House of Lords
House of Commons
Joint Committee on Human Rights

Legislative Scrutiny:
Care Bill

Eleventh Report of Session 2013–14

Report, together with formal minutes

Ordered by the House of Lords
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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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The current staff of the Committee is: Mike Hennessy (Commons Clerk), Megan Conway (Lords Clerk), Murray Hunt (Legal Adviser), Natalie Wease (Assistant Legal Adviser), Lisa Wrobel (Senior Committee Assistant), Michelle Owens (Committee Assistant), Holly Knowles (Committee Support Assistant), and Keith Pryke (Office Support Assistant).

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Summary

The Care Bill was introduced into the House of Lords on 9 May 2013, received its Third Reading on 29 October 2013 and then proceeded to the House of Commons where it received its Second Reading on 16 December 2013. Commons’ Committee stage began on 9 January 2014 and is due to end on 4 February. This Report examines the most significant human rights issues in the Bill.

We are grateful to the Department for providing a detailed human rights memorandum which sets out why the Government is satisfied about the compatibility of the Bill with other relevant international human rights obligations, not just the ECHR. This has been of great assistance to our human rights scrutiny of the Bill. We also commend the Department for providing considerable information about the Bill’s potential impacts on groups of people with protected characteristics.

The right to independent living is enshrined in Article 19 of the UN Convention on the Rights of Persons with Disabilities. Despite the UK having ratified the Disabilities Convention, independent living does not currently exist as a freestanding, justiciable right in UK law. We welcome the provisions in the Bill that make arrangements for continuity of care, and the Bill’s creation of a general duty on local authorities to promote the well-being of an individual in the adult social care system, as these are both positive steps towards promoting and protecting independent living as a right.

However, we are disappointed that the Government did not take the opportunity in this Bill to specifically provide for a free-standing right to independent living that could be directly enforceable by individuals in domestic law as we recommended in our Independent Living Report. We call on the Government to bring forward an amendment at Commons’ Report Stage to amend the Bill to include a free-standing provision to give concrete effect in UK law to the right to independent living.

Clauses 42 to 47 in Part 1 of the Bill place a duty on local authorities to make enquiries where they reasonably suspect that an adult is at risk of neglect or abuse, and under which each local authority is obliged to create a Safeguarding Adult Board. We note that the creation of the new adult safeguarding duty promotes the Government’s positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction and to protect vulnerable individuals from ill-treatment. We welcome these provisions as human rights enhancing measures. We also welcome, as human rights enhancing measures, the provisions contained in Part 2 of the Care Bill that are designed to implement the recommendations made by the Francis Report to safeguard adults at risk of abuse or neglect.

We welcome, in principle, the proposal to establish a set of fundamental standards aimed at preventing ill-treatment of patients that will create legal requirements applicable to all providers of health and adult social care in England registered with the Care Quality Commission. However, we regret that the Government has not taken the opportunity in this Bill to set out the standards in primary legislation in order to allow Parliament an opportunity to scrutinise fully the provisions and determine whether they are sufficient to meet the Government’s positive obligations to protect vulnerable individuals from harm.
Clause 48 of the Bill makes provision about the scope of the Human Rights Act 1998 by extending what counts as a “public function” for the purposes of s. 6(3)(b) of that Act. It provides that providers of care and support (social care) regulated by the Care Quality Commission are exercising a “public function” for the purposes of the Human Rights Act. The clause was inserted by a non-Government amendment in the House of Lords and the Government now seeks to remove the clause in the House of Commons. We agree with the Joint Committee on the draft Care and Support Bill that express statutory provision is necessary in order to ensure that all providers of publicly arranged social care services are bound by the Human Rights Act. 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.

However, we do not consider that the European Convention on Human Rights requires the Human Rights Act to provide a direct legal remedy for those who pay for and arrange their own care and support from private providers, as recommended by the Joint Committee on the draft Bill. Nevertheless, we acknowledge the arguments in favour of ensuring equal legal protection for all those receiving care, however it is arranged or paid for. We recommend an alternative, more limited amendment to clause 48, which in our view would still achieve most of the principal rationales behind the original amendment, at the same time as serving the Government’s objective of not extending the Human Rights Act to cover entirely private contractual arrangements, where there is no state involvement. We also recommend that the Government make available to Parliament its assessment of the extent to which the stronger regulatory powers available to the CQC since 2008 have led to the provision of more human rights compatible care to all service-users, including the evidence on which that assessment is based; and that the CQC consider requiring that private care contracts include terms requiring providers to comply with the Human Rights Act.

The Bill as introduced enshrined the right of adults caring for other adults in England to receive support from their local council and imposed a duty on local authorities to meet carers’ eligible needs for support. We welcome the provisions in the Bill that consolidate and simplify the legislation relating to carers’ rights of assessment and support and note, in particular, the potentially positive implications for women in this regard.

We welcome the amendment introduced by the Government at Lords’ Committee stage of the Children and Families Bill, which provides for young carers to receive the same consideration and protection in relation to their needs as the provisions outlined above relating to adult carers in the Care Bill. We are however not satisfied with the Government’s explanation for why it has not taken this opportunity to make equivalent provision in the Bill to consolidate and update the existing legislation in relation to parent carers of disabled children. We recommend that the Government bring forward amendments to either the Care Bill or the Children and Families Bill to give parent carers of disabled children equivalent rights to a needs assessment for support.
1 Introduction

Background

Pre-legislative scrutiny

1. In July 2012, the Government published a White Paper, *Caring for our Future: Reforming Care and Support*, together with a draft Care and Support Bill, and a paper on funding of care and support, *Caring for our Future: Progress Report on Funding Reform*. Significantly, the White Paper outlined that “the focus of care and support will be transformed to promote people’s wellbeing and independence.” The draft Bill addressed many of the recommendations of the Law Commission review into adult social care law, which recommended a “consolidation and simplification” of the “complex and confusing patchwork of legislation”.

2. In November 2012, a Joint Committee was appointed to examine the draft Bill. The Committee was chaired by the Rt Hon Paul Burstow MP. The Committee published its Report on 19 March 2013. In its Report, the Committee described the draft Bill’s proposals as “a major reform of the legal framework governing the provision of adult care and support in England”. It noted that the Bill went “further than just a consolidation by establishing in law, for the first time, that well-being is the guiding principle of decision-making in care and support”. Additionally the Bill “significantly extends the rights of adult carers”.

3. The Government published its response to the Joint Committee’s pre-legislative scrutiny Report and the responses to the public consultation on the draft Care and Support Bill on introduction of the Care Bill on 9 May 2013. The Government made two key additions to the Bill since it was published in draft. Firstly, it introduced a cap on the costs that people will have to pay for care in their lifetime. Secondly, the Government included its legislative response to the Francis Inquiry relating to care standards in Part Two of the Bill. The Government explained that this “delivers a number of elements in the Government’s response to the findings of the Francis Inquiry, which identified failures across the health and care system that must never happen again”.

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1 For further detail, see House of Commons Library Research Paper 13/71, 11 December 2013
2 Cm 8378
3 Cm 8386
4 Cm 8381
5 HM Government, *Caring for our Future: Reforming Care and Support*, July 2012, p 8
7 Joint Committee on the Draft Care and Support Bill, *Draft Care and Support Bill*, HL 143/ HC 822, Session 2012–13, 19 March 2013
8 Ibid., p 3
9 Ibid., p.
10 Department of Health, *The Care Bill Explained: Including a response to consultation and pre-legislative scrutiny on the Draft Care and Support Bill*, Cm 8627, 10 May 2013
11 Ibid., p. 8
4. The Care Bill was introduced in the House of Lords on 9 May 2013. It received its Second Reading on 21 May 2013, and had eight Committee sittings and four Report days. Third Reading was on 29 October 2013. It received its First Reading in the House of Commons on 30 October and Second Reading on 16 December 2013. Commons Committee stage began on 9 January 2014 and is due to end on 4 February. The Rt. Hon Jeremy Hunt MP, Secretary of State for Health, has confirmed that, in his view, the provisions of the Bill are compatible with Convention rights.

5. We wrote to the Minister of State for Care and Support, Norman Lamb MP, on 17 July 2013 about the human rights implications of specific aspects of the Bill. The Government responded on 10 September.

6. We received written evidence and representations about the Bill from Age UK, the British Psychological Society and National AIDS Trust. These representations mainly concern Part 1 of the Bill with regard to local authority care and support. We also received written evidence from Carers UK calling for parent carers of disabled children to be given the same rights as adults caring for other adults and young carers. All correspondence about the Bill and written evidence we have received are available on our website.

