

# United Nations Universal Periodic Review of the United Kingdom (3<sup>rd</sup> Cycle)

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## About this submission

The Universal Periodic Review (UPR) is a mechanism of the Human Rights Council (HRC) aimed at improving the human rights situation on the ground of each of the 193 United Nations (UN) Member States. Under this mechanism, the human rights situation of all UN Member States is reviewed every 4.5 years. The UK is due to undergo its third Universal Period Review in April / May 2017.

As part of the UPR process Age UK is very pleased to have this opportunity to comment on the UK Government's domestic human rights record over the past four years. This submission details the most significant areas where the human rights of older people in the UK are abused. It also examines the UK Government's record of reporting on the human rights situation of older people to the UN human rights treaty bodies.

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

## About Age UK

Age UK is the country's largest charity dedicated to helping everyone make the most of later life. We believe in a world where everyone can love later life and we work every day to achieve this. We help more than 5 million people every year, providing support, companionship and advice for older people who need it most. The Age UK network includes Age UK, Age Cymru, Age NI and Age Scotland and around 150 local Age UK partners in England.

## A. Background and framework

### 1. Scope of international obligations

#### *International human rights protections for older people*

- 1.1 Age, either alone or in combination with other factors, is not explicitly prohibited as a ground for discrimination in any of the UN human rights instruments, except the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Age UK believes that this failure to address discrimination on the basis of older age and to recognise ageism as a harmful social norm is one of the most significant gaps in the protection of human rights in older age both in the UK and globally.
- 1.2 Discussions at UN level about the development of a new international convention on the rights of older people have been on-going since 2011, when the Open-Ended Working Group on Ageing (OEWG) was established with a broad mandate to examine the international framework in relation to the human rights of older people, to identify possible gaps and how best to address them. The UK has been present at and observed the proceedings of all the OEWG meetings but has not taken any active part.

**Recommendation:** The UK Government should take an active role in UN level discussions about proposals for a human rights convention for older people.

## 2 Domestic constitutional and legislative framework

### *Bill of Rights*

- 2.1 The UK Government has made a manifesto commitment to repeal the Human Rights Act 1998 (HRA) and replace it with a British Bill of Rights. The newly appointed Justice Secretary said in September 2016 that her department will consult fully on the proposals when they are published, although no timetable has been provided at this stage.
- 2.2 It is Age UK's view the existing legislation provides a strong foundation for preventing abuses of older people's rights and we do not think the case for its repeal has been made. We would be particularly concerned if the proposals undermine the effectiveness or scope of the HRA or the potential for enforcing it for example by limiting its use to cases which are determined to be the most serious, allowing the UK courts to strike out cases deemed to be 'trivial'. In our view this would put at risk the Government's ability to comply with recommendation 110.32 (Qatar).

**Recommendation:** Any future human rights legislation must protect the rights and freedoms in the European Convention on Human Rights and must not undermine the effectiveness or scope of the HRA 1998 or the potential for enforcing it.

### *Older people without protection under the HRA*

- 2.3 It continues to be a matter of serious concern that not all older people in receipt of regulated care services have their human rights protected by HRA. Section 73 of the Care Act 2014 extended the HRA to explicitly cover all those receiving care funded or arranged by the local authority. However while welcome, this was only a partial closure of the protection gap that continues to leave those whose care is funded by another public body, such as the National Health Service or who are paying and arranging for their own care, outside the scope of the HRA.
- 2.4 Far from being a legal technicality this lack of protection has a very real detrimental impact on those receiving care. A number of cases have come to our attention recently that demonstrate this, including examples of older people facing unfair eviction from care homes in possible breach of their right to private and family life who currently have no means to challenge those decisions under the HRA.

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

### 3 Institutional and human rights infrastructure and policy measures

3.1 The ability of the Equality and Human Rights Commission (EHRC), a National Human Rights Institution (NHRI), to function as a strong independent national body is at risk of being compromised by further future cuts to its budget, reported in April 2016.

