CARE BILL - Human Rights in Social Care

House of Commons, Report Stage Briefing

Introduction

The Care Bill makes important provisions to improve safeguarding procedures for people receiving social care services. However as the law stands, the fundamental protection and access to individual redress offered by the Human Rights Act is not applied equally in all care settings. The Care Bill does not remedy this anomaly and may make the situation worse. People who use care services should have their human rights protected to the fullest extent and the Care Bill provides an opportunity to ensure this through New Clause 11.

New Clause 11

Please vote to support New Clause 11 to ensure that all publicly funded or arranged care users have the direct protection of the Human Rights Act.

New Clause 11 does not extend the coverage of the Human Rights Act in social care, it simply provides the protection Parliament originally intended, to people receiving publicly arranged or funded social care services. We call on all MPs to support this important new clause in the Bill.

NC11

To move the following Clause:—

‘(1) A person (“P”) who provides regulated social care for an individual under arrangements made with P by a public authority, or paid for by a public authority, is to be taken for the purposes of subsection (3)(b) of section 6 of the Human Rights Act 1998 (acts of public authorities) to be exercising a function of a public nature in doing so.

(2) This section applies to persons providing services regulated by the Care Quality Commission.

(3) In this section “social care” has the same meaning as in the Health and Social Care Act 2008.’.

Human Rights in the Care Bill – progress to date

In the House of Lords an amendment to the Care Bill, Clause 48 *Provision of "care and support services"*, was included in the Bill to clarify that all social care services regulated by the Care Quality Commission have duties under section 6 of the Human Rights Act 1998 (HRA). The clause was inserted into the Bill at Report Stage in the House of Lords following an amendment tabled by Lord Low of Dalston, with cross-party support, that was passed by 247 votes to 218.

In the House of Commons at Committee stage, Clause 48 was removed from the Care Bill. The Government argued that the Human Rights Act was never intended to apply to purely private arrangements and that there was insufficient evidence that application of human rights law would make a difference to care service delivery.

Since Committee stage, the Joint Committee on Human Rights has published its analysis of the Care Bill[1] stating, *"The Bill provides an opportunity to fill the gaps in human rights protection for all those receiving publicly arranged care, including in their own home and in residential care homes under arrangements made other than under the National Assistance Act 1948, and we recommend that the opportunity to legislate to this effect not be missed by Parliament.*"

The JCHR have also proposed an amendment to the Care Bill that differs from former Clause 48 by making it clear that its scope should be confined to regulated care services that are publicly arranged and/or publicly funded. This would not include care services which are privately arranged and paid for. This amendment would clarify that for people receiving publicly funded or arranged care in their own homes, in privately run care homes or through personal budgets, the Human Rights Act would give them protection against the service provider. Adopting this approach would provide much needed clarity to care providers, care users and the courts on Parliament's intentions for coverage of the Human Rights Act. This amendment has been tabled as New Clause 11 for debate at Report Stage of the Bill.

What practical impact does this have for care service users?

The Human Rights Act has enormous potential to improve the lives of those most vulnerable to human rights abuses in social care settings. In social care settings people can face greater risks to their rights to privacy, to family life, to being safe from degrading treatment and sometimes even their right to life. This is backed up by the evidence, such as

[1] JCHR, *11th Report of session – Legislative Scrutiny: Care Bill*, 22nd January 2014.

the landmark report by the Equality and Human Rights Commission, *Close to home*[2], which found serious, systematic threats to the human rights of older people using home care services. These included:

- Examples of older people receiving inadequate support with food and drink, leading to severe weight loss and dehydration.
- 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.
- 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.

As things stand, individuals receiving home care are not considered to fall within the 'public functions' definition in the HRA. Practically, this means that self-funding care home residents and domiciliary care users or their family or carers can complain to the care home or care company depending on the terms of their contract. But in many cases they will not be able to take their complaint any further. Contractual terms and conditions give little protection; residents have no security of tenure and are often afraid to complain due to fear of eviction. Many people in care settings face additional challenges asserting contractual rights particularly if they have dementia or learning disabilities.

It is also important to note that the Care Quality Commission has no power to investigate complaints from individual residents. Self-funders are not able to use statutory local authority or NHS complaints procedures as these routes are only open to people whose care is publicly arranged. The Local Authority Ombudsman now has a role in investigating complaints from self-funders but it remains to be seen how effective this will be as investigations will not be underpinned by a framework of public law or by the concept of maladministration which is central to Ombudsman's investigations of public sector provision.