7. The Equality and Human Rights Commission has published a number of parliamentary briefings on the Bill, most notably to support the non-Government amendment tabled by Lord Low of Dalston in relation to the scope of the Human Rights Act, which we consider in chapter 4 below.

Information provided by the Government

Human rights memoranda

8. The Explanatory Notes to the Bill as introduced set out a brief summary of the Government’s analysis of the Bill’s compatibility with the European Convention on Human Rights (the “ECHR”). On 27 June 2013, the Department provided a separate human rights memorandum to accompany the Bill. The Memorandum provides detailed information about the Government’s analysis of the compatibility of the Bill with the ECHR and the UN Convention on the Rights of Persons with Disabilities (the “Disabilities Convention”). We are grateful to the Department for providing a detailed human rights
memorandum, and in particular for providing information explaining why the Government is satisfied about the compatibility of the Bill with other relevant international human rights obligations, not just the ECHR. This has been of great assistance to our human rights scrutiny of the Bill. However, the memorandum was received midway through Lords’ Committee stage. We repeat our general recommendation to Departments that they publish a detailed human rights memorandum on introduction of a Bill—and certainly before Second Reading—in order to ensure effective human rights scrutiny in Parliament and beyond.18

Equality information

9. Public bodies must have due regard to the need to avoid discrimination and promote equality of opportunity for all protected groups when making policy decisions.19 This is known as the Public Sector Equality Duty (the “PSED”).20 An Equality Impact Assessment (an “EIA”) is an analysis of a proposed policy, or a change to an existing one, which assesses whether the policy has a disparate impact on persons with protected characteristics.21

10. The case of R (Brown) v Secretary of State for Work and Pensions determined that a public authority has to be able to demonstrate that it had paid ‘due regard’ to its equality obligations. While there is no legal requirement to carry out specific equality impact assessments, documentary evidence of compliance with the PSED is important.22 The Court stated that it is good practice for those exercising public functions in public authorities to keep an adequate record showing that they had actually considered their equality duties, stating that proper record-keeping encourages transparency and will discipline those carrying out the relevant function to undertake their equality duties conscientiously.23 The Court emphasised that the duty must be exercised in substance, with rigour and with an open mind. It is not a question of "ticking boxes".24 Also, the Court advised that the duty to consider the impact of a policy on people with protected characteristics is a continuing one.25 The Equality and Human Rights Commission has

19 The protected grounds covered by the equality duty are: age, disability, sex, gender reassignment, pregnancy and maternity, race, religion or belief, sexual orientation, marriage and civil partnership
20 Section 149 of the Equality Act 2010. In May 2012, the Government announced a review of the PSED. The Review of the Public Sector Equality Duty: Report of the Independent Steering Group was published on 6 September 2013, along with the Government’s response. The review identified a number of issues associated with the implementation of the PSED and makes recommendations for the Equality and Human Rights Commission, for public bodies and for Government. As part of the Government’s reform of judicial review, it is considering the possibility of limiting the availability of judicial review in relation to the PSED disputes, and introducing an alternative, non-judicial mechanism instead. See: GEO, Review of the Public Sector Equality Duty: Report of the Independent Steering Group, 6 September 2013; HC Deb 6 September 2013 cc33–34; EHRC, Commission responds to Public Sector Equality Duty Review report, 17 October 2013
21 For further information on EIAs see: House of Common Library Standard Note, The Public Sector Equality Duty and Equality Impact Assessments, 18 October 2013, SN/BT/6591
22 R (Brown) v Secretary of State for Work and Pensions and another, [2008] EWHC 3158 (Admin), para 96; R (D) v Worcestershire County Council [2013] EWHC 2490 (Admin)
23 R (Brown) v Secretary of State for Work and Pensions and another, [2008] EWHC 3158 (Admin), para 96
24 Ibid, para. 93
25 Ibid, para 96
published various guidance documents for public authorities on how to assess and document compliance with the equality duty.²⁶

11. There are ten separate impact assessments covering specific aspects of the Care Bill, which each incorporate an equality impact assessment. These documents were published prior to the Bill’s introduction.²⁷ There is detailed equality analysis, which considers the impacts on equalities and groups of people with protected characteristics arising from the various reforms proposed by the Bill. In particular, the assessment identifies women, disabled and older people as the groups that are most likely to be affected by the changes.²⁸ The assessments also set out details of the Department’s engagement with stakeholders on the equality impacts of the reforms, and details of the evidence that the Department has relied on when formulating its policy. The Department of Health also published a separate equality analysis to accompany the Caring for our future White Paper and the draft Care and Support Bill.²⁹ The Department has stated that it will continue to review and update its equality analysis in order to “identify and mitigate any adverse impacts in relation to the implementation of the new legal framework”.³⁰

12. In our view, the extent of the information provided by the Government demonstrates a thorough consideration of the potential impacts of the Care Bill on groups of people with protected characteristics, and shows that the Department has paid due regard to its equality obligations. We wish to commend the Department of Health’s approach as an example of good practice in this regard.

**Purposes of the Bill**

13. The Bill is divided into four parts. The first part reforms the adult social care system. It consolidates care and support law into “a single, clear statute, which is built around the person not the service”.³¹ The Bill enshrines the right of carers in England to receive support from their local council and introduces a duty to meet carers’ eligible needs for support. The Bill also proposes a cap on care costs and provides a new legal entitlement to a personal care budget for eligible individuals. Additionally, it sets out measures to ensure those in need of care are able to move between local authorities without interruption to their care and clarifies how, were a care provider to go out of business, individuals would be protected.

14. The second part of the Bill relates to care standards and addresses specific recommendations from the Francis Inquiry into the failings at Mid-Staffordshire hospital.

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²⁷ http://services.parliament.uk/bills/2013-14/care/documents.html

²⁸ Department of Health, Impact Assessment, Care and Support Legal Reform (Part 1 of the Care Bill) IA No 6107, 8 May 2013, Annex A, pp 61 & 62


³⁰ Department of Health, Impact Assessment, Care and Support Legal Reform (Part 1 of the Care Bill) IA No 6107, 8 May 2013, para 1.88

³¹ Cabinet Office, *Queen’s Speech 2013 Briefing*, 8 May 2013, p 55
15. The third part of the Bill establishes Health Education England and Health Research Authority as statutory non-departmental bodies. These would “strengthen education and training for health care professionals” and “protect and promote the interests of people in health and social care research”.32 The final part of the Bill contains technical matters including consequential amendments and territorial extent.
2 The right to independent living

16. The right to independent living is enshrined in Article 19 of the Disabilities Convention. It states:

**Article 19—Living independently and being included in the community**

States Parties to the present Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;

b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;

c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

17. Part 1 of the Bill reforms adult social care. Clause 1 of the Bill establishes the overarching principle that a local authority must promote the well-being of the adult when carrying out its care and support functions for adults and carers under the Bill. The Explanatory Notes to the Bill state that the “well-being principle is not directly enforceable as an individual right”, but that it carries “indirect legal weight, where a local authority’s failure to follow the principle may be challenged by judicial review”.

18. “Well-being” is not defined precisely. However, subsection (2) provides guidance on its interpretation, which includes:

- personal dignity;
- physical and mental health, and emotional well-being;
- protection from abuse and neglect;
- control by the individual over day-to-day life (including over care and support provided to the individual and the way that it is provided);
- participation in work, education training or recreation;
- social and economic well-being;
- domestic, family and personal relationships;
• suitability of living accommodation; and the
• individuals’ contribution to society.

19. The well-being principle embodies the fundamental human rights principles of respect for dignity, non-discrimination and individual autonomy. The Government, in its human rights memorandum, states that the duty to promote well-being is consistent with Article 3 of the Disabilities Convention, which reflects these fundamental principles. However, the Law Society, in its Briefing on the Bill, suggests that the failure to refer explicitly to the right to independent living as central to the well-being principle inhibits the necessary approach to the individual and their specific needs.

20. In our Independent Living Report, we concluded that adult social care is a particularly important policy area in terms of independent living as adult social care policy is a key delivery mechanism for the support that many disabled people need to go about their daily lives. Despite the UK having ratified the Disabilities Convention, independent living does not currently exist as a freestanding, justiciable right in UK law. Our inquiry into independent living made a series of recommendations in relation to adult social care, and we concluded that such a freestanding right to independent living should be expressly included in any forthcoming legislation on adult social care. We concluded that:

“[…] merely filling in the gaps in the current legislative framework will still not accord the right to independent living the legal status that its fundamental importance deserves”.

