

Parliamentary Briefing

Health and Social Care Bill – House of Lords, Committee Briefing

New Clause 207A

Human Rights Act 1998: provision of certain social care to be public function

Lord Darzi of Denham

- (1) A person ("P") who provides accommodation, together with nursing or personal care, in a care home for an individual under arrangements made with P under the relevant statutory provisions is to be taken for the purposes of subsection (3)(b) of section 6 of the Human Rights Act 1998 (c.42) (acts of public authorities) to be exercising a function of a public nature in doing so.
- (2) The "relevant statutory provisions" are—
 - (a) in relation to England and Wales, sections 21(1)(a) and 26 of the National Assistance Act 1948 (c.29),
 - (b) in relation to Scotland, section 12 or 13A of the Social Work (Scotland) Act 1968 (c.49), and
 - (c) in relation to Northern Ireland, Articles 15 and 36 of the Health and Personal Social Services (Northern Ireland) Order 1972 (S.I. 1972/1265 (N.I. 14)).
- (3) In subsection (1) "care home"—
 - (a) in relation to England and Wales, has the same meaning as in the Care Standards Act 2000 (c.14), and
 - (b) in relation to Northern Ireland, means a residential care home as defined by Article 10 of the Health and Personal Social Services (Quality, Improvement and Regulation) (Northern Ireland) Order 2003 (S.I. 2003/431 (N.I. 9)) or a nursing home as defined by Article 11 of that Order.
- (4) In relation to Scotland, the reference in subsection (1) to the provision of accommodation, together with nursing or personal care, in a care home is to be read as a reference to the provision of accommodation, together with nursing, personal care or personal support, as a care home service as defined by section 2(3) of the Regulation of Care (Scotland) Act 2001 (asp 8).
- (5) Subsection (1) does not apply to acts (within the meaning of section 6 of the Human Rights Act 1998 (c.42)) taking place before the coming into force of this section."

Summary response

As the coalition of charities who have had the closest involvement in the question of public function under the Human Rights Act in the field of social care, we are delighted the Government has brought forward an amendment to close the loophole created by the YL case. We are particularly pleased that the Government has recognised the importance of promoting human rights principles throughout social care services using the Act to protect people who are at high risk of human rights abuses. We remain concerned that self-funding residents who arrange their own residential care remain outside the scope of the Human Rights Act and look forward to engaging in further discussions to show why they should benefit from the protection offered by the Human Rights Act.

Who will now receive protection and who is still left out?

At present, everyone who lives in a local authority care home is protected by the Human Rights Act – including those who pay the local authority for the full cost of their care. If the Government's amendment is accepted by the Committee then the following groups of care home residents would be deemed to be within the scope of the Human Rights Act:

People whose care is arranged by a local authority including:

- Everyone who lives in an independent (charitable or private) care home where the local authority pays for all or part of their care;
- People who fund their own care but lack mental capacity so the local authority contracts with the care provider on their behalf;
- People who fund their own care but have made an agreement with the local authority to defer the payments until after their death, on which basis the local authority contracts with the care provider on their behalf.

We seek further assurances from the Government, on the parliamentary record, that the following groups are already covered by the Human Rights Act:

- Care home residents whose care is wholly funded by the NHS under the NHS Continuing Health Care arrangements;
- Care home residents who receive an NHS funded nursing care contribution of £101¹ per week for care provided by a registered nurse;
- People who are self-funding residents, lacking mental capacity living in an institutional setting who are effectively detained by the institution (Bournewood cases).

People who arrange and pay for their own residential care will still be outside the scope of the Human Rights Act.

The Government's amendment does not seek to address the situation of older and disabled people who receive publicly arranged social care in their own homes, instead of in residential care homes. We appreciate that 'domiciliary care' raises a number of complicated issues in terms of the scope of the Human Rights Act and look forward to exploring these further as part of the long-promised consultation about the meaning of 'public authority' under the Human Rights Act.

Residents funded by the NHS

Care home residents whose care is wholly funded by the NHS under the Continuing Care provisions (around 37,000 people) or part funded by the NHS through the nursing care contribution of £101 per week (around 41,000 people) are not covered by the amendment. We understand the Government has received legal advice that these residents are already covered by the Human Rights Act and that no court ruling has affected this status, but we seek reassurance on the record that this is the case.