3.2 Since 2012 the Government has brought in legislation to narrow the remit of the EHRC, removing its duty to promote good relations between groups. In the context of our ageing society an absence of good relations between different age groups can have damaging effects and a lack of concerted effort to address such tensions and stereotypes seriously undermine attempts to promote greater age equality and tackle age discrimination.

**Recommendation:** We urge the Government to protect the EHRC's budget from further cuts.

## B. Cooperation with human rights mechanisms

### 4 Cooperation with treaty bodies

4.1 Systematic examination of the reports presented by the UK Government to the UN human rights treaty bodies in the reporting period, shows that they contain little or no substantive reporting on the human rights situation of older people. References to age were only made in the broader context of equality with regards to legislation and did not address specific abuses of human rights for older people.

4.2 For example, in its most recent report to on the International Covenant on Civil and Political Rights the Government highlights the role of the Care Quality Commission (CQC) in protecting the rights of all service users 'including older and vulnerable people in regulated care settings'. However this is the only reference to older people in the whole report and no attention is paid to any of the potential human rights breaches detailed elsewhere in this submission.

**Recommendation:** In addition to strengthening human rights protection for older people, the UK Government must be much more vigorous in using existing human rights instruments and treaty bodies.

## C. Implementation of international human rights obligations

### 5 Equality and non-discrimination

#### *Age Discrimination*

5.1 In 2012 a prohibition on harmful age discrimination in provision of goods and services came into effect under the Equality Act 2010. Despite the inclusion of an unacceptably wide exception for the financial services sector, it was hoped that this legislation would reduce the daily experiences of ageism faced by older people. In the event this

optimism has proved to be somewhat misplaced. Implementation of the Act has been hampered by low levels of awareness and understanding of the legislation. Research commissioned by the Government Equalities Office among employers and service providers found that some were not even aware that age discrimination is now covered by the Act.<sup>1</sup> This situation has been exacerbated by failure to provide adequate statutory guidance and does not comply with recommendations 110.50. (Indonesia) and 110.102. (Spain).

5.2 Without effective implementation of the legislation, evidence of harmful age discrimination is plentiful. In healthcare older people's access to a range of treatments has long been inadequate compared to other age groups, for example access to joint replacement and cataract surgery, which are treatments particularly required by older people, have both been subject to restrictions in recent years.<sup>2</sup>

**Age UK Recommendations:**

- The Government must reconsider the financial services exemption from the ban on harmful age discrimination.
- All parts of the NHS and social care services should monitor the extent to which they achieve age equality and ensure that discrimination does not arise from funding cuts.

6 Right to life, liberty and security of the person

*Deprivation of Liberty*

6.1 The Deprivation of Liberty Safeguards (DoLS) exist to regulate deprivations of liberty involving people who lack capacity to consent to their care and treatment arrangements. They have been subject to considerable criticism ever since their introduction and were deemed 'not fit for purpose' by a House of Lords post legislative scrutiny committee on the Mental Capacity Act (MCA) in 2014. A few days after this report was published a Supreme Court judgment (known as Cheshire West) widened the definition of deprivation of liberty to a considerable extent, leaving the regime struggling to cope with a huge increase in the number of cases. As a result the Government asked the Law Commission to undertake a review of the DoLS which is currently underway.

6.2 A key concern with the current DoLS system is that it is too often used to sanction restrictive care or treatment that is manifestly not in the best interests of individuals deemed to lack capacity. An issue frequently raised with us by professionals is the difficulty of identifying 'less restrictive' options to residential care because of the funding restrictions within the social care sector.

6.3 There is growing concern about the inappropriate use of antipsychotic drugs for dementia patients in care homes.<sup>3</sup> Older people in such situations may be deprived of their liberty yet safeguards are rarely in place to safeguard their rights.

**Recommendation:** Reform of the DoLS must prioritise protecting and promoting the human rights of those who are deemed to lack capacity.