21. The Government’s human rights memorandum did not provide an analysis of the measures in the Bill that promote the right to independent living. However, while not referring to the right to independent living directly, the Government’s Impact Assessment states:

“The Bill is designed to help overturn traditional approaches to disability, and implement a social model approach. This is underpinned by approaches which seek to place greater power in the hands of all service users, including disabled people. This is exemplified in setting out rights for everyone to have a personal budget, as well as consolidating the law around disabled people being able to access direct payments. This will give people greater control over the services they use. In addition, the Bill places a duty on local authorities to ensure that in the future adults who use social care services (including disabled people) will have control over their day to day life.”

34 Department of Health Human Rights Memorandum to the JCHR, para 3. Article 3(a) of the Disabilities Convention provides for respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons.

35 Law Society, Second Reading Briefing, para 1

36 Joint Committee on Human Rights, Twenty-third Report of Session 2010–12, para 163

37 Joint Committee on Human Rights, Twenty-third Report of Session 2010–12, para 65

38 Joint Committee on Human Rights, Twenty-third Report of Session 2010–12, para 67

39 Department of Health, Impact Assessment, Care and Support Legal Reform (Part 1 of the Care Bill) IA No 6107, 8 May 2013, Annex A, p 63
22. Whilst some of the measures contained in the Bill go some way to promote the right to independent living, there is no specific free-standing provision to protect and promote the right to independent living. We therefore wrote to the Government to request a fuller analysis as to which provisions of the Bill promote the right to independent living. We also asked the Government to explain why it decided not to give the right to independent living a free-standing statutory basis in the Bill, suggesting that the well-being principle, established under Clause 1, could include a reference to the right to independent living.\(^{40}\)

23. The Government’s response to us explained its view that the well-being principle is sufficient to give effect to the right to independent living under Article 19 of the Disabilities Convention. The Government highlighted that “the well-being principle relates to outcomes and areas of an individual’s life such as: control by an individual over their day to day life; participation in work, education or training; and the individual’s contribution to society.”\(^{41}\)

24. The Government further explained that Clause 1 “requires local authorities to have regard to certain matters including: the importance of beginning with the assumption that an individual who receives care and support services is best-placed to judge their own well-being; the individual’s views, wishes and feelings; and the importance of the individuals participating as fully as possible in any decisions made about them that relate to any care and support they might receive.”\(^{42}\)

25. In relation to Clause 1 of the Bill, the Government concluded that:

“The principles and ideas which are central to the right to independent living as articulated in Article 19 are expressed in Clause 1 and consequently underpin Part 1 of this Bill”\(^{43}\)

26. In addition to Clause 1 of the Bill, the Government set out the following provisions and explanations, which it believes promote independent living, autonomy and choice:

“Clause 9(4)(b) Needs Assessments. A needs assessment must include an assessment of the outcomes that the adult wishes to achieve in day-to-day life.

Clause 24(1)(c) Steps for local authority to take. The local authority must help the adult to decide how to have their needs met.

Clause 25(3)(a) and (5) Care and Support plans. In preparing a care and support plan, the local authority must involve those adults receiving services; and in doing so, it must take all reasonable steps to reach agreement with the adult about how their needs should be met.

Clause 30(1) Choice of Accommodation. Regulations may require a local authority to meet an individual’s preference for specific accommodation. Conditions may be imposed in the regulations, for example, that the local authority is satisfied that the

\(^{40}\) Letter from the Chair to the Minister of State for Care and Support, Norman Lamb MP, 17 July 2013, Qs.3 & 4

\(^{41}\) Letter from the Minister of State for Care and Support, Norman Lamb MP, to the Chair, 10 Sep 2013, Q. 3

\(^{42}\) Ibid.

\(^{43}\) Ibid.
preferred care home is able to provide appropriate care and support to meet the person’s needs.

Clauses 31 and 32 Direct Payments. These are for both adults with and without capacity and enable people to take greater control of the care packages they receive.

Clauses 37 and 38 Continuity of Care. These provisions will allow people greater freedom and choice about which area they want to live in.”

27. The provisions of the Bill in relation to continuity of care are a vital component of the right to independent living. In our Independent Living Report, we urged the Government to guarantee the enjoyment of rights under Article 19 in relation to continuity of care arrangements, in particular in relation to the right to choose one’s place of residence on an equal basis with others.

28. The provisions, as amended during Lords’ Report stage, ensure that people who move from one local authority to another do so with no interruption in their care. Clause 37 provides a framework intended to achieve this, and sets out responsibilities on the relevant local authorities. Baroness Campbell of Surbiton said:

“It is a basic human right to move freely within one’s country, whether to pursue education or employment opportunities, to improve one’s family life or to seek personal support [...] this is the first time that disabled people will have that right to freedom of movement if they require support”.

Furthermore, Lord Howe gave a commitment that the Department of Health will review how the continuity of care arrangements are operating three years following implementation.

29. We welcome the provisions in the Bill that make arrangements for continuity of care, as this is central to the right to independent living, and we encourage the Government to work closely with relevant stakeholders to develop the regulations and statutory guidance in relation to the continuity of care provisions.

30. Overall, the Government’s response to us outlining additional information about the provisions of the Bill that promote the right to independent living is welcome. However, we note that the Government has not identified any provisions that might have an adverse effect on the right to independent living. For example, the new eligibility criteria for adult social care, provided for at Clause 13 of the Bill (and to be set out in further detail in regulations), could represent a potentially retrograde step in the promotion of the right to

44 Ibid., Q.4
46 Ibid., para 175
47 HL Deb., 14 October 2013 cc. 312–318
48 Ibid.
49 Ibid. c. 316
independent living under Article 19 if the national eligibility threshold is set so high as to exclude large numbers of adults from access to care and support.50

31. In our Independent Living Report, we concluded that:

“While we recognise the exceptional economic circumstances facing the UK, we conclude that there is a risk of retrogression of the UK’s obligations under Article 19 as a result of the cumulative impact of spending cuts and reforms. There has been particular concern about the effects of reductions in funding for local authorities, changes to Disability Living Allowance under the Welfare Reform Bill, caps on housing benefit and the closure of the Independent Living Fund, and the way in which these might interact to restrict enjoyment of the right to independent living. Many local authorities are restricting eligibility criteria for social care support. We argue that this risks breach of Article 19.”51

32. Further, while certain provisions in the Bill may promote the right to independent living, there remains no express right in UK law. In our Independent Living Report, we considered that the existing matrix of human rights, equality and community care law, while instrumental in the protection and promotion of the right to independent living, is not sufficient.

33. We welcome, in principle, the Bill’s creation of a general duty on local authorities to promote the well-being of an individual in the adult social care system as a positive step towards promoting and protecting independent living as a right. We are grateful to the Department for its detailed response to us setting out its analysis of how the well-being principle contained in Clause 1, along with other provisions of the Bill, promote the right to independent living. We also note the importance of the continuity of care provisions in this regard.

34. However, we are disappointed that the Government did not take the opportunity in this Bill to specifically provide for a free-standing right to independent living that could be directly enforceable by individuals in domestic law. We recommended in our Independent Living Report that the right to independent living should be included in any forthcoming Bill on adult social care in England. We consider that the Care Bill is the most appropriate opportunity for the Government to provide the necessary legislative underpinning of the right to independent living. We therefore call on the Government to bring forward an amendment at Commons Report Stage to amend the Bill to include a free standing provision to give concrete effect in UK law to the right to independent living. If the Government does not do so, we ask it to explain why it does not accept the need for such free standing legislation. In our Independent Living Report, we specifically requested that the Government publish this assessment. We are not satisfied with the Government’s response to this request for information thus far.

35. In any event, we recommend that the Bill be amended so that the well-being principle includes an express reference to the right to independent living. This would not be directly enforceable as an individual right, but a local authority could be

50 Joint Committee on Human Rights, Twenty-third Report of Session 2010–12, para 138; Law Society, Care Bill Lords’ Second Reading Briefing, para 10

51 Joint Committee on Human Rights, Twenty-third Report of Session 2010–12, Summary, p. 1
challenged for a failure to promote the right when carrying out its care and support functions under the Bill.

