

# Joint Committee on Human Rights: Business and Human Rights inquiry

Ref: 3416

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## About this call for evidence

The Joint Committee on Human Rights, chaired by Rt Hon Harriet Harman MP, announced an inquiry into human rights and business on 16<sup>th</sup> June 2016.

The inquiry's terms of reference set out that the inquiry will look in particular at the following issues:

- What steps the Government takes to monitor compliance with the UN Guiding Principles
- How far the Government is able to enforce the UN Guiding Principles
- Whether, and if so what, progress British business has made in carrying out its responsibility to respect human rights
- Whether victims of human rights abuse involving business enterprises within UK jurisdiction have access to effective remedy

Age UK is pleased to have the opportunity to make a submission in response to the call for evidence and will **focus on the last of these bullet points, with particular reference to the situation of older people receiving regulated social care services from private and third sector providers.**

## About Age UK

Age UK is the country's largest charity dedicated to helping everyone make the most of later life. We believe in a world where everyone can love later life and we work every day to achieve this. We help more than 5 million people every year, providing support, companionship and advice for older people who need it most. The Age UK network includes Age UK, Age Cymru, Age NI and Age Scotland and around 165 local Age UK partners in England.

Please note this submission relates to our experience in England only.

## 1. Introduction and background

1.1 It continues to be a matter of serious concern to Age UK that not all older people receiving care services regulated by the Care Quality Commission (CQC) are accorded the protections of the Human Rights Act 1998 (HRA).

1.2 As the joint committee is well aware, in 2008 the "YL" case found that private and third sector care home providers were considered not to be directly bound by the HRA, with the result that hundreds of thousands of service users had no direct legal remedy to hold their providers to account for abuse, neglect and undignified care. This was partially addressed with cross-party support by s.145 HSCA 2008 which clarified that residential care services provided under the National Assistance Act 1948 were bound by the HRA. Subsequently under s.73 Care Act 2014, the scope of the HRA was extended further to

explicitly cover all those receiving LA funded or arranged care in both residential and domiciliary care settings.

- 1.3 While welcome, these provisions continue to leave those whose care is funded by another public body such as the NHS or who are paying and arranging for their own care (so called self-funders) apparently outside the scope of the HRA.
- 1.4 It should also be noted that implementation of provisions in the Care Act 2014 which give self-funders a right to ask the local authority to arrange their care has been delayed until 2020. This means that the human rights protection offered by s.73 to this group is also delayed until this date.

## 2 Care services funded by other public bodies

- 2.1 NHS continuing healthcare (CHC), which is a package of long-term care funded by the NHS to meet someone's medical needs, is often provided by a private care home. The legal authority for this arrangement is found in NHS Directions, which are binding instructions issued by the Secretary of State using powers under primary legislation. Following YL it is not clear that care service users whose care is funded in this way are covered by the HRA.
- 2.2 Far from being a legal technicality this lack of guaranteed human rights protection can have a very real detrimental impact on those receiving this type of care. A number of cases have come to our attention recently of older people in receipt of CHC funding facing apparently unfair eviction from their care homes in possible breach of their rights to private and family life who have been advised that have no means to directly challenge those decisions under the HRA.
- 2.3 Additionally those receiving residential care services under section 117 of the Mental Health Act 1983 are not covered. S. 117 places a duty on health and social services to provide aftercare services to certain patients who have been detained under the Act. Aftercare services must be provided free of charge and can include residential accommodation as part of the package, these may sometimes be provided by the private sector.
- 2.4 **That the level of human rights protection someone in receipt of care services has should be dependent on which branch of the state is funding their care is clearly inequitable and potentially discriminatory. We recommend that the Government look urgently at clarifying the law in this area.**

## 3 Self-funders

- 3.1 Since the HRA came into force in 2000 the provision of social care has changed significantly with far higher numbers of people receiving care provided by private and third sector providers. Data in this area is limited but academics have estimated that around 170,000 (45 %) of the registered care home places in England are occupied by

self-funders and 170,000 older people pay for care in their own home. It has been suggested that this figure increases to 270,000 if it is widened to include help with activities such as housework and shopping and could increase to 400,000 by 2030.<sup>1</sup>

3.2 A category of self-funders who are particularly vulnerable to breaches of their human rights are those who are lacking mental capacity and are deprived of their liberty without their consent. Sections 4A and 4B Mental Capacity Act 2005 establish some human rights safeguards for this group and require that deprivation of liberty must be formally authorised. However as a number of legal cases (for example *AJ v a Local Authority* or *Essex County Council and RF & Others*) have shown where this process is not followed or fails, the HRA is essential to gain redress for breaches of their rights. It is deeply inequitable that self-funders who have capacity and who may also face human rights breaches in care settings do not currently have access to similar levels of protection.

3.3 It has been argued that contractual terms can act as a sufficient mechanism for protecting the rights of care home residents. However unpublished case study analysis by Age UK has found that care home contracts are often characterised by unfair terms and conditions as a result of the large power imbalance involved. For example we have found examples of requests made by care homes for third party top ups, unreasonably large initial payments demanded from people entering care homes, and contractual requirements on residents not to seek local authority funding. In light of these findings the argument that contracts can protect human rights ring hollow. For those at the sharp end of indifference and abuse, what matters is that care providers have clear legal duties to protect human rights. Without this individuals have little prospect of direct legal remedies, which are important for victims of abuse, and to drive broader cultural change within services to respect and safeguard the human rights of all service users.

**3.4 The Government must urgently extend HRA protections to all older people by ensuring that all providers of regulated care services are regarded as public authorities for the purposes of the Act, regardless of who is funding the service provided.**

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<sup>1</sup> IPC (2011) People who pay for care: quantitative and qualitative analysis of self-funders in the social care market.