## *End of Life Care*

6.4 In the period since the last review there have been a number of important legal judgments relating to the use of Do Not Attempt Cardio Pulmonary Resuscitation (DNACPR) notices, notably in the *Tracey* case in 2014<sup>4</sup>, which found that the hospital had breached Mrs Tracey's human rights by placing a DNACPR order on her notes without consulting her. We are remained concerned that despite these judgements older people's wishes in respect to resuscitation continue to be either unknown or disregarded. A national clinical audit of end of life care, published in 2016, found that a DNACPR order was in place for 94% of patients' notes at the time of death. Where sudden deaths are excluded, discussion about CPR by a senior doctor with the patient was recorded in only 36%. Overall, for 16% there was no reason recorded why a discussion did not take place.<sup>5</sup>

## 7 Right to Dignity

### *Impact of austerity on health and social care funding*

7.1 Funding for older people's social care has suffered devastating cuts in recent years. Between 2010/11 and 2015/16 the budget for older people's social care shrank from £8 billion to £6.3 billion – a reduction of 21 per cent, although demographic change meant the number of people requiring care grew.

7.2 This under-funding poses a real threat to older people's right to dignity under article 8 ECHR. People who would have received publicly funded social care in the past are no longer eligible, meaning those without access to informal care or who can't afford to pay are being left to struggle on alone, with consequent risks to their health and wellbeing. There are now more than a million older people who have difficulty with daily living activities such as eating, bathing and taking their medication who receive no support from paid or unpaid carers.<sup>6,7</sup> This is in spite of a new Care Act, enacted only in 2014, which requires greater support for people who pay for their own care.

<p><b>Recommendation:</b> An immediate and significant injection of funding into social care is needed in order to safeguard older people's human rights.</p>
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### *Quality of Care*

7.3 Serious concerns persist in relation to dignity in the care of older people in social and health care settings. In 2015, the London School of Economics (LSE) found that around a million older people reported 'poor or inconsistent standards of dignity and respect' when in hospital. Around 640,000 older people reported not getting enough help to eat. As lower levels of staffing are linked with poor performance in delivering basic care, it is a growing concern that there are increasing numbers of hospitals under 'special measures,' due in part due to not having safe staffing levels.<sup>8</sup>

7.4 The process of discharge from hospital is an area which warrants particular attention. A recent report from the Ombudsman concluded that *'Our casework on hospital discharge illustrates how failures in communication, assessment and service co-ordination are compromising patient safety and dignity, undermining patients' human rights and causing avoidable distress and anguish for their families and carers.'*<sup>9</sup>

**Recommendation:** Current drives towards quality in hospitals and care homes must be maintained, and hospitals must do more to recognise those with high needs as soon as they are admitted, and to support them after discharge.

### *Elder Abuse*

7.5 Abuse of older people in the UK is largely a 'hidden problem'. Official police statistics consistently report low levels of abuse and domestic violence against older people. But prevalence surveys suggest that around 340,000 (about 1 in 25) older people living in the community are affected by abuse every year.<sup>10</sup> The Care Act 2014 includes a duty on local authorities to investigate allegations of abuse and neglect. However there is no explicit duty in the Act to take action following such an investigation, and people can no longer be eligible for local authority support on the basis of being at risk of abuse or neglect.

**Recommendation:** The abuse of older people should be given greater profile and awareness of the links between domestic violence and the abuse of adults should be actively promoted. Solutions should empower older people, enabling them to achieve the outcomes that they want, and not label them as 'vulnerable' or further erode their autonomy.

## 8 Administration of justice, including impunity and the rule of law

### *Access to complaints mechanisms in health services*

8.1 Despite being the greatest users of health and social care, there is evidence to suggest that older people are often less likely to complain if they receive poor service. Complaints from those aged 65 and over about their healthcare only made up around a quarter of all the complaints received about health care services in England in 2014-15.<sup>11</sup>

### *Access to Employment Tribunals*

8.2 In 2013 fees were introduced in Employment Tribunals for the first time. People bringing an age discrimination claim have to pay an initial fee of £250, followed by £950 if the claim goes to a hearing. Age UK is seriously concerned that this increase is pricing those who have suffered discrimination at work out of the justice system, and means that employers who discriminate against older workers are not being held to account.

