

Close to home recommendations review

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1. Acknowledgements

The Equality and Human Rights Commission (the Commission) is grateful to all the organisations and people who helped us with this review. These include the local authorities that responded – particularly those supplying extra documentation – and those we interviewed,

the United Kingdom Homecare Association, HM Revenue and Customs and Unison. We also talked to the Low Pay Commission Secretariat about the Commission's recent recommendations concerning the social care sector.

2. Introduction and terminology

This report presents the Commission's assessment of what local authorities, Government, the Care Quality Commission and the Local Government Ombudsman have done in response to recommendations directed at them in our Close to home inquiry report.

Close to home was published in November 2011 following a formal inquiry into older people and human rights in home care. It revealed serious breaches of human rights including people not getting support to eat and drink, being put to bed at 2.45pm and being left unwashed for days.

Close to home called for:

- effective monitoring to ensure that human rights are properly incorporated into the ways in which local authorities commission home care and that systems are put in place so that problems in care delivery come to light early;
- protection to close gaps in the current legal system; and
- better guidance for older people so that they have clear information about their human rights when making decisions about home care plus guidance for local authorities about their human rights obligations.

The terminology we use in this report is:

Close to home

Close to home, published by the Commission in November 2011, presented our findings and recommendations following a year-long formal inquiry into the human rights of older people in England wanting or receiving home care.

The Close to home recommendations review

This report is referred to throughout as the Close to home recommendations review ('the recommendations review'). It is the Commission's analysis of the action taken by others as a result of the Close to home recommendations.

The survey

The survey is an in-depth research analysis conducted on behalf of the Commission by IFF Research Ltd. IFF used an on-line survey to assess how local authorities responded to the Close to home recommendations. The bulk of our findings about local authorities in the recommendations review are drawn from this survey. The full results of the survey are in a research report which can be accessed at:
<http://www.equalityhumanrights.com/publications/our-research/research-reports/research-reports-81/>.

3. Executive summary

- We were encouraged that around 70 per cent of local authorities responded to our review by the initial deadline and that the majority of these had taken some action to address relevant Close to home recommendations. A few authorities impressed us with well thought through approaches to commissioning home care. They publicly and purposely set out to ensure that the human rights of older people needing or receiving home care were better protected.
- However, in general, the way home care is commissioned by local authorities may be increasing the risks of older people suffering human rights abuses. In particular, the rates that some local authorities pay care providers do not always appear to cover the actual costs of delivering care, a significant proportion of which is workers' wages which should include travel time. Poor working conditions may lead to a high turnover of staff and increase the risks to the human rights of older people.
- We recognise the severe financial pressures local authorities are under, but unless commissioning practices change, the threats to older people's human rights will continue.
- Organisations must 'have regard' to Commission inquiry recommendations addressed to them¹ and we are concerned the two local authorities that did not respond to our recommendations review appear not to have fulfilled this obligation. We wrote to all authorities that failed to respond to this recommendations review (listed in Appendix A) before this report was published and have implemented plans to ensure that they address the Close to home recommendations.
- Government, the Care Quality Commission and the Local Government Ombudsman have all taken some positive steps in response to Close to home. The Care Minister's announcement in March 2013 that the Care Quality Commission will resume responsibility for monitoring adult social care commissioning indicates that an independent framework will be in place to detect poor quality commissioning practices. However, we are dismayed that no action has been taken to implement the main Close to home recommendation. This is that the definition of 'public function' under the Human Rights Act 1998 should be extended to include the provision of home care by private and voluntary sector organisations, at least when this is publicly arranged, bringing home care into line with residential care services. We are also concerned that Government has no plans to issue up-to-date human rights guidance for local authorities.
- The new approach to inspections and intelligence gathering adopted by the Care Quality Commission in the summer of 2013 means that there will be specialist teams with relevant expertise in regulating home care. The Care Quality Commission has started to publish more consumer information about providers and put in place

¹ Equality Act 2006 Schedule 2 paragraph 18.

easier, more appropriate ways for older home care service users to express their views and experiences so that they become part of the intelligence base. The Local Government Ombudsman has taken some steps to improve public awareness about its role in investigating complaints from people funding their own home care and intelligence sharing with local authorities and the Care Quality Commission, but recognises that more work is needed to ensure that older people and their families know how to, and feel more able to, raise complaints and concerns.

- Our report signals the risks to human rights of older people when care workers are poorly paid and supported. To address this, we believe that not only should contracts commissioning home care include a requirement that care workers are paid at least the National Minimum Wage, including payment for travel time, but also that local authorities should be transparent and set out how the rates they pay cover these costs.
- Our findings about care worker conditions are similar to the findings in other reports published this year, in particular *Does it pay to care?* by the Resolution Foundation.² HM Revenue and Customs have recently carried out an inquiry into payment of the National Minimum Wage by care providers. Our findings also synchronise with the heightened national attention among politicians and in the media being given to the experiences of low-paid workers. The Church of England's Archbishop John Sentamu is chairing an Independent Commission looking at

the Living Wage³ which will report in 2014 and be well placed to inform party manifesto commitments for the next general election.

- The job that care workers do requires significant compassion and skill, yet their status does not reflect this. This extract from the Cavendish Review describes the reality of what society expects of care workers:

The phrase “basic care” dramatically understates the work of this group. Helping an elderly person to eat and swallow, bathing someone with dignity and without hurting them, communicating with someone with early onset dementia; doing these things with intelligent kindness, dignity, care and respect requires skill. Doing so alone in the home of a stranger, when the district nurse has left no notes, and you are only being paid to be there for 30 minutes, requires considerable maturity and resilience.⁴

- Until care commissioning practices incorporate closer attention to the real costs of care and the need to protect human rights and all Close to home recommendations are implemented in full, threats to human rights seem likely to continue.
- Since Close to home was published, the Commission has produced written guidance about human rights for older people needing or receiving home care and on human rights for authorities that commission home care. At the end of this report we explain what we plan to do next.

² Resolution Foundation (2013) *Does it pay to care? Under-payment of the National Minimum Wage in the social care sector.*

³ www.archbishopofyork.org/articles.php/2946/archbishop-of-york-launches-living-wage-commission.

⁴ Department of Health (2013) *The Cavendish Review: An Independent Review into