

## Parliamentary Briefing

# Bill of Rights Bill, Second Reading, House of Commons

September 2022

### Summary

Age UK is concerned that the Government's Bill of Rights Bill, as currently proposed, **will weaken the framework that protects older people's rights and make it harder for older people to access justice. We are especially concerned that older people living with dementia and other forms of cognitive decline and mental ill-health, and care home residents, will lose out as a – no doubt unintended – consequence of these proposed reforms.**

The Human Rights Act provides a legal framework for public authorities and organisations carrying out public functions. It obliges public authorities to protect and promote human rights. The Human Rights Act also ensures that other laws affecting older people should be applied in a way that respects human rights, including the Equality Act 2010, the Care Act 2014, the Mental Capacity Act 2005, and Deprivation of Liberty Safeguards. As currently drafted, the Bill of Rights does not achieve the same outcome.

As we age, we are more likely to need support with everyday activities. We may need personal care to help with washing, dressing and going to the toilet, and we will often have much more contact with health and care services. Under the current framework, public authorities have a duty to embed human rights principles in all that they do. For older people who need ongoing care and support, this is essential and helps to ensure that older people living in care settings are treated with dignity and respect. Where residents in care homes are state funded, they also have recourse to the Human Rights Act in the event that their human rights are breached.

Public bodies have a responsibility to take into account human rights in their work. The proposed Bill of Rights will weaken this and will make it more difficult for older people to pursue redress when their rights have been breached.

Heart breaking disputes about visiting in care homes and isolated but deeply concerning examples of the blanket imposition of 'Do not attempt Resuscitation' Orders on older people during the pandemic have shown beyond any doubt that their rights need strengthening, and that improved mechanisms should be put in place to make sure that they are upheld effectively. Far from addressing deficiencies in the current system, including the lack of redress for self-funding care home residents and the absence of an effective complaints mechanism, the Bill of Rights as drafted threatens to weaken the already fairly flimsy protections that exist for older people.

## Age UK Bill of Rights proposed amendments

### The Bill of Rights: Key areas of concern

- Removal of Clause 5 to ensure that the framework protecting older people's rights remains in place and that older people's rights are protected as society changes
- Section 3 of the Human Rights Act retained. The repeal of section 3 would lead to reduced rights protections for older people and confusion among public authorities, their staff, and the general public about what the changes would mean in practice.
- Proposals to restrict damages highlighted in Clause 18 removed from the Bill. They undermine the principle of universality and may affect vulnerable older people from getting compensation where the state has breached their rights.
- The removal of the 'permission stage' proposed in Clause 15. This would make it impossible for the majority of vulnerable older people who have experienced human rights abuses to go to court.
- Further consideration of the impact of the Bill of Rights on Wales, Scotland and Northern Ireland is necessary

### Public authorities- Positive obligations (Clause 5)

Age UK is concerned that proposals to limit positive obligations will significantly weaken the rights framework that protects older people in health and social care settings.

Positive obligations play a key role in protecting and upholding the rights of ordinary people, particularly when they are at their most vulnerable. They place a duty on public authorities to proactively take effective measures to deter conduct that would breach human rights, respond to serious human rights breaches (e.g., by investigating the breach), and provide information to explain the risk of human rights breaches. This duty also provides an important means through which older people and their families can challenge human rights abuses. If this is removed, older people and their families will be less likely to have an effective form of recourse where human rights abuses have occurred.

Under the Bill of Rights:

- Public authorities would not need to adopt any new positive obligations set by the European Court of Human Rights (ECHR).
- The courts would not always require a public authority to comply with positive obligations for a broad range of reasons, including resource allocation.

The purpose of new positive obligations set by the ECHR will be to ensure that rights are safeguarded in the light of any societal changes – this could include technological changes. If these are not brought into UK law, the Bill of Rights will fail to protect older people as society changes through time.

By not requiring a public authority to comply with positive obligations, there is a risk that human rights will not always be upheld in health and social care settings.

We are also deeply worried that at a time when many public services are under extraordinary pressure, including the NHS and social care, this provision will give officials a green light to short-cut processes that protect high vulnerable older people's interests, on the grounds of 'lack of resources'.

**Age UK would like to see Clause 5 removed from the Bill of Rights to ensure that the framework protecting older people's rights remains in place and that older people's rights are protected as society changes, and when public services are under pressure.**

### **The repeal of Section 3 of the Human Rights Act**

Currently, Section 3 of the HRA obliges public authorities to apply UK laws in a way that is compatible with the Human Rights Act. It also provides a framework to help public officials make complex decisions relating to an individual's human rights and has helped to embed a culture of respect for human rights in public authorities.

Under the Bill of Rights, public authorities may no longer have to apply other laws, including laws relating to mental health or social care, in a way that ensures people's human rights are respected. This change will have a significant impact on the human rights protections available to some of the most vulnerable members of society, including older people in care settings and hospitals, many of whom are living with dementia, and will reduce the accountability of public officials and public bodies.

At present the Human Rights Act underpins many other laws in the UK, including legislation that directly applies to older people, such as the Care Act 2014, Equality Act 2010, Mental Capacity Act and Deprivation of Liberty Safeguards. It is difficult to know what these changes would mean in practice for existing and future legislation. This is likely to create a great deal of uncertainty for public authorities and their staff, including in relation to complex legal areas, such as mental capacity and deprivation of liberty.

**Age UK would like to see Section 3 of the Human Rights Act retained in the Bill of Rights. The repeal of Section 3 would lead to less rights protections for older people and confusion among public authorities, their staff, and the general public about what the changes would mean in practice. We see no justification for its removal.**

### **Claimants conduct and human rights remedies- Clause 18**

The Government is proposing that the past conduct of a claimant should be considered when decisions about remedies are made, e.g., compensation for human rights breaches.

