CARE BILL 2013 – Lords Committee Stage

AMENDMENT

#TBC

LORD LOW OF DALSTON

After Clause 46 insert the following new clause—

“Human Rights Act 1998: provision of “care and support services” to be public function.

(1) A person (“P”) who provides regulated ‘social care’ 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) 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.”

PURPOSE

This amendment would make all providers of social care services regulated by the Care Quality Commission subject to section 6 of the Human Rights Act 1998.

BRIEFING

Introduction

The Human Rights Act 1998 (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 courts which 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).¹

¹ YL v Birmingham City Council [2007] UKHL 27.
This 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. Whilst the public body commissioning services is always bound by the HRA, this remedy is of little practical value to the individual at the end of poor or abusive treatment.

Following a sustained campaign, the then Labour Government, with cross-party support, accepted that the loophole created by YL needed to be closed and section 145 was included in the Health and Social Care Act 2008 (HSCA) to clarify that residential care services provided or arranged by local authorities are covered by the HRA. In that debate the now Minister, Earl Howe, gave his backing to the amendment:

“Earl Howe: Perhaps I may briefly add my own welcome to these amendments. The points I intended to raise have already been raised, so I will not repeat them. However, I took particular note of a point made by the alliance of Scope, RNID, RNIB and RADAR when they said that these amendments will certainly provide encouragement or, indeed, formal duties on the part of care homes to develop a culture of respect for the human rights of their residents. I think that that is most important.”

We are very concerned that the Care Bill as it stands risks returning the situation in England and Wales to that at the time of the YL judgement. S.145 HSCA refers specifically to those placed in residential care under s. 21(a) and 26 of the National Assistance Act 1948 and it is expected that these sections will now be repealed under clause 107 of this Bill, negating its effect. We seek clarification from the Government as to how they intend to address this and an assurance there will be no regression in human rights protection.

Extending HRA protection to all providers of publicly arranged care and support

The organisations supporting this amendment have long been concerned that s. 145 HSCA does not cover all care service users, nor even all residential care service users. Rather, as noted above, it only protects people placed in residential care under the National Assistance Act 1948. Having accepted the argument that primary legislation was required 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 treat residential care provided under other legislation and domiciliary care in the same way.

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

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2 House of Lords, Hansard, 22 May 2008: Col GC635
http://www.publications.parliament.uk/pa/ld200708/ldhansrd/text/80522-2306.htm
3 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
to be bound by the duty imposed by section 6 of the Human Rights Act 1998: not to act in a way which is incompatible with a Convention right.  

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. 

The Government considers that there are dangers in such a provision as it is felt that it would risk casting doubt about the interpretation of the HRA in other sectors. It stated in its note to the Joint Committee; ‘Each time specific provision is made with respect to a particular type of body; we weaken the applicability of the existing provision and raise doubt about all those bodies that have not been specified explicitly in the legislation.’ In response we contend that the legal situation following YL is already one of significant legal ambiguity, which is unsatisfactory for both service providers and the users of public services. This forces service users to litigate on a case by case basis to seek clarification. The proposed amendment would bring the necessary legal clarity as it deems that all those providing social care services regulated by the Care Quality Commission (CQC) are exercising a public function for the purposes of s. 6 HRA.

Without the direct positive obligation to protect an individual’s human rights, conferred by s.6 of the HRA, human rights abuses of care service users are a frequent occurrence as has been highlighted by a long succession of inquiries and reports, such as the Equality and Human Rights Commission inquiry into home care which uncovered serious, systemic threats to the basic human rights of those receiving care services.

Extending HRA coverage to all regulated care providers

This amendment also seeks to include those who are eligible for care but who, due to means testing, have to arrange and/or pay for their own care (so-called self-funders) and therefore currently lack the full protection of the HRA.

To date it has been the case, at least for those who were found to be eligible for care in their own home, that the obligation for the local authority to arrange care regardless of the person’s resources provided them with a degree of protection under the HRA. The local authority’s duties to arrange care are subject to the HRA even though the provider might not be.

The changes to the system for arranging care to be introduced by the Care Bill weaken this argument. The Bill introduces a single system for arranging care,

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4 Note for the Joint Committee on the Human Rights Act, 21 February 2013.
5 Joint Committee on the Draft Care and Support Bill (March 2013) Report on Draft Care and Support Bill
6 Note for the Joint Committee on the Human Rights Act, 21 February 2013.
7 The proposed amendment would address the human rights protection gaps for care recipients in England only, reflecting the fact that this Bill is primarily concerned with the social care system in England. This would create an anomaly in the devolved nations that would need to be addressed in subsequent legislation (the opportunity to do this in Wales already exists in the Care Bill currently before the assembly).
whether that takes place in a residential setting or the recipient’s own home. Under these proposals where people are deemed eligible for care, but after means testing are found to be responsible for paying part or all of the cost of that care, they will be able to request that the local authority arranges their care, but they may have to pay them to do this. We believe that this new system is likely to reduce the coverage of the HRA because people who are entitled to local authority care in their own home, but have to pay for it, will no longer be automatically protected by the Act unless they request that the local authority arranges their care. We fear many will not make a request as they will not be able to afford to pay for the cost of having the local authority arrange their care, on top of the cost of the care itself.

The Joint Committee on the Draft Care and Support Bill recommended that ‘[t]he draft Bill should be amended to ensure that all private and third sector providers of care services regulated by public authorities are deemed to be performing public functions within the meaning of section 6(3)(b) of the Human Rights Act 1998.’ The proposed amendment follows this approach and if accepted would provide equal protection to all users of regulated social regardless of where that care is provided and who pays for it.

There are those who argue, as their Lordships did in YL, that the right approach for protecting human rights is not an extension of the HRA. An alternative often suggested is that regulation can be better used to target specific issues. The CQC is under a duty to have due regard to the need to protect the human rights of those using care services in performing its functions, which include inspecting all care homes and registered home care providers. It is argued that this gives self-funders human rights protection; but without a credible prospect of litigation against the care provider themselves, there is reduced pressure on them to respect and safeguard the human rights of service users.

Conclusion

We fully accept that bringing all 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 parts too. However the evidence continues to mount that without direct application of the HRA and the proactive approach to promoting and protecting rights that it demands, abuse, neglect and undignified treatment are commonplace occurrences. The status quo is not acceptable. The proposed amendment offers a simple, effective and lasting solution to this long-standing problem. The HRA can provide an essential safety net for social care recipients who find themselves in highly vulnerable situations; the Government must not deny them this protection.

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9 Note for the Joint Committee on the Human Rights Act, 21 February 2013.
10 Section 4(1)(d) of the Health and Social Care Act 2008