36. The following amendment would give effect to this recommendation.

Clause 1, page 2, after line 1, insert:

“(j) the right to living independently and being included in the community.”
3 Human rights compatible treatment

Safeguarding adults at risk of abuse or neglect

37. Clauses 42 to 47 in Part 1 of the Bill place a duty on local authorities to make enquiries where they reasonably suspect that an adult is at risk of neglect or abuse, and each local authority is obliged to create a Safeguarding Adult Board.\(^{52}\) The Explanatory Notes to the Bill outline that the local authorities’ duty applies to adults who have care and support needs regardless of whether they are currently receiving support from the local authority, and who are either at risk of or experiencing neglect or abuse, including financial abuse, but are unable to protect themselves. The eligibility criteria that the local authority sets for services and support are not relevant in relation to safeguarding. Safeguarding enquiries should be made on the understanding of the risk of neglect or abuse, irrespective of whether the individual would meet the criteria for the provision of services.\(^{53}\) The Government’s human rights memorandum states that the new adult safeguarding duty and the establishment of the Safeguarding Adult Boards will strengthen the protection for adults with care and support needs.\(^{54}\)

38. We note that the creation of the new adult safeguarding duty promotes the Government’s positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction and to protect vulnerable individuals from ill-treatment. We welcome these provisions that are designed to safeguard vulnerable adults at risk of abuse or neglect as human rights enhancing measures.

Care standards

39. The measures in Part 2 of the Bill largely address specific recommendations from the Francis Report about transparency and care standards in the NHS. The Francis Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry was published on 6 February 2013.\(^{55}\) This public inquiry examined the serious failures in care at Mid-Staffordshire NHS Foundation Trust before 2009. The Francis Report made 290 recommendations. Key themes included the need for clear fundamental standards of care, measures of compliance, and greater openness, transparency and candour throughout the system, underpinned by statute where necessary.

40. The measures in Part 2 help to implement the Government’s positive obligations under Article 3 of the ECHR to protect adults from harm and to conduct full, prompt, impartial investigations where there are allegations of mistreatment. This includes the introduction of “Ofsted-style rating” for hospitals and care homes, establishing a unified regime for detecting and intervening in failures in care quality at NHS hospitals, introducing a statutory “duty of candour” for health service providers and making it a criminal offence for care providers to give false and misleading information about their performance.

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\(^{52}\) Clause 42 and Schedule 2  
\(^{53}\) ENs Bill 123, para 53  
\(^{54}\) Department of Health Human Rights Memorandum to the JCHR, June 2013, para 4  
\(^{55}\) Report of the Mid Staffordshire NHS Foundation Trust Public Inquiry (Francis Report), 6 February 2013
In its recent Concluding Observations on the UK, the UN Committee against Torture recommended that the Government implement the recommendations in the Mid Staffordshire Inquiries reports, and in particular recommended the UK “to establish a structure of fundamental standards and measures of compliance in order to prevent ill-treatment of patients receiving health care services”.

On 19 November 2013, the Department of Health published *Hard Truths, the Journey to Putting Patients First*, setting out its detailed response to each of the 290 recommendations and the action it has taken. In his statement to the House of Commons, the Secretary of State for Health stated that he accepts the principles behind all of the recommendations made by the Francis Inquiry. We welcome, as human rights enhancing measures, the provisions contained in Part 2 of the Care Bill that are designed to implement the recommendations made by the Francis Report to safeguard adults at risk of abuse or neglect.

In relation to the introduction of fundamental care standards, as highlighted by the Francis Report and the UN Committee against Torture, the Government confirmed to us that it is currently working to introduce such a structure of fundamental care standards, which will create legal requirements applicable to all providers of health and adult social care in England registered with the Care Quality Commission. The Government informed us that the new standards will be introduced by April 2014 via secondary legislation (replacing the provisions of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2010), rather than as provisions in the Care Bill. The Department is working closely with the Care Quality Commission in this regard, and it is expected that the Department will consult shortly on the draft regulations. The draft regulations are likely to cover matters including: care and safety of patients and service users; abuse and neglect; respecting and involving service users to ensure person-centred care; and matters relating to patient consent.

We welcome, in principle, the proposal to establish a set of fundamental standards aimed at preventing ill-treatment of patients that will create legal requirements applicable to all providers of health and adult social care in England registered with the Care Quality Commission. However, we regret that the Government has not taken the opportunity in this Bill to set out the standards in primary legislation in order to allow Parliament an opportunity to scrutinise fully the provisions and determine whether they are sufficient to meet the Government’s positive obligations to protect vulnerable individuals from harm.

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56 UN Committee Against Torture, Concluding Observations on the Fifth Periodic Report of the UK, para 33
57 Department of Health response to the Francis Report, *Hard Truths, the Journey to Putting Patients First*, Cm 8754-I (19 November 2013) ; HC. Deb. 19 November 2013, cc1095–1097
58 HC. Deb. 19 November 2013, c.1097
59 Letter from the Minister of State for Care and Support, Norman Lamb MP, to the Chair, 10 Sep 2013, Q.16
60 Ibid.
61 Department of Health response to the Francis Report, *Hard Truths, the Journey to Putting Patients First*, Cm 8754-I (19 November 2013) p. 62
4 The scope of the Human Rights Act

Background

45. Clause 48 of the Bill makes provision about the scope of the Human Rights Act 1998 by extending what counts as a “public function” for the purposes of s. 6(3)(b) of that Act. It provides that providers of care and support (social care) regulated by the Care Quality Commission are exercising a “public function” for the purposes of the Human Rights Act.

46. As the Explanatory Notes to the Bill explain, the effect of the clause is that all care and support providers who are regulated by the Care Quality Commission are bound by the duty in s. 6(1) of the Human Rights Act to act in a way which is compatible with the European Convention on Human Rights.62 This means that individuals have a direct cause of action against such providers, and access to the legal remedies envisaged in the Act, in relation to any incompatibility with Convention rights.

47. The clause was inserted by a non-Government amendment made during the Bill’s Report Stage in the House of Lords.63 The amendment was proposed by Lord Low of Dalston. The Government opposed the amendment but it was agreed by 247 votes to 218.

48. The Government now seeks to reverse the amendment in the House of Commons and has tabled an amendment to leave out the clause.64

The rationales behind clause 48

49. Clause 48 of the Bill serves a number of distinct purposes, as explained by Lord Low when introducing the amendment in the Lords.65

(1) No retrogression in human rights protection

50. First, the clause aims to prevent the Bill from causing retrogression in the level of human rights protection which is already available to certain recipients of social care. The specific concern here is that, without such express provision, the effect of the Bill will be to undo even the limited statutory protection conferred on some residents of care homes by s. 145 of the Health and Social Care Act 2008. As explained below, that provision was Parliament’s response to the decision of the House of Lords in the case of YL v Birmingham City Council, in which it was held that private and third sector organisations providing care home services to individuals pursuant to contracts with local authorities were not performing a “public function” for the purposes of the Human Rights Act and therefore were not bound by the obligations in the Act when providing that service. Section 145 of the 2008 Act was intended to plug the specific gap identified by that case by providing that a person who provides accommodation, together with nursing or personal care in a care home, under arrangements made under specific provisions of the National Assistance Act

62 Bill 123 – EN, para. 280.
63 HL Deb 16 October 2013 cols 543–565.
64 Amendment 112.
65 HL Deb 22 July 2013 cols 1102–1105 (Committee stage) and HL Deb 16 October 2013 cols 544–546 (Report stage).
1948, is to be taken to be performing a public function in doing so, and therefore to be bound by the Human Rights Act.

51. The Care Bill, however, changes the system for arranging care, and it is anticipated that the relevant provisions of the National Assistance Act will be repealed, leaving s. 145 without any statutory provisions on which to bite. One of the purposes of the amendment which became clause 48 was therefore to seek the Government’s assurance that the Bill would not lead to a regression in human rights protection by leaving care home residents in the position they were in following the judgment in YL and before Parliament’s response in s. 145.

52. The Government provided the reassurance that was sought at Committee stage in the House of Lords. Baroness Northover assured the House that there would be a consequential amendment to s. 145 of the 2008 Act to make sure that there would be no going backwards in human rights protection.66

(2) Fill the gaps in human rights protection for publicly arranged/paid for care

53. The second rationale behind clause 48 is to improve upon Parliament’s earlier limited response to the YL judgment, by filling other gaps in human rights protection for people receiving publicly arranged care. Section 145 of the 2008 Act is confined to the specific scenario which was litigated in the YL case itself: where residential care is provided by a private or third sector provider under arrangements made with that contractor by a local authority under particular provisions of the National Assistance Act.

54. The scope of that legislative response was criticised by our predecessor Committee at the time.67 It leaves unprotected by the Human Rights Act recipients of other publicly arranged care, including, most significantly, care provided by private or third sector providers for individuals in their own home (“home care” or “domiciliary care”), as well as other residential care service users whose care is arranged by local authorities under different powers.

55. Clause 48 would fill these gaps in human rights protection for other recipients of publicly arranged care, by, in effect, broadening the scope of the legal protection provided by s. 145 to take in all publicly arranged social care.

