

PROTECTION OF CARE RECIPIENTS AND CARERS BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Protection of Care Recipients and Carers Bill [HL] as introduced in the House of Lords on 6 December 2022 (HL Bill 78).

- These Explanatory Notes have been provided by Lord Hunt of King's Heath in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill.

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Overview of the Bill

- 1 The objectives of this Bill are to address concerns surrounding the health, well-being and rights of people in residential care, their families and carers, which have been brought to light during the COVID-19 pandemic. The legal protections and guarantees summarised below are based on key recommendations and lessons learned set out in recent Reports by the House of Commons Health and Social Care Committee and Parliament’s Joint Committee on Human Rights, and evidence received during the passage through Parliament of the Health and Care Act 2022.
- 2 The Bill introduces regulatory and other mechanisms to guarantee that care users have reasonable access to, and support from, loved ones.
- 3 Provisions are included to protect residents from increasingly common patterns of institutional abuse, in which care homes retaliate against residents or relatives who complain by banning visits, threatening residents with eviction and sometimes evicting them.
- 4 Existing fundamental standards for treatment and care are updated to make it an offence for care providers to issue “do not attempt cardiopulmonary resuscitation” (DNACPR) Notices to people without consulting them, their loved ones, or carers (as applicable), where the person concerned suffers harm, or dies as a result.
- 5 Fundamental standards are also updated to place duties on care providers: to take account of the needs of carers who support service users; to enable service users to receive support from loved ones, while assessing any risks involved; to plan properly for emergencies including epidemics; to make people aware of complaints procedures; and to focus better on the nutritional needs of service users.
- 6 Finally, the Bill ensures that all recipients of health and care services, whether or not this is funded and arranged privately, have the same human rights under UK law. The Bill equalises rights contained in the Human Rights Act 1998.

Policy background

- 7 In several recent Reports, Parliament’s Joint Committee on Human Rights has examined lessons to be learned from the COVID-19 pandemic. One common theme emerging from their work is the way in which people in care through age, disability or illness – already amongst the most vulnerable in our society – are often doubly disadvantaged, and their vulnerability increased, through a lack of effective remedies for inappropriate or abusive treatment which can leave them effectively helpless.
- 8 In particular, according to the July 2022 Report¹:
 - “Insufficient respect [has been] given to ensuring meaningful contact [with] loved ones, during the pandemic, and in some cases, since general restrictions ... ended” [paragraph 69]. “[T]oo often the correct balance has not been struck” between infection control and contact with loved ones, “and too much has been left to individual care settings to determine” [paragraph 66].

1 Joint Committee on Human Rights, Protecting human rights in care settings, 13 July 2022, <https://committees.parliament.uk/publications/23214/documents/169544/default/>

- The Committee heard concerns that care users are put off making formal complaints because they face retaliation [paragraph 101]. The Care Quality Commission (CQC) does not generally investigate individual complaints [paragraph 100].
 - “The system of rights enforcement for those in care settings can be close to if not incoherent when viewed from a user perspective” [paragraph 88]. “[E]fforts to enforce human rights in many care settings do not get off the ground” [paragraph 90].
 - The Committee heard how DNACPR Notices have been imposed without consultation, most often on a blanket or group basis [paragraph 31]. The CQC told the Committee that they had found a lack of oversight and scrutiny of these decisions [paragraph 33].
- 9 This Bill is based on the proposition that care users’ needs for more robust safeguards – which mainly predate the COVID-19 pandemic but have been highlighted by its effects – can only be secured by legislation. No relevant legislation was contained in the May 2022 Queen’s Speech or in Government bills currently in Parliament. In all cases but one, the measures introduced by this Bill do not affect the Human Rights Act 1998.

Commentary on provisions of Bill

Clause 1: Right to Care Support

- 10 Clause 1 implements recommendation 19 (paragraph 83) of the Joint Committee on Human Rights (JCHR) Report *Protecting human rights in care settings* (July 2022),² by giving everyone a right to nominate up to two Care Supporters. Service users in any care setting will then have a defined entitlement to unrestricted, face-to-face physical contact in private with their Care Supporters. The Care Quality Commission (CQC) will be responsible for monitoring and enforcing compliance.
- 11 Under Clause 1, details of nominated Care Supporters will be held on GP records. In this way, the nominations will be fully portable, and automatically transferred, between all health and care settings, geographical areas and funding arrangements. This arrangement will also ensure that care homes cannot dictate or interfere with a person's personal choice as to whom they want as their Care Supporters. If someone lacks capacity in relation to a decision as to whether to have a Care Supporter, or a decision as to whom to nominate, those decisions may be made on their behalf and in their best interests in accordance with the Mental Capacity Act 2005.

