

## Inquiry into Residential Care for Older People

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**Evidence from Professor John Williams, Department of Law and Criminology, Aberystwyth University.**

Contact details – [jow@aber.ac.uk](mailto:jow@aber.ac.uk)

1. I present this evidence in a personal capacity. I have a research interest in older people and the law and in particular in the safeguarding and protection of older people. Paragraphs 2 – 7 consider the effectiveness of the regulatory framework and suggest an alternative approach; paragraph 8 includes a short comment on financial viability.
2. This Inquiry is timely given the concerns recently expressed about the care of older people in residential care and the disturbing revelations of the quality of care in some (by no means all) care homes in England and Wales. The legalistic approach to regulation has not really changed since the Registered Home Act 1984 and has failed to keep pace with a growing awareness of human rights. The residential care home landscape in the 1980's was quite different from that of today, not least because it was then driven primarily by financial assessments rather than assessments based on need.
3. The Care Standards Act 2000 and the regulations, are no longer fit for purpose and Wales should consider a more imaginative regulatory framework that works from general principles of 'good' care and respect for human rights. My main criticisms of the current regulatory framework are:
  - a. It is driven by detail and attempts to anticipate every conceivable situation that could arise in a care home. Such a traditional regulatory approach does not necessarily drive up standards; it creates a compliance culture rather than an enhancement culture. Adhering to the detail can distract from the broader requisites of quality residential care. It can lead to defensive practice that in turn may perversely reduce the quality of the provision from the older person's perspective.
  - b. The National Minimum Standards for Care Home for Older People are a helpful adjunct to the legal framework. The Aims of the NMS are clearly stated in paragraph 1 of the Introduction

‘These standards will be used by the Assembly’s Care Standards Inspectorate for Wales (CSIW) when determining whether these care homes are providing adequate care, meeting the needs of the persons who live there and otherwise being carried on in accordance with regulatory requirements.’

The standards in the NMS cover important issues for older people in residential care that were identified during the consultation exercise - choice of service, planning for individual needs and preferences, quality of life, quality of care and treatment, staffing, conduct and management of the service, concerns, complaints and protection, and ☒ physical environment.

Quite properly, the NMS are designed to achieve stated outcomes. The NMS may not be deserving of criticism as they are thoughtful and were innovative at the time of their introduction. However, they are specific in their approach and risk compartmentalising some of the more pervasive themes that should inform good quality provision. They also predate the deprivation of liberty safeguards and the importance of care homes having policies and procedures, and a physical environment that minimises the risk of a deprivation. Liberty and the protection of it, is critical to the operation of any care home and should feature prominently in any regulatory regime.

Admittedly, much guidance and assistance is found in the Deprivation of Liberty Code, but the creation of an environment that maximise liberty must be central within the regulatory framework.

4. There is a need for a new regulatory framework that starts with a number of key principles that permeate into the more detailed regulation. The current Welsh regulations include principles such as independence, dignity, privacy and family life not as overarching principles, but rather as components of the detailed regulations. Consequently, these principles are fragmented, qualified in application and lost in the detail. The Law Commission's report, *Adult Social Care*, discusses the use of statutory principles in adult social care law. (Law Commission, Law Com No 326 . Although it modified its thinking following the consultation exercise, it recommended identifying on the face of the statute an overarching purpose of adult social care, namely to promote or contribute to the well-being of the individual (paras 4.16–4.21). This approach builds on the successful use of statutory principles in the Mental Capacity Act 2005 and the Children Act 1989. It is a useful model for the future development of care home regulation in Wales.
5. The application of the Human Rights Act 1998 to care homes has an unfortunate history given the finding by the House of Lords in the YL case that a private care home did not perform a function of a public nature and therefore was not bound directly by the Human Rights Act 1998. This was remedied partially by s.145 Health and Social Care Act 2008 in relation to care home providing care under arrangements made by a local authority.
6. The Care and Social Services Inspectorate Wales performs 'functions of a public nature' with s.6 Human Rights Act 1998, and the Welsh Ministers, by virtue of s.81 Government of Wales Act 2006, cannot do any act that is incompatible with the European Convention on Human Rights. In any future regulatory framework, human rights must be central and must set the tone for the detailed regulation. Human rights principles must be present on the face of the legislation. These statutory principles would not duplicate the Human Rights Act 1998; they would instead provide a clear principled framework focused on residential care within which detailed regulations operate.
7. The United Nations Principles for Older Persons (passed by the General Assembly in 1991) contain five principles that states are encouraged incorporate into their national laws. In Wales, s.25 *Commissioner for Older People (Wales) Act 2006* requires the Commissioner to 'have regard' to the Principles in deciding what constitutes the interests of older people in Wales. They could also provide a basis for statutory principles applicable in any new regulatory framework for care homes. The matrix below seeks to illustrate how, working from each individual UN