(3) Extend human rights protection to privately arranged care

56. The third aim of clause 48 is to extend human rights protection to those who arrange and/or pay for their care privately: so-called “self-funders”. It aims to provide equal protection to all users of regulated social care, regardless of where that care is provided, who arranges it and who pays for it.

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66 HC Deb 22 July 2013 col. 1118.
The Joint Committee on the draft Care and Support Bill

57. The Joint Committee on the draft Care and Support Bill made two relevant recommendations.

58. First, it recommended that the actual Bill, when introduced, should make express statutory provision to ensure that private providers of all publicly arranged care and support are bound by the Human Rights Act. It noted that while this was the Government’s intention, it could only be given effect by express statutory provision because the effect of the decision of the House of Lords in the YL case was to make it legally uncertain whether the Human Rights Act would apply to such providers in the absence of such express statutory provision.

59. Second, the Joint Committee on the draft Bill went further and considered that the benefit of the protections of the Human Rights Act should also extend to so-called “self-funders” who arrange and pay for their own care and support. Such people are equally vulnerable to having their rights infringed by private care providers and the Joint Committee on the draft Bill could not see any basis for depriving them of the protection of the Human Rights Act merely because there is no public sector involvement in arranging or paying for their care.

60. The Joint Committee on the draft Bill therefore recommended that the Bill, when brought forward, should ensure that 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.

61. Clause 48 seeks to give effect to both of the Joint Committee’s recommendations.

The Bill as introduced

62. The Bill, as introduced, did not make provision to give effect to either of these recommendations by the Joint Committee on the Draft Bill.

63. The reasons for the Bill not including express provision to ensure that private providers of all publicly arranged care and support are exercising a public function for the purposes of the Human Rights Act were set out in the Government’s Human Rights Memorandum. It stated that “all providers of publicly funded or arranged health and social care should consider themselves bound by the section 6 duty”. In the Government’s view, such private providers are already to be treated as exercising functions of a public nature for the purposes of the Human Rights Act, notwithstanding the decision in YL.

64. The Human Rights Memorandum did not, however, expressly address the Joint Committee’s other recommendation, that the benefit of the protections of the Human Rights Act should also extend to so-called “self-funders” who arrange and pay for their own care and support.

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69 Ibid., para. 292.
70 Department of Health Human Rights Memorandum para 17
The significant human rights issues

65. We have been sent copies of briefings by the Equality and Human Rights Commission and by a group of organisations, all with relevant expertise in the area, urging us to support clause 48 and to oppose the Government’s proposed deletion of it from the Bill.

66. In our view, the debates on this clause to date, and many of the submissions that we have received about it, including those from the Government, have not always distinguished sufficiently clearly between two distinct questions:

(1) whether all providers of publicly arranged social care services are already bound by the Human Rights Act, or whether express statutory provision is necessary in order to remove the legal uncertainty created by the decision of the House of Lords in the YL case (“the YL issue”); and

(2) whether the Human Rights Act should directly provide a legal remedy for those who privately arrange and pay for their own care and support from private providers, or whether this goes beyond what is required by the European Convention on Human Rights (“the wholly private issue”).

67. The Government, in its response to the Joint Committee’s pre-legislative scrutiny Report on the draft Bill, for example, gave a single response to its two separate recommendations. The issues have often been conflated due to the ambiguity of some of the terminology used. In particular, there has been considerable debate about whether so-called “self-funders” should enjoy the protection of the Human Rights Act. The term “self-funders”, however, can refer both to those who both arrange and pay for their care, using their own private resources, and those who arrange their own care but pay for it using public funds which they receive by way of direct payments, or, as will increasingly be the case, personal budgets. To avoid confusion, we have tried to avoid using the terminology of “self-funders” in this Report, preferring to distinguish between care which has been publicly arranged and/or paid for on the one hand, and care which has been wholly privately arranged and paid for on the other.

68. For reasons we explain below, we think it is necessary to separate out the two issues we have identified above before deciding whether the Bill requires amendment and, if so, how.

Publicly arranged/paid for care (“the YL issue”)

69. We asked the Government in relation to this issue whether it was its intention that private providers of all publicly arranged care and support should be treated as discharging a public function and therefore be bound to act compatibly with the Human Rights Act, and, if so, why the Government has not accepted the recommendation of the Joint Committee on the draft Bill that express statutory provision was necessary to achieve that.

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71 Age UK, the British Institute of Human Rights, Mind, the Equality and Diversity Forum, Real Life Options, Disability Rights UK, Liberty, Scope and the Law Society.

72 The Care Bill explained —including a response to consultation and pre-legislative scrutiny on the Draft Care and Support Bill (May 2013), p. 34 at para. 129 and pp. 76–77.

73 Letter dated 17 July 2013 from our Chair to Norman Lamb MP, Minister of State for Care and Support.
70. The Government replied that in its view all providers of publicly arranged health and social care services, including those in the private and voluntary sectors, should consider themselves to be already bound by the Human Rights Act. It considers the case law to support a broad application of s. 6(3)(b) of the Act and regards the case of YL as “a case on the particular facts” which does not necessarily mean that the reasoning in that case would be applied to other social care settings.

71. The Government therefore does not consider that “an amendment to the Human Rights Act 1998” (sic) is necessary. It is concerned that any such amendment would risk casting doubt on the interpretation of the Human Rights Act in other sectors: “[e]ach time specific provision is made with respect to a particular type of body, we weaken the applicability of the general test and raise doubt about all those bodies that have not been specified explicitly in the legislation.” The Government also argues that service users are still able to bring a claim against the local authority that arranged their care, because local authorities do not contract out of their Human Rights Act duties by contracting the provision of care to another provider.

72. We have considered carefully each of the Government’s arguments on the YL issue that an express statutory provision on the question is not necessary, but we do not find them convincing.

73. First, we disagree that the law is already clear that all providers of publicly arranged health and social care services, including private and third sector providers, should consider themselves to be bound by the Human Rights Act. We welcome the fact that the Government wishes this to be the case, but in our view, the decision of the House of Lords, at worst, is authority to the contrary or, at best, leaves the matter in very considerable legal doubt. We agree with our predecessor Committee in the last Parliament, which did not accept the Government’s argument that express statutory provision was not necessary, and recommended legislative provision to restore what it considered to be Parliament’s original intention that the Act should apply to private providers of publicly arranged services.

74. Second, we acknowledge the force of the Government’s argument that a sector by sector response to the YL judgment may cast doubt on the interpretation of the “public function” test in other contexts, and so undermine the scope of the Human Rights Act. In our view, however, that damage has already been done by the YL decision itself. Like our predecessor Committee, we would prefer to see the YL problem addressed at a more general level, such as by a general interpretive statute clarifying the scope of s. 6(3)(b) of the Human Rights Act for all purposes, rather than a piecemeal sectoral approach, but in the absence of such a legislative response there is no alternative but to address the problem created by the YL decision as the opportunity arises in each context where it has given rise to uncertainty.

75. Third, we reject the Government’s suggestion that service users have adequate human rights protection because they can rely directly on the Human Rights Act against the local authority that arranged their care. The inadequacy of such indirect protection has long

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74 Letter dated 10 September 2013 from Norman Lamb MP to our Chair.

75 Lord Low’s amendment, now clause 48 of the Bill, does not in fact amend the Human Rights Act, but follows the model of s. 145 of the Health and Social Care Act 2008 by deeming the provision of certain services to be the exercise of a public function for the purposes of the Human Rights Act.
been a matter of consensus in debates and reports about this issue. Indeed, since the Government has made clear that it wishes all providers of publicly arranged care services to consider themselves bound by the Human Rights Act, including private providers under contract with local authorities, we presume that it too considers that a service user’s remedies against the arranging authority are not sufficient.

76. We have also considered the arguments for extending the legal protection provided by s. 145 of the 2008 Act so that it covers other forms of publicly arranged/paid for social care, and we find those arguments compelling. The Report of the Equality and Human Rights Commission into the rights of older people in home care found evidence of “serious, systematic threats to the human rights of older people using home care services”, including a lack of respect for personal privacy and dignity, lack of support with basic requirements such as feeding and drinking, and in some cases neglect and abuse.76 The latest statistics show that in 2012-13 some 485,000 adults received home care in England, of which the vast majority (385,000) were aged 65 and above.77 Some 91% of all the home care provided was provided by the private and voluntary sector, rather than directly by local authorities. The gap in legal protection left by the YL case is therefore a significant one which needs to be urgently addressed.

77. We therefore agree with the Joint Committee on the draft Bill, that express statutory provision is necessary in order to ensure that all providers of publicly arranged social care services are bound by the Human Rights Act. 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.