In a recent letter from Lord Darzi to Andrew Dismore MP, the Chair of the Joint Committee on Human Rights, the Government said:

It remains the Government's view that the provision of publicly-arranged health and social care should generally be considered a function of a public nature, and we will continue to treat those exercising such functions as subject to the Human Rights Act. In particular, as I am aware this has been a matter of some concern, I would emphasise the Government's firm view that independent providers of NHS care under the National Health Service Act 2006 are exercising a function of a public nature.

'Bournewood' cases

We also want reassurance about another group, people without mental capacity living in an institutional setting who are effectively detained by the institution in a manner which may amount to a deprivation of liberty (so-called 'Bournewood' cases). An estimated 50,000 people in residential care, including self-funders, fall within this group. In 2009, the Mental Health Act 2007 will bring in new procedures within the Mental Capacity Act 2005 for these detained cases, introduced to comply with Article 5 of the European Convention on Human

¹ Some people are still receiving £139 per week under transitional provisions

Rights. The procedures recognise that restrictions amounting to deprivation are being placed on someone's liberty by the institution, with the state's authority. We hope that the Government believes this group to be already covered by the scope of the Human Rights Act and seek public assurances that this is the case.

We ask Peers to seek reassurance from the Government, on the parliamentary record, that those receiving NHS continuing care payments, those receiving the NHS funded nursing care contribution and those in situations where institutions are authorised to detain residents are, in the Government's opinion, covered by the Human Rights Act.

Self-funding residents in care homes

There are approximately 420,000 care home residents across the UK. Homes owned by local authorities account for only 37,500 care home places, whereas there are around 373,000 people in the independent (private or charitable) care home sector. Of independent sector residents, around 115,000 are so-called self-funders (27% of all care home residents); that is, they pay their own care home fees and have their own contract with the care home. This group of residents are not within the scope of the Human Rights Act and the Government's amendment does not seek to address this issue.

Anyone with capital over £22,250 will pay for their own residential care. People with capital between £13,500 and £22,250 are expected to make a contribution from capital as well as income. Those with capital less than £13,500 still have to contribute from their income. (Figures represent current rates in England and Northern Ireland; slightly different capital limits apply in Scotland and Wales).

We believe that the distinction made between those who pay for their own care and those funded by local authorities is arbitrary. In future debates on the protection offered care home residents, the vulnerability of self-funders should be raised and the Government's position that self-funders should remain outside the scope of the Human Rights Act should be challenged. Why should someone paying for their own care with the same condition, receiving the same care not receive the same protection as a local authority funded resident, purely because of an arbitrary capital limit?

Why are human rights important in social care settings?

The recent report of the Joint Committee on Human Rights² highlighted that residents in care homes are amongst those most vulnerable to human rights abuses. The report raised numerous concerns including:

- Eviction from care homes and fear of making complaints;
- 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; and
- Bullying, patronising and infantilising attitudes towards older people.

The British Institute of Human Rights (BIHR) knows well from its capacity-building work that older and disabled people receiving social care services in their own homes are also vulnerable to abuse and other forms of ill-treatment.

Those who remain outside the scope of the Human Rights Act have no direct legal remedies under the Act against those providing their care. As a consequence, they are unable to directly challenge these shocking abuses as violations of their human rights. Of equal importance is the fact that these providers are not given any encouragement to develop a culture of respect for the human rights of their vulnerable service users. While this should be a priority for the Care Quality Commission, it is also important for the law to reinforce efforts to promote a human rights culture.

If you would like further information on any aspect of the Human Rights loophole or clarification on this briefing please contact Angela Kitching, Parliamentary Officer, Age Concern England on 020 8765 7299 or Angela.Kitching@ace.org.uk or Kate Jopling, Head of Public Affairs, Help the Aged on 020 7843 9426 or Kate.Jopling@helptheaged.org.uk

² JCHR, "The Human Rights of Older People in Healthcare", Eighteenth Report of Session 2006-07, Volume 1