**Recommendation:** Age UK is calling on the Government to repeal tribunal fees for discrimination claims.

- 9 Freedom of religion or belief, expression, association and peaceful assembly, and right to participate in public and political life

### *The Right to Vote*

9.1 There is emerging evidence that older people in residential settings are not receiving the support they need to be able to vote in elections. A study into how those living in residential and nursing care settings were supported to vote in the 2015 general election found wide variations in practice between different services.<sup>12</sup> Alarming the study found that in some homes mental capacity is tested before residents vote and in the vast majority of cases if a resident is found not to have mental capacity to make this decision they are prevented from voting. This is reflected in figures which suggest that in these settings turnout is less than half of the national average, whereas the demographic of these settings would suggest it might have been expected to be higher than average.

- 10 Right to work and to just and favourable conditions of work

10.1 Age discrimination, myths and stereotypes continue to exist around the productivity, capability and commitment of older workers, despite the fact that unjustified age discrimination has been illegal for five years. This can lead to older workers being overlooked for recruitment, training and promotion, or leaving the labour market before they are ready to do so with detrimental effects, both financial and personal. Long-term unemployment remains a persistent problem for workers aged 50+. Over 42 per cent of unemployed people aged 50–64 have been out of work for more than a year – a higher rate than for any other age group.<sup>13</sup>

**Recommendation:** The Government must make the case for employing older workers more effectively, in particular to smaller businesses, including improving awareness of age discrimination.

- 11 Right to social security and to an adequate standard of living

11.1 Relative pensioner poverty has fallen over the last twenty years but there are still 1.6 million (14 per cent) of pensioners living in poverty (with incomes of less than 60 per cent of typical household income after housing costs) of whom 900,000 are in severe poverty (incomes less than half of typical household income). Some groups are at greater risk. For example 35 per cent of private tenants and 24 per cent of social tenants are in poverty compared to 10 per cent of owner occupiers. Ethnicity is also important - 27 per cent of Asian or Asian British and 24 per cent of Black or Black British are in poverty.<sup>14</sup>

**Recommendation:** The Government should set targets for the continued reduction and eventual abolition of pensioner poverty. Pensioner poverty should be halved by 2020.



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- <sup>1</sup> *Evaluation of the Implementation of the Equality Act 2010: Report 2 – Awareness and Impact of the Equality Act*, Government Equalities Office, January 2013
- <sup>2</sup> Access all ages, Royal College of Surgeons/Age UK, 2012
- <sup>3</sup> Szczepura A, Wild D, Khan AJ, et al. Antipsychotic prescribing in care homes before and after launch of a national dementia strategy: an observational study in English institutions over a 4-year period. *BMJ Open* 2016
- <sup>4</sup> R (Tracey) v Cambridge University Hospitals NHS Foundation Trust & Ors [2014] EWCA Civ 822
- <sup>5</sup> End of Life Care Audit – Dying in Hospital: National report for England 2016, RCP/Marie Cure (2016)
- <sup>6</sup> Age UK Research analysis using Marmot, M. et al. English Longitudinal Study of Ageing: Waves 0-6, 1998-2013 [computer file]. 21st Edition. Colchester, Essex: UK Data Archive [distributor], July 2014. SN: 5050
- <sup>7</sup> Principal Projection – England Population Single Year of Age, 2012-based, ONS 2013
- <sup>8</sup> Older people’s experiences of dignity and nutrition during hospital stays: Secondary data analysis using the Adult Inpatient Survey, Vizard, P., Burchardt, T., LSE, 2015
- <sup>9</sup> Parliamentary and Health Service Ombudsman (2015) *A report of investigations into unsafe discharge from hospital*
- <sup>10</sup> NatCen (2007) UK *Study of Abuse and Neglect of Older People Prevalence Survey Report*
- <sup>11</sup> Parliamentary and Health Service Ombudsman (2015) *Breaking down the barriers: Older people and complaints about health care*
- <sup>12</sup> Thompson, E., Kaur, R., Scullion, J. and Baggott, R. (2016) Care and the Vote, *Political Studies Association 66th International Conference* (panel 2015 General Election 2), Brighton, 21st - 23rd March 2016
- <sup>13</sup> Labour Market Statistics, June 2015
- <sup>14</sup> Households Below Average Income 1994/5 to 2013/14 DWP 2015.