78. Whether such express statutory provision should be in the form provided for in the current clause 48, however, or in some other form, depends on the answer to the separate issue of whether the Human Rights Act should also provide a direct legal remedy for those who privately arrange and pay for their own care and support from private providers, to which we now turn.

Privately arranged and paid for care (“the wholly private issue”)

79. We asked the Government whether it considers that the Human Rights Act should provide a legal remedy for people who privately arrange and pay for their own care and support from private providers, and, if not, why not.78

80. The Government replied that it does not consider that the Human Rights Act should provide for a legal remedy in purely private contractual relations.79 It says that the Human Rights Act is about public functions, and is intended to reflect the scheme of the European Convention on Human Rights which provides legal remedies against public authorities. It

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78 Letter dated 17 July 2013 from our Chair to Norman Lamb MP, Minister of State for Care and Support.

79 Letter dated 10 September 2013 from Norman Lamb MP to our Chair.
acknowledges that the ECHR imposes positive obligations on the State to ensure that individuals respect each other’s rights, but says that “this is not at all the same as placing private individuals and enterprises directly under obligations which were designed to apply to Governments.” In the Government’s view, the Human Rights Act is not the appropriate framework for regulating contracts arranged privately, without the State’s involvement, between care homes and private individuals or their families. It points out that “self-funders” of care and support have other avenues of recourse open to them, both legal and non-legal, and that the Health and Social Care Act 2008 strengthened the regulatory regime by ensuring that the regulator (the Care Quality Commission) can inspect all providers to establish whether they are acting in the spirit of the relevant provisions of the ECHR.

81. Similar concerns about the effect of what is now clause 48 of the Bill were expressed by Lord Faulks during Lords’ Report Stage. He pointed out that “this is the first time an attempt has been made to include, within the scope of the Human Rights Act, what may be a purely private function [...] this amendment is in effect extending the scope of the Convention beyond the terms of the Human Rights Act.”

82. In its letter to Members of the Public Bill Committee, the Government explains its reasons for wanting to delete clause 48 from the Bill. It says:

The Human Rights Act is about the relationship between individuals and public authorities. It is not intended to cover entirely private arrangements, where there is no state involvement. If clause 48 became law, it would be the first time the Act extended into the purely private sphere, in this case the relationship between an individual and a private care provider. It could lead to other interest groups arguing that they should also be able to challenge private providers on human rights grounds in other areas. It also muddies the water - extension to all regulated social care casts doubt about the application of the HRA to other areas where currently cover is implied but not expressly mentioned.

83. We understand the reasons why the House of Lords inserted clause 48 into the Bill. The more a mixed economy of care becomes established, the more absurd it seems that individuals receiving an identical service from the same provider have access to different legal remedies purely because one pays for the service and the other does not, or because one has arranged it themselves while the other has had it arranged for them by a public authority. We also note with interest the comments made by Baroness Howarth of Breckland, who has experience as a third sector provider of care services, at Lords’ Committee stage, to the effect that no providers would object to being bound by the HRA:

There is not a single provider that would object to being controlled by the Human Rights Act; I think that we all see ourselves as already being controlled by that Act, because we work under contract to the local authorities and see that as a clear extension of it. If it were direct, we would not operate any differently from how we do already.

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80 HL Deb 16 October 2013 cols 552–3.
81 HL Deb 22 July 2013 col. 1108.
84. We also recognise the importance of ensuring that the trend towards greater use of direct payments and personal budgets, which will be accelerated by the new framework provided by the Bill, does not mean a corresponding diminution of the scope of human rights protection for the recipients of care services who will increasingly arrange their own care, albeit paid for with public funds.

85. However, human rights law does not require that Convention rights should be directly enforceable by individuals against private care providers where there has been no involvement by a public authority in arranging or paying for that care. The Convention does include positive obligations to protect an individual’s Convention rights against other private actors, by ensuring that the legal framework provides adequate protection, but this does not go so far as to require the State to make available a direct cause of action against a private provider. The UK’s legal framework for providing such protection, which includes a combination of criminal offences and regulatory requirements on the inspectors to inspect providers against a human rights framework, is probably sufficient to satisfy that positive obligation to protect Convention rights, without having to make the HRA directly applicable to private contractual situations. A person who arranged and paid for their own care from a private care company would not be able to make an application to the European Court of Human Rights to complain that their right to privacy or dignity was not being respected by the contractor, nor that the Human Rights Act fails to give them a direct legal remedy against that contractor.

86. Parliament can, of course, choose to go beyond the Convention by conferring such rights, and could, if it so wished, use the legal framework for giving effect to Convention rights to do so. However, it is important to appreciate that this is what it would be doing: using the legal framework of the HRA, which was designed to give domestic effect to Convention rights, to go beyond that original purpose. Indeed, we note that our predecessor Committee in the last Parliament was in favour of protecting “self-funders” in principle, but considered it important to point out that this represented a significant extension of the Human Rights Act rather than a restoration of the scope of the Act originally intended by Parliament before the House of Lords restrictive interpretation of the scope of the Act in *YL*.83

87. Clause 48 makes the Human Rights Act apply to the provision of regulated social care. There is a perfectly respectable argument, in our view, for saying that if the state has chosen to regulate the provision of a service in the public interest, as it has the provision of social care, then the provision of that service is of a sufficiently “public” nature to warrant direct applicability of the Human Rights Act to all providers. It is important to be fully aware of the implications of taking that step, however. Many services which are provided on a private contractual basis are nevertheless publicly regulated in various ways: private education provided by private schools, private health care paid for by private health insurance, even private rented residential accommodation. On the basis of the approach

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82 See eg. *Costello-Roberts v UK* (1993) 19 EHRR 112, in which the Court found that the State is responsible for regulating the conduct of private schools and therefore it can examine whether the use of corporal punishment in such schools infringes the right not to be subjected to inhuman and degrading treatment in Article 3 of the Convention.

taken in clause 48 it would be difficult to distinguish between the provision of regulated social care and the provision of other regulated services.

88. In our view, clause 48 goes further than is strictly necessary to serve the principal rationales which motivated its introduction. We do not consider that the ECHR requires the Human Rights Act to provide a direct legal remedy for those who pay for and arrange their own care and support from private providers, as recommended by the Joint Committee on the draft Bill. Nevertheless we do acknowledge the arguments in favour of ensuring equal legal protection for all those receiving care, however it is arranged or paid for.

**An alternative amendment to deal with the YL problem**

89. As we have explained above, we do not consider that the ECHR requires that the Human Rights Act provide a direct legal remedy against private providers where care and support has been privately not publicly arranged and is privately paid for, but we do consider that express statutory provision is necessary in order to make sure that such a remedy is available against private providers where care has been publicly arranged or paid for. We therefore propose an alternative, more limited amendment to clause 48, which in our view would still achieve most of the principal rationales behind the original amendment, at the same time as serving the Government’s objective of not extending the Human Rights Act to cover entirely private contractual arrangements, where there is no state involvement. Any such amendment must, in our view, meet a number of minimum requirements.

90. First, it should ensure that there is no winding back of the legal protection already provided by s. 145 of the Health and Social Care Act 2008, so that residents of private care homes whose care has been arranged by their local authority under the National Assistance Act 1948 continue to enjoy the full protection of the Human Rights Act against the private providers, even if the National Assistance Act is repealed as a consequence of the passage of the Care Bill. In other words, it must ensure that the limited statutory solution to the YL problem is preserved.

91. Second, the amendment should seek to fix the YL problem for other aspects of social care which are not covered by the 2008 solution, by extending the protection of the Human Rights Act to other residential care not arranged under the National Assistance Act and to home care.

92. Third, it should take the opportunity to update the legal protection afforded by s. 145 in the light of the trend towards care being privately arranged but publicly paid for via direct payments or personal budgets. In other words, it should go beyond s. 145 by ensuring that not only care which has been arranged by a public authority, but care which has been privately arranged but paid for with public funds, is covered.

93. Fourth and finally, it would stop short, however, of providing a legal remedy under the Human Rights Act where care has been arranged and paid for wholly privately, without any involvement of a public authority.

94. In our view a relatively small amendment to clause 48 would give effect to this recommendation, by inserting the words shown in bold italics below in sub-paragraph (1).
The effect of these words is to qualify clause 48 as it currently stands by confining its scope to regulated care services that are publicly arranged and/or publicly funded, thereby excluding from its scope care services which are privately arranged and paid for. The language used is modelled on the wording of the existing s. 145 of the Health and Social Care Act 2008 as far as the definition of “publicly arranged care” is concerned. The proposed heading of the clause also follows the wording of s. 145. It goes further than s. 145, however, by including care services “paid for by a public authority”, in recognition of the fact that increased use of direct payments and personal budgets mean that increasingly in future care services will be arranged, not by a public authority, but by the service user using public funds.