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Principles through the relevant ECHR provision, a more detailed framework could be developed. This is illustrative only and would need much more refinement. However, it seeks to demonstrate how the general principle could translate into a more detailed provision. The advantage of this approach is that detail is dependent in its application on the principle. For example, why are appropriate staffing levels important? They are important not for their own sake, but to maximise the independence of the resident.

<b>UN Principle</b>	<b>Relevant ECHR provision</b>	<b>Detailed regulatory issues</b>
Independence	Art 3 – prohibition of inhuman or degrading treatment Art 5 – right to liberty Art 8 – private live, family life, home and correspondence Art 9 – right to freedom of thought, conscience and religion Art 10 – freedom of expression	<ol style="list-style-type: none"> <li>1. Appropriate staffing level and training to ensure high quality personal care.</li> <li>2. The need for an environment that is not restrictive, encourages, and facilitates access the wider community.</li> <li>3. A safe environment.</li> <li>4. Regular contact (when it is what the older person wants) with family.</li> <li>5. The need to recognise that the care home is that person 'home' and should be respected as such.</li> <li>6. Recognition of diversity</li> </ol>
Participation	Art 5 – right to liberty Art 8 – private life Art 8 – private live, family life, home and correspondence Art 10 – freedom of expression	<ol style="list-style-type: none"> <li>1. Participation in the wider community – how this can be facilitated.</li> <li>2. Participation in the decision making process of the care home.</li> <li>3. The need to avoid decisions being taken about a resident rather than with a resident.</li> <li>4. Participation in a chosen religion.</li> </ol>
Care	Art 2 – protection of life Art 3 – prohibition of inhuman or degrading treatment Art 5 – right to liberty Art 8 – private live, family life, home and correspondence	<ol style="list-style-type: none"> <li>1. The provision of high quality care by trained staff that meets resident's entitlement to food, hydration, heat, comfort, personal care, health care and social care.</li> <li>2. A suitable physical environment to ensure that such care is provided (e.g. the ergonomics of the building must be fit for purpose)</li> <li>3. Access to necessary services that can be provided in a dignified</li> </ol>

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		<p>way that respects privacy.</p> <p>4. Choice.</p> <p>5. The right to refuse services.</p>
Self-fulfilment	Art 8 private life	<p>1. A challenging environment that respects the needs for communal activities and private time and space.</p> <p>2. Access to educational, cultural, spiritual and recreation facilities.</p> <p>3. The need to ensure that the environment and culture is one in which residents can continue to develop and thrive.</p>
Dignity	<p>Art 2 – protection of life</p> <p>Art 3 - prohibition of inhuman or degrading treatment.</p> <p>Art 8 – private life</p>	<p>8. Respect for privacy especially in relation to toilet needs and personal care.</p> <p>9. Appropriate safeguarding and protection procedures that link in with local safeguarding procedures.</p> <p>10. Training of staff in issues of dignity and safeguarding</p>

7. Particular emphasis in any new regulatory framework must be placed on the following:
- a. A care home is a person's 'home' and engages the right to protection of the home. Residents are not simply 'placed' in a care home – it is their home and within that home they should be able to personalise their space to reflect their personality;
  - b. Some consideration must be given to pets and whether this engages any human rights;
  - c. Care home should be family friendly and make provision for grandchildren and other family members to ensure that the right to family life is protected;
  - d. The design and architecture of care homes can be crucial in maximising liberty and preserving dignity particularly for residents with dementia (lighting, visual distinction between various areas, recognition that corridors may be a primary space for people who wander etc). We need to ensure that human rights are incorporated into the design process;
  - e. Access to fresh air and to natural light and views.
8. Financial viability is a major concern, especially following the Southern Cross experience. The provision of care homes has regrettably been turned into a business and it is probably too late to reverse this. However, it should be incumbent on the regulatory framework to ensure that those living in care homes have security and are not exposed to unnecessary risks because of speculative activities by financial backers. We are not dealing with commodities; we are dealing with people some of whom are particularly vulnerable.

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