amended from time to time.”

Lord Hunt of Kings Heath to move that this House do agree with the Commons in their Amendment 45 and do propose Amendment 45A thereto.

45A*

Line 15, at end insert—

“(1B) Regulations must provide for the circumstances in which information for the promotion of health can be disseminated.”

Clause 124

Page 106, line 37, at end insert—

“(ba) section (*Human Rights Act 1998: provision of regulated care or support etc to be public function*) (Human Rights Act 1998: provision of regulated care or support etc to be public function);”

Background

The Human Rights Act (HRA) applies to all public authorities and to other bodies when they are performing ‘functions of a public nature.’ Under section 6 such bodies are under a duty to act compatibly with the human rights protected by the Act. This ensures that human rights are not limited to litigating in the courts or dispute resolution, but become part and parcel of the development and delivery of public services.

Previously, a loophole had developed in the case law. It meant that care home services provided by private and third sector organisations under a contract to the local authority were not considered to fall within the ‘public functions’ definition in the HRA (the “YL” case). The decision that private and third sector care home providers were not directly bound by the HRA meant that thousands of service users had no direct legal remedy to hold their



providers to account for abuse, neglect and undignified treatment. Even though the public body commissioning services remains bound by the HRA, this is of little practical value to the individual at the receiving end of poor or abusive treatment.

This loophole was closed with cross-party support by s.145 HSCA 2008 .This provides that residential care services that are publically arranged are covered by the HRA.

However, the organisations supporting this amendment to the Care Bill have long been concerned that s. 145 HSCA does not cover all care service users, nor even all residential care service users. Rather, it only protects people placed in residential care under the National Assistance Act 1948. This fails to cover people who have arranged for and/ or pay for their own care or people receiving care in their own home. An additional concern is that the Care Bill is expected to make this provision ineffective by repealing the statutory provisions which define what is ‘publically arranged’.

It is vital to ensure that service providers, people and their families know that the direct obligation to protect an individual’s human rights under s.6 of the HRA, applies to them. Without this clarity, people who suffer indifference or abuse are doubly vulnerable, unsure of whether the law protects them. Equally, service providers, and particularly staff seeking to challenge poor practices, are left unsure of where they stand. Time and again inquiries such as the Equality and Human Rights Commission’s inquiry into home care uncover serious, systemic threats to the basic human rights of those receiving care services.²

We fully accept that bringing all publicly arranged or funded regulated social care services within the scope of s.6 HRA will not alone solve the problems of undignified care and human rights abuses in care settings; improved regulation, additional safeguarding legislation and better training must also play their part too. However the evidence continues to mount that without direct application of the HRA and a proactive approach to the promotion and protection of rights, abuse, neglect and undignified treatment are commonplace occurrences.

Examples of cases that engage in individual’s human rights

The Equality and Human Rights Commission’s inquiry into older people and human rights in home care led to its ‘Close to home’ report, published in November 2011.³ The inquiry

²EHRC (2011) Close to Home: an inquiry into older people and human rights in home

³ Close to Home: An inquiry into older people and human rights in home care, Equality and Human Rights Commission, 2011



found evidence of serious, systematic threats to the human rights of older people using home care services.

Although the inquiry concluded that about half of older people receiving home care were satisfied with the services they received, with evidence of some good practice by local authorities and provider organisations, there was also evidence of serious human rights breaches.

- There were examples of older people receiving inadequate support with food and drink, leading to severe weight loss and dehydration.
- Some care workers had an unfounded belief that health and safety restrictions prevented them from preparing hot meals, leaving clients to heat up their own food in the microwave.
- Although evidence of intentional physical abuse was relatively unusual, several instances were reported.
- Some older people were neglected because care workers had been allocated insufficient time to complete everything in the care plan; it was common for care visits to be scheduled for only 15 minutes.
- Problems also arose when workers under pressure carried out their tasks in a distracted and rushed way, with a greater impact for those with dementia.
- Some older people reported a lack of respect for personal privacy when intimate tasks were carried out, a problem compounded by having a high turnover of care workers carrying out intimate care.
- Some older people had no control over the timing of their visits, with examples of individuals having to stay in bed for long periods of time in soiled incontinence pads.
- In contrast to care packages for younger disabled adults, older people's care rarely includes support for social activities. The inquiry unveiled a pervasive sense of isolation and loneliness among older people, especially those living alone.

The British Institute of Human Rights has learned of the following examples relating to older people in residential care via its training and other capacity-building activities:

- Older people being left in their own waste for hours because staff do not change the sheets;
- Staff advising new recruits not to respond when certain residents call in the middle of the night on the basis that they are 'just looking for attention';
- Neglect of bed-ridden older people leading to pressure sores;
- Continent older people being forced to wear incontinence pads because staff say they do not have time to take them to the toilet;
- Bathing of older people one after another in the same bath water;
- Routine overmedication in order to keep older people docile;



- Chronic understaffing leading, in one home, to a single male carer looking after 30 older women;
- Night staff forcing older people to wake up at 4 a.m. to be cleaned and dressed before the end of the night shift. Residents then had to wait hours before being taken by morning staff to the cafeteria for breakfast;
- A lesbian resident being told she could not place a photograph of her partner on her bedside table because staff claim they are offended;
- An older person being slapped by a staff member after refusing tea;
- An older woman being placed on a commode, fed breakfast and washed by a carer, all at the same time.

The 2007 report of the Joint Committee on Human Rights highlighted⁴ that residents in care homes are amongst those most vulnerable to human rights abuses. Their report highlighted numerous concerns including:

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

⁴ JCHR, "The Human Rights of Older People in Healthcare", Eighteenth Report of Session 2006-07, Volume 1.