**48 Human Rights Act 1998: provision of certain care and support services to be public function**

(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.

95. The following two amendments to the Bill would give effect to this recommendation:

Page 41, line 2, leave out ‘Provision of “care and support services”’ and insert ‘Human Rights Act 1998: provision of certain care to be public function’

Page 41, line 3, after “social care” insert:

for an individual under arrangements made with P by a public authority, or paid for by a public authority,

**How effective is the CQC in the performance of its positive obligation?**

96. We also seek further information about the practical effectiveness of the human rights protection available for those who should not be covered by our recommended amendment because they arrange and pay for their own care. The Government says that they do not need any further legal protection for their human rights because the Care Quality Commission (“the CQC”), as the regulator, is bound by the Human Rights Act and has a positive obligation to ensure that all individuals who receive care and support are protected, including those whose care is privately arranged and paid for. The Government points to the strengthened regulatory powers in the Health and Social Care Act 2008 to ensure that the CQC can enforce regulatory requirements that are in line with the spirit of
the relevant provisions of the Convention, which should ensure that in practice everyone receives care “that conforms to the spirit of Convention rights.”

97. We note that in September 2011 the CQC and the Equality and Human Rights Commission published joint guidance for CQC inspectors on equality and human rights, giving practical information linking human rights to each of the CQC’s “essential standards” of quality and safety of care, with the aim of ensuring a more consistent understanding of human rights and increased sensitivity to human rights issues across the large workforce of CQC inspectors. We welcome this initiative but we are not aware of any evidence in the public domain as to whether it has led, in practice, to better protection of human rights for all service-users, including those who privately arrange and pay for their care, and to a reduction in the sorts of interference with human rights identified by the EHRC in its Close to home Report. Such information is necessary in order to be able to evaluate the Government’s claim that the human rights of those who arrange and pay for their own care are sufficiently protected by the positive obligation on the regulator. We recommend that the Government make available to Parliament its assessment of the extent to which the stronger regulatory powers available to the CQC since 2008 have led to the provision of more human rights compatible care to all service-users, including the evidence on which that assessment is based. We also recommend that the CQC consider requiring that private care contracts include terms requiring providers to comply with the Human Rights Act.

5 Carers’ rights

Adults caring for adults

98. The Bill as introduced enshrined the right of adults caring for other adults in England to receive support from their local council and imposed a duty on local authorities to meet carers’ eligible needs for support.85

99. Clause 10 of the Bill sets out a single duty to assess carers’ needs for support.86 It requires a local authority to carry out an assessment, known as a “carer’s assessment”, where it appears that a carer may have needs for support at that time, or in the future. The aim of the assessment is to determine whether a carer has support needs either currently or, possibly, in the future and what those needs may be. This duty to assess a carer replaces existing duties in relation to the assessment of adult carers in section 1(1) of the Carers (Recognition and Services) Act 1995 and section 1 of the Carers and Disabled Children Act 2000.87

100. Clause 20 of the Bill sets out the core duty of the local authority to meet a carer’s eligible needs for support. This duty replaces the power to provide services to carers in section 2 of the Carers and Disabled Children Act 2000, in respect of those carers who are adults and are providing care for another adult.88

101. In relation to these provisions, the Government’s Impact Assessment states that:

“The most relevant aspect to gender equality is around the provisions in the Bill for carers. As the last UK census outlines, there are approximately 6 million carers in the UK, and the vast majority of these are women. The Bill for the first time sets out a number of rights for carers for the first time, placing a series of duties on local authorities to meet a carer’s needs for support. This should have a significant benefit for a large number of women.”89

102. We welcome the provisions in the Bill that consolidate and simplify the legislation relating to carers’ rights of assessment and support and we note, in particular, the potentially positive implications for women in this regard.

Young carers

103. The Government introduced an amendment at Lords’ Committee stage of the Children and Families Bill, which provides for young carers to receive the same

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85 Clauses 10 and 20
86 Clause 10 of the Bill
87 Bill 123–EN 2013–14, paras. 80 & 81
88 Ibid. para 130
89 Department of Health, Impact Assessment, Care and Support Legal Reform (Part 1 of the Care Bill) IA No 6107, 8 May 2013, p 61
consideration and protection in relation to their needs as the provisions outlined above relating to adult carers in the Care Bill.\textsuperscript{90}

104. Initially, the Government had not made any provision in either the Care Bill or the Children and Families Bill for the rights of young carers to a needs assessment for support. We therefore wrote to the Government to ask for information about the Government’s justifications for not making provision in relation to young carers.\textsuperscript{91} In its response, the Government said that the Care Bill was not the appropriate place to set out duties owed to child carers.\textsuperscript{92} Subsequently, the Secretary of State for Education, Rt Hon Michael Gove MP, announced that the Government would bring forward an amendment to the Children and Families Bill during Lords’ Committee stage to address the needs of young carers.\textsuperscript{93} Clause 80 of the Children and Families Bill now provides for the rights of young carers to have an assessment of needs for support.\textsuperscript{94}

105. We welcome the Government amendment to the Children and Families Bill which seeks to improve the legislative framework by providing for young carers to receive the same consideration and protection in relation to their needs as the new provisions relating to adult carers in the Care Bill.

An opportunity to strengthen the rights of parent carers of disabled children

106. Existing rights of parent carers of disabled children to have their needs separately assessed were introduced in the Carers (Recognition and Services) Act 1995 and the Carers and Disabled Children Act 2000. The Carers Equal Opportunities Act 2004 is also relevant to the needs of parent carers, which provides that needs assessments should consider the ability of carers to participate in work or training.

107. In our scrutiny of the Care Bill, we wrote to the Government to ask why it had not taken the opportunity to make equivalent provision in the Bill to consolidate and update the existing legislation in relation to parent carers of disabled children, in the same way as the existing legislation in relation to carers caring for adults.\textsuperscript{95}

108. In its response to us, the Government stated that it had no plans to change the existing legislation on the provision of assessment for parent carers. While not referring to the relevant provisions contained in the Carers (Recognition and Services) Act 1995 and the Carers and Disabled Children Act 2000, the Government highlighted Section 17 of the Children Act 1989, which provides for family support and short breaks based on the needs of the parent as well as the disabled child. The Government further stated that, under the special educational needs provisions of the Children and Families Bill, parent carers will have more choice and control about the support that they receive. The Government also

\textsuperscript{90} Eleventh Marshalled List of Amendments, Children and Families Bill, Amendment No. 241, 15 November 2013
\textsuperscript{91} Letter from the Chair to the Minister of State for Care and Support, Norman Lamb MP, 17 July 2013, Q.8
\textsuperscript{92} Letter from the Minister of State for Care and Support, Norman Lamb MP, to the Chair, 10 Sep 2013, Q.8
\textsuperscript{93} Written Statement to Parliament from the Secretary of State for Education, Rt Hon Michael Gove MP about changes to young carers legislation, 8 October 2013
\textsuperscript{94} Clause 80 of the Children and Families Bill, HL Deb 18 Nov 2013 col. GC308
\textsuperscript{95} Letter from the Chair to the Minister of State for Care and Support, Norman Lamb MP, 17 July 2013, Q.9
highlighted that parent carers can benefit from a wide range of practical and emotional support offered by local carers' centres.96

109. While we acknowledge the existing provisions, they do not equate to a clear and single duty in law which requires a local authority to carry out a needs assessment of parent carers of disabled children and to meet the eligible needs of such parent carers. In its response to us, the Government has not provided information about its justifications for excluding this group of carers from the new provisions relating to carers of adults contained in the Care Bill and the equivalent rights for child carers now contained in the Children and Families Bill.

110. In this regard, we note the Law Commission’s report on reform of adult social care, which recommended that existing duties to assess the needs of parent carers of disabled children should be amended to make them consistent with the adult social care statutory provisions, either by consolidating their assessments into a single statute or by incorporating them into the Children Act 1989.97

111. Baroness Pitkeathley OBE moved an amendment at Lords’ Committee stage of the Children and Families Bill to press for equivalent rights to a needs assessment for parent carers of disabled children.98 Carers UK published a parliamentary briefing on this amendment. It states that the Government has recognised the need to bring forward new rights both for adults caring for adults and for young carers. In its view, this leaves parent carers of disabled children as the only group of carers who will be left with the lesser rights to assessment and support provided in old legislation which will be largely superseded by the new Bills (the Care Bill and the Children and Families Bill).

