Department of Health & Social Care

From Gillian Keegan MP
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Rt Hon Harriet Harman MP
Chair of Joint Committee on Human Rights

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Dear Harriet,

Thank you for your letter of 20 May and the crucial work of the Joint Committee on Human Rights in examining human rights issues not only in the social care sector but across this government's work.

You asked about the application of the Human Rights Act 1998 (HRA) to the adult social care sector. The Act's provisions apply to the actions of a "public authority", which includes persons exercising functions of a public nature. Section 73 of the Care Act put beyond doubt how this definition relates to the adult social care sector. We have further reviewed the position and agree with your understanding that the HRA applies only in cases where care is either arranged or funded, in part or in whole, by a local authority. Other arrangements are between private individuals and private businesses, and therefore outside the scope of the HRA. However, in cases where care is arranged by the NHS and funded through Continuing Health Care, section 73 of the Care Act does not apply. However, the CCG (or Integrated Care Board from July 2022) making arrangements for that care will fall within the HRA definition of a public authority, and the person in receipt of care and support will therefore benefit from its protections.

We therefore agree that, in a strict legal sense, the HRA protections are triggered by the circumstances in which an individual receives care, and the position is not affected by whether any other individual supported by the same provider qualifies for these. However, it goes without saying that care provider-wide policies, including those relevant to human rights – for example on visiting – will apply to those individuals in receipt of care and support who are entirely self-funded in exactly the same way as they apply to those benefiting from HRA protections. Since the vast majority of care providers offer care and support for one or more residents who are funded by a local authority or the NHS, in practice some of the positive impacts of HRA protections extend further than its legal scope.

There are other safeguards in place which protect the human rights of self-funded individuals in private care settings, which have a duty of care to all those they care for regardless of how they are funded. All CQC-registered providers must meet the fundamental standards set out in the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014, including person-centred care, treating people with dignity and respect, and providing safe care and treatment. Where these are believed not to be met, individuals can bring civil claims against providers for damages on the basis that the provider has breached its duty of care or been negligent. In addition, private providers are

likely to have contractual obligations to ensure the safety and wellbeing of people in their care and individuals would also be able to bring a civil claim for breach of contract.

Providers must act on complaints received from people with care and support needs, who have further recourse to the Local Government and Social Care Ombudsman (LGSCO) if they wish to lodge a complaint. Compliance with the LGSCO's findings is high: in 2020/21 99.8% of providers and councils agreed to and implemented LGSCO recommendations.

Finally, our charging reforms will bring more individuals within scope of the HRA. The further commencement of section 18(3) of the Care Act in October 2023, as a part of the wider package of charging reforms, will give more self-funding individuals the opportunity to have their care arranged by the local authority. This part of the Care Act is already in effect for domiciliary care and will be extended so that more self-funders who require support in a care home can ask their local authority to meet their needs (meaning that the local authority will have a duty to arrange care in a care home for these individuals), bringing them within the scope of the HRA as confirmed by section 73 of the Care Act. The extension of the upper capital limit of the means test will also bring more people into local authority-arranged care; more individuals who would previously have funded and arranged their own care will fall within the means test limits and therefore have their care arranged by their local authority.

I would also like to clarify the point I made about the higher risk of mortality faced by all people with a learning disability during the pandemic. Research has shown that it is some people with a learning disability, such as people with Down syndrome, who are within the top percentage of people at severe risk of death due to Covid-19 (source BMJ: https://doi.org/10.1136/bmj.n2244). In addition, in response to the question from Florence Eshalomi (MP for Vauxhall), I mentioned Senior Intervenors. Senior Intervenors are being offered - as part of a pilot – initially to those who will most benefit from extra support to overcome blockers to discharge rather than everybody in long term segregation. Everyone with a learning disability or autistic person in long term segregation will be offered an independent review of their care and treatment.

During the evidence session I committed to write to you with further details on prosecutions for neglect of residents and on CQC investigation of complaints under the Mental Health Act (MHA).

Section 20 of the Criminal Justice and Courts Act 2015 makes it an offence for any paid care worker to ill-treat or wilfully neglect someone they care for, and section 21 makes it an offence for a care provider to ill-treat or wilfully neglect those they care for. Crucially ill treatment refers to the conduct of the offender irrespective of whether it damaged or threatened to damage the health of the victim.

The Ministry of Justice publish quarterly Criminal Justice System statistics which includes data on s.20 and s.21 of the Criminal Justice and Courts Act 2015. The latest publication was on the 19 May 2022 available here. As of December 2021, this publication shows:

- An increase in the number of cases proceeded against section 20 of the Criminal Justice and Courts Act since 2017 where a care worker ill-treated/wilfully neglected an individual, with 56 proceeded in 2017 and 74 proceeded in 2021.

- The number of convicted and sentenced cases under section 20 of the Criminal Justice and Courts Act have remained low since 2017, between 21-26 cases where a care worker ill-treated/wilfully neglected an individual, except during 2019 when convicted and sentenced cases rose to 42 and 40 cases respectively.

- The number of proceeded cases against section 21 increased from two in 2017 to seven in 2021 however there were no convicted or sentenced cases under section 21 of the Criminal Justice and Courts Act in 2021.

Turning now to the CQC investigation of complaints under the MHA: the principal role of the CQC in responding to MHA complaints is to hold providers to account about how they investigate the matters raised by individuals escalating concerns to CQC, and to monitor all the complaints in the system relating to MHA. This includes ensuring that providers respond in accordance with their own policies and procedures; that they acknowledge the issues someone has raised; keep them informed about how they are responding to them; inform them if their response is going to be late; and provide the person concerned and CQC with a clear decision about the outcome of the investigation.

The CQC complaints team and national contact centre received 2,280 complaints and concerns about the MHA in 2021/22. This compares to 2,231 in 2019/20 and an average of 2,385 over the past five years.

The most common issue raised to CQC in 2020/21 concerned the medical treatment patients had received under the MHA (21%). This was down from 29% who raised this issue to CQC in 2019/2020. Other commonly raised issues in 2020/2021 included those relating to dignity, privacy and safety (20%), respect and dignity (15%) and provision of information (12%).

On the 23 March the Committee asked CQC for data relating to the steps taken in relation to each of 2,280 complaints, to help better understand why that resulted in seven investigations. As requested by the Committee, CQC have provided written evidence further detailing their role in overseeing MHA complaints and the process CQC follows.

As you will be aware from the additional evidence provided by CQC, in 2020/21 CQC opened seven investigations about complaints that had not been satisfactorily resolved through local processes. This compares with 14 investigations CQC undertook in 2019/20. CQC anticipate the number of CQC investigations will be higher in 2021/22 than the previous two years and will report on these numbers in their MHA annual report to Parliament.

As set out in their evidence to the committee, CQC do not hold the granular data about the individual steps taken in the 2,280 cases, but CQC do employ a robust, staged process to hold providers fully to account in how they respond to every single complaint CQC pass to them.

I would like to take this opportunity to reiterate my thanks to the Committee for extending the invitation to provide evidence to the inquiry into protecting human rights in care settings and I hope that this additional information assists the Committee in its inquiry. I would be grateful if the record could be corrected to clarify how the Care Act and Human Rights Act apply to private providers, and I look forward to receiving a copy of your report.

GILLIAN KEEGAN