Clause 2: Duty of facilitating support to care home residents

- 12 Clause 2 introduces additional protections necessary for care home residents (whether or not they have nominated Care Supporters), to ensure that families and carers have an immediate and direct remedy in the courts where access to loved ones is unreasonably denied, for example in retaliation for complaints.
- 13 This Clause complements Clause 1, placing a statutory duty on care homes to ensure that family and other informal carers are allowed reasonable access to residents. The duty would be directly enforceable in the courts by either residents or carers, who would therefore not have to depend on regulatory action by the CQC, delay to which can itself cause serious harm to residents' well-being where care homes are denying reasonable contact.

Clause 3: Prevention of potentially retaliatory care home evictions

- 14 Clause 3 is designed to prevent care homes from evicting residents, and to deter them from threatening to evict residents, in reprisal for complaints or safeguarding alerts raised by residents, their families, or carers.
- 15 Clause 3 will invalidate any eviction notices issued while complaints are still in progress.

Clause 4: Decisions concerning the future provision of cardiopulmonary resuscitation

- 16 Clause 4 addresses recommendations 5, 6 and 7 (paragraphs 36-38) of the JCHR Report *Protecting human rights in care settings* (July 2022),³ as well as recommendation 8 (paragraph 76) of the Committee's previous Report *The Government's response to COVID-19: human rights implications* (September 2020).⁴
- 17 Clause 4 changes the regulatory framework to ensure that people with learning disabilities have their right to life respected.

2 <https://committees.parliament.uk/publications/23214/documents/169544/default>.

3 <https://committees.parliament.uk/publications/23214/documents/169544/default>.

4 <https://committees.parliament.uk/publications/2649/documents/26914/default>.

- 18 The existing Fundamental Standards for care and treatment are contained in Section 2 of Part 3 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.⁵ Existing regulation 22 creates offences of failing to comply with certain Fundamental Standards; these are prosecutable by the CQC and are listed on their website.⁶
- 19 Clause 4 makes it an offence for an NHS body, care home or other registered provider to issue a DNACPR Notice for a person without involving the person in the decision to the maximum extent possible, where the person then suffers avoidable harm or a significant risk of avoidable harm as a result. The Court could impose an unlimited fine for this offence.
- 20 If the service user is a child, failure to consult the parents in these circumstances will be covered by the offence. If the service user is an adult who does not have mental capacity, a failure to consult a family member or carer about their wishes, in compliance with section 4 of the Mental Capacity Act 2005, would also constitute the offence.
- 21 This offence would also apply if someone did not want future CPR, but a decision is nonetheless made to provide CPR without consulting them, and they then (for example) suffer brain damage as a result.

Clause 5: Application of UK human rights to care settings

- 22 Clause 5 will amend the current situation under which human rights protections in UK law apply to care home residents whose placements are either funded or arranged by local authorities or the NHS (now integrated care boards), but not to other residents – who may be in the same home and in adjacent rooms – who have arranged and are paying for their care privately.
- 23 The Clause will extend the same rights to all users of health and care services, irrespective of how their care is arranged or paid for. This provision is given effect through the Care Act 2014.

Clause 6: Fundamental Standards for care and treatment: well-being of carers

- 24 Clause 6 will extend the Fundamental Standard for person-centred care in existing regulations, performance against which is regulated by the CQC, to recognise the essential role of carers, given the dependence of service users on their care. It will oblige NHS bodies and providers of residential and domiciliary care to take into account the needs of carers, including needs for respite, and to involve them in decisions about the care of a loved one who does not have mental capacity.

Clause 7: Fundamental Standards for care and treatment: support, emergencies, nutrition, complaints

- 25 Clause 7 adds into the Fundamental Standards for care and treatment some provisions that are currently not present, including some highlighted during the COVID-19 pandemic which had previously been discussed in Parliament but not yet included.⁷
- 26 Clause 7 includes within Fundamental Standards a general requirement relating to support from family, friends and carers, including individual consideration of any risks involved.

⁵ <https://www.legislation.gov.uk/ukxi/2014/2936>.

⁶ <https://www.cqc.org.uk/guidance-providers/regulations-enforcement/offences-health-social-care-act-2008-regulated-activities>.

⁷ <https://publications.parliament.uk/pa/ld201415/ldhansrd/text/141105-0002.htm#14110583000087>.

- 27 Clause 7 introduces a duty to plan for reasonably foreseeable emergencies, and arises from the problems around personal protective equipment supply during the pandemic.
- 28 Clause 7 includes an explicit requirement in the Fundamental Standards for service providers to communicate complaints procedures to those who may need to use them.
- 29 Clause 7 is also intended to help ensure the adequacy of nutrition, by requiring that service users should be offered a choice of food.

Clause 8: Extent and short title

- 30 The Act extends to England and Wales only.
- 31 The Act may be cited as the Protection of Care Recipients and Carers Act 2022.

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