This undermines the principle of universality of human rights, and it means that past conduct could prevent people from getting compensation when the state has breached their rights. This is likely to impact on older people affected by medical conditions such as dementia, or conditions linked to a loss of mental capacity, where an individual's behaviour may not always meet a perception of 'standard conduct'. It may also have a detrimental impact on groups of older people such as older migrants and older people from communities with high levels of police intervention, including those from minority ethnic backgrounds.

### **Example scenario**

*Person A has dementia. Before their dementia was properly diagnosed, they were convicted of theft. The medical opinion is that the theft is linked to their medical condition. Person A is now in a nursing home and their family have brought a human rights case to court because Person A has experienced neglect during their time in the care home. The Court finds in Person A's favour but Person A does not receive as much compensation as others without a previous conviction because of their history, even though their previous conviction can be linked to their medical condition.*

**Age UK would like to see proposals to restrict damages highlighted in Clause 18 removed from the Bill of Rights. These undermine the principle of universality and may affect vulnerable older people from getting compensation where the state has breached their rights.**

### **The implementation of a 'permission stage'- Clause 15**

Under the Bill of Rights, an individual would need to prove that they had faced a 'significant disadvantage' before they can make a claim (take a case to court) under the Bill of Rights. Age UK is concerned that this would make it harder for older people to hold public authorities and the Government to account.

It is well-documented that many older people face barriers to accessing justice due to mental or physical ill health, cost, and difficulties in navigating a complex system at a time they may be at their most vulnerable. We are concerned that a requirement to prove 'significant disadvantage' would create a further barrier to making a claim under the 'Bill of Rights'.

If it is not possible for an older person to access justice via the UK courts, they would need to take a case to the European Court of Human Rights in Strasbourg. This is likely to be very difficult for many older people due to the reasons set out above.

**Age UK would like to see this proposal removed from the Bill of Rights. This proposal would make it almost impossible for the majority of vulnerable older people who have experienced human rights abuses to go to court.**

### **Impact on human rights protections for older people in Scotland, Wales and Northern Ireland**

More attention must be given to potential incompatibility between a Bill of Rights and legislation in Northern Ireland, Scotland and Wales. For example, in Scotland the European Convention on Human Rights is given effect through the 1998 Scotland Act as well as the existing Human Rights Act. In Wales, the requirement that legislation passed by the Senedd must be compatible with the Human Rights Act means that the Act is fundamental to the Welsh devolution settlement. It is unclear from the consultation how the proposed UK Bill of Rights will interact with law at the local level and how it will fit with plans in Scotland and Wales to strengthen and advance human rights, or ongoing plans to develop a Northern Ireland Bill of Rights. We think this is potentially a significant problem that does not have a clear resolution.

**Age UK believes further consideration of the impact of the Bill of Rights on Wales, Scotland and Northern Ireland is necessary.**

### **How current Human Rights legislation protects older people**

The Human Rights Act was implemented in October 2000. It provides a framework through which older people's rights can be protected and enforced in their day-to-day interactions with health and social care services. For example:

- Under Article 2, 'the right to life', clinical decisions to withdraw treatment should only be made where there is no therapeutic or other benefit to the patient. Adopting Human Rights principles in practice, decisions around non-conveyance to hospital, withdrawal of treatment or nutrition or the application of 'Do Not Attempt Pulmonary Resuscitation (DNACPR)' orders should be made in consultation with the person affected or their next of kin/loved ones wherever possible.
- Under Article 3, older people whose care has been state-funded must be protected from inhumane and degrading treatment
- Under Article 5, the right to liberty, older people must not have their liberty taken away from them without the correct Deprivation of Liberty Safeguards procedure being followed
- Under Article 8, the right to respect for private and family life, home and correspondence, everyone has the right to live without harassment and with respect for their private, personal and family life. For example, older people should be supported to stay in their home, or with family or partner, if they choose to. They should also be free to enjoy visits and support from their loved ones if they live in a residential care setting.
- Under article under Article 14, older people must not be discriminated against because of their age, e.g., they should not be refused medical treatment

The Act also provides mechanisms to challenge poor treatment – for example, families of those in Mid-Staffordshire Hospital were able to use human rights arguments to secure compensation for scandalously poor treatment suffered by their relatives, such as being left in soiled sheets and not being given enough to eat or drink during their time in hospital.

### **How could older people's rights be better protected?**

There are several measures the Government could take using this Bill and other legislation that would improve the rights and protections of older people. This includes:

- A new, independent complaints process for health and social care that really works for older people (existing complaints procedures are often inadequate – complaints processes are complex, often lengthy, and some routes to redress are not available to people who fund their own care and the regulator is currently unable to investigate individual complaints).
- Better tenancy protections for older people living in residential care settings – safeguarding residents against unfair evictions & fee hikes, unjustified visiting bans and the inappropriate application of bad behaviour clauses
- Recourse to effective legal mechanisms for all older people receiving social care, including those who pay for and arrange their own care (this group cannot currently make a claim under the Human Rights Act)

- The establishment of an Older People's Commissioner for England to champion the rights of older people and make changes that positively impact older people and ensure their rights are upheld.
- Full support from the Government for an international Convention on the Rights of Older People – to provide a strong framework to protect older people's rights post-pandemic at the national and international level.

### **What you can do**

We would be delighted if you were able to raise any of these points at the Bill's Second Reading. For more information please contact Roshni Mistry, Senior Public Affairs Officer at [roshni.mistry@ageuk.org.uk](mailto:roshni.mistry@ageuk.org.uk)