112. During the Lords’ debate, the Parliamentary Under-Secretary for Schools, Lord Nash, repeated the Government’s position that it had no intention of changing the legislation in relation to parent carers of disabled children. The Minister’s response during the debate provides some further explanation as to the Government’s rationale; namely, that the primary focus of a local authority’s support to parents of a child in need is with a view to safeguarding or promoting the child’s welfare. The Minister stated:

“We are clear that any change to the Children Act 1989 to assess the needs of parent carers separately would change fundamentally the principles of the Act and risk the needs of the children becoming second to those of their parent. Recent serious case reviews for Daniel Pelka and Keau Williams have shown starkly what can happen when the needs of parents are put ahead of those of the child. Our approach to legislation and statutory guidance is that the needs of the individual child are paramount.”99

113. While we are clear that the best interests of the child are a primary consideration in all actions concerning children,100 we do not consider the references to cases of child abuse and neglect to be appropriate in the context of discussing the rights of parent carers of

96 Ibid.
97 Law Commission, Adult Social Care, LAW COM No 326
98 Amendment 267EA; HL Deb. 20 Nov 2013 cc. GC 474-479
99 HL Deb. 20 Nov 2013 col. GC479
100 Article 3 of the UN Convention on the Rights of the Child
disabled children to a needs assessment for support. Children’s rights are not in conflict with parents’ rights in this regard. Indeed, the UN Convention on the Rights of the Child recognises that a child is not isolated from his or her family.\textsuperscript{101} Research by UNICEF has found that action to realise the rights of children can be envisaged as taking place within and through a triangular set of relations involving the state, parents (and/or guardians) and the child.\textsuperscript{102} This consideration seems relevant to us in the context of assessing the need for support of parents who care for disabled children. Carers UK has highlighted that 47% of carers caring full-time for disabled children under 18 go without any practical support.\textsuperscript{103}

114. We are not satisfied with the Government’s response to us in relation to parent carers of disabled children. We recommend that the Government brings forward amendments to either the Care Bill or the Children and Families Bill to give parent carers of disabled children equivalent rights to a needs assessment for support.

\textsuperscript{101} For example, Articles 5 and 18 of the UN Convention on the Rights of the Child


\textsuperscript{103} Research from Carers UK survey of over 3,500 service users, Carers UK, \textit{Care Bill Second Reading Briefing}, December 2013
Conclusions and recommendations

Introduction

1. We are grateful to the Department for providing a detailed human rights memorandum, and in particular for providing information explaining why the Government is satisfied about the compatibility of the Bill with other relevant international human rights obligations, not just the ECHR. This has been of great assistance to our human rights scrutiny of the Bill. However, the memorandum was received midway through Lords’ Committee stage. We repeat our general recommendation to Departments that they publish a detailed human rights memorandum on introduction of a Bill—and certainly before Second Reading—in order to ensure effective human rights scrutiny in Parliament and beyond. (Paragraph 8)

2. In our view, the extent of the information provided by the Government demonstrates a thorough consideration of the potential impacts of the Care Bill on groups of people with protected characteristics, and shows that the Department has paid due regard to its equality obligations. We wish to commend the Department of Health’s approach as an example of good practice in this regard. (Paragraph 12)

The right to independent living

3. We welcome the provisions in the Bill that make arrangements for continuity of care, as this is central to the right to independent living, and we encourage the Government to work closely with relevant stakeholders to develop the regulations and statutory guidance in relation to the continuity of care provisions. (Paragraph 29)

4. We welcome, in principle, the Bill’s creation of a general duty on local authorities to promote the well-being of an individual in the adult social care system as a positive step towards promoting and protecting independent living as a right. We are grateful to the Department for its detailed response to us setting out its analysis of how the well-being principle contained in Clause 1, along with other provisions of the Bill, promote the right to independent living. We also note the importance of the continuity of care provisions in this regard. (Paragraph 33)

5. However, we are disappointed that the Government did not take the opportunity in this Bill to specifically provide for a free-standing right to independent living that could be directly enforceable by individuals in domestic law. We recommended in our Independent Living Report that the right to independent living should be included in any forthcoming Bill on adult social care in England. We consider that the Care Bill is the most appropriate opportunity for the Government to provide the necessary legislative underpinning of the right to independent living. We therefore call on the Government to bring forward an amendment at Commons Report Stage to amend the Bill to include a free standing provision to give concrete effect in UK law to the right to independent living. If the Government does not do so, we ask it to explain why it does not accept the need for such free standing legislation. In our
Independent Living Report, we specifically requested that the Government publish this assessment. We are not satisfied with the Government’s response to this request for information thus far. (Paragraph 34)

6. In any event, we recommend that the Bill be amended so that the well-being principle includes an express reference to the right to independent living. This would not be directly enforceable as an individual right, but a local authority could be challenged for a failure to promote the right when carrying out its care and support functions under the Bill. (Paragraph 35)

**Human rights compatible treatment**

7. We note that the creation of the new adult safeguarding duty promotes the Government’s positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction and to protect vulnerable individuals from ill-treatment. We welcome these provisions that are designed to safeguard vulnerable adults at risk of abuse or neglect as human rights enhancing measures. (Paragraph 38)

8. We welcome, as human rights enhancing measures, the provisions contained in Part 2 of the Care Bill that are designed to implement the recommendations made by the Francis Report to safeguard adults at risk of abuse or neglect. (Paragraph 42)

9. We welcome, in principle, the proposal to establish a set of fundamental standards aimed at preventing ill-treatment of patients that will create legal requirements applicable to all providers of health and adult social care in England registered with the Care Quality Commission. However, we regret that the Government has not taken the opportunity in this Bill to set out the standards in primary legislation in order to allow Parliament an opportunity to scrutinise fully the provisions and determine whether they are sufficient to meet the Government’s positive obligations to protect vulnerable individuals from harm. (Paragraph 44)

**The scope of the Human Rights Act**

10. We therefore agree with the Joint Committee on the draft Bill, that express statutory provision is necessary in order to ensure that all providers of publicly arranged social care services are bound by the Human Rights Act. 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. (Paragraph 77)

11. In our view, clause 48 goes further than is strictly necessary to serve the principal rationales which motivated its introduction. We do not consider that the ECHR requires the Human Rights Act to provide a direct legal remedy for those who pay for and arrange their own care and support from private providers, as recommended by the Joint Committee on the draft Bill. Nevertheless we do acknowledge the arguments in favour of ensuring equal legal protection for all those receiving care, however it is arranged or paid for. (Paragraph 88)
12. We recommend that the Government make available to Parliament its assessment of the extent to which the stronger regulatory powers available to the CQC since 2008 have led to the provision of more human rights compatible care to all service-users, including the evidence on which that assessment is based. We also recommend that the CQC consider requiring that private care contracts include terms requiring providers to comply with the Human Rights Act. (Paragraph 97)

Carers’ rights

13. We welcome the provisions in the Bill that consolidate and simplify the legislation relating to carers’ rights of assessment and support and we note, in particular, the potentially positive implications for women in this regard. (Paragraph 102)

14. We welcome the Government amendment to the Children and Families Bill which seeks to improve the legislative framework by providing for young carers to receive the same consideration and protection in relation to their needs as the new provisions relating to adult carers in the Care Bill. (Paragraph 105)

15. We are not satisfied with the Government’s response to us in relation to parent carers of disabled children. We recommend that the Government brings forward amendments to either the Care Bill or the Children and Families Bill to give parent carers of disabled children equivalent rights to a needs assessment for support. (Paragraph 114)
Formal Minutes

Wednesday 22 January 2014

Members present:

Dr Hywel Francis, in the Chair

Mr Robert Buckland
Mr Virendra Sharma
Sir Richard Shepherd

Baroness Berridge
Baroness Kennedy of the Shaws
Lord Lester of Herne Hill
Baroness Lister of Burtersett
Baroness O’Loan

Draft Report (Legislative Scrutiny: Care Bill), proposed by the Chairman, brought up and read.

Ordered, That the Chair’s draft Report be now considered.

Paragraphs 1 to 114 read and agreed to.

Resolved, That the Report be the Eleventh Report of the Committee to each House.

Ordered, That the Chair make the Report to the House of Commons and that the Report be made to the House of Lords.

Ordered, That embargoed copies of the Report be made available in accordance with the provisions of Standing Order No. 134.

[Adjourned till Wednesday 29 January at 9.30 am]
Declaration of Lords’ Interests

No members present declared interests relevant to this Report.

A full list of members’ interests can be found in the Register of Lords’ Interests:
http://www.publications.parliament.uk/pa/ld/ldreg/rego1.htm
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