By clarifying the law to confirm that all providers of publicly arranged or paid-for care are within the scope of the Human Rights Act, service users who experience serious human

[2] Equality and Human Rights Commission, 2011, *Close to Home: An inquiry into older people and human rights in home care*.

rights abuses would have a direct means of legal redress. But as well as supporting cases in the courts, human rights arguments can be used in negotiation and advocacy. For example, the HRA has been successfully invoked when arguing against a local authority's refusal to place a married couple in the same nursing home. The charity involved in the case pointed out that the decision was in breach of the couple's right to respect for private and family life (protected by Article 8 of the Human Rights Act), an argument which the council accepted. The couple were housed together, without the need to go to court.

What is the problem in law?

A loophole has developed in the law. This 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).[3] 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 partly closed with cross-party support by s.145 HSCA 2008 .This provides that residential care services provided or arranged by local authorities are covered by the HRA.

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.[4] Rather, it only protects people placed in residential care under the National Assistance Act 1948 (and similar legislation in Scotland, Wales and Northern Ireland). If it is accepted that primary legislation was needed to clarify that Parliament did intend the HRA to extend to residential care services provided by private and third sector organisations under a contract to the local authority, it is anomalous not to have a clause in the Care Bill to make it absolutely clear that residential care provided under other legislation and domiciliary care are indeed covered by HRA.

The Government's view as stated in a note submitted to the Joint Committee on the Draft Care and Support Bill, is that *'all providers of publicly arranged care and support, including private and voluntary sector providers should consider themselves to be bound by the duty*

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

[4] S. 145 HSCA does not cover residential care provided by private or third sector providers under s. 117 of the Mental Health Act 1983, NHS Continuing Healthcare and under s. 4A and s.4B Mental Capacity Act 2005

imposed by section 6 of the Human Rights Act 1998: not to act in a way which is incompatible with a Convention right.' [5]

The Joint Committee acknowledges that this is the Government's position but concludes that '*as a result of the decision in the YL case, statutory provision is required to ensure this.'* [6] A number of eminent lawyers who spoke in the debate at Report Stage in the House of Lords agreed with this assessment. Lord Hope, the recently retired Deputy President of the Supreme Court, said that:

'Comments of the kind that were made, that people should consider themselves bound by a convention right, however well intentioned, do not have the force of law. They could not be relied upon, for example, in a court to guide a judge about the meaning of Section 6(3)(b) in the particular context. Therefore, they leave the law in a state of uncertainty because they do not have the force of law, and they have no relevance to a decision that the court would have to take.'[7]

Shouldn't the Care Quality Commission sort this out?

Some argue that further legislation is not necessary to protect people's human rights, suggesting instead that regulation can be used to focus on any specific issues. It is true that the CQC is under a duty to promote and protect the human rights of those using care services when it performs its functions. The CQC's functions include inspecting all care homes and registered home care providers.[8] However the argument that this provides all care users with sufficient human rights protection rings hollow. For those at the sharp end of indifference and abuse, it is essential that both the provider and the regulator have clear legal duties to protect human rights. Without this, individuals have little prospect of direct legal remedies, which are key for victims of abuse. Clear legal duties also drive broader cultural change within services to respect and safeguard the human rights of all service users.

Conclusion

We fully accept that bringing more 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.

[5] Note for the Joint Committee on the Human Rights Act, 21 February 2013.
[6] Joint Committee on the Draft Care and Support Bill (March 2013) Report on Draft Care and Support Bill
[7] Official Report, Lords, 16 October 13: Column 549
[8] Section 4(1)(d) of the Health and Social Care Act 2008

New Clause 11 does not extend the coverage of the Human Rights Act in social care, it provides protection, as Parliament originally intended, to people receiving publicly arranged or funded social care services. We call on all MPs to support this important new clause in the Bill.

As Lord Hope notes, the status quo is no longer acceptable and inaction could even result in a regression in human rights protection:

'A failure by Parliament to grasp this opportunity now and to make it clear will be noticed. There is a risk that, if that opportunity is not taken by Parliament now, courts may take this as a sign that Parliament is content with the law as it stands and may be understood to be on the basis of YL.' [9]

MPs should vote for New Clause 11 to use the Care Bill to make Parliament's view clear and offer more consistent protection and redress under the Human Rights Act to people receiving services.

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[9] Official Report, Lords, 16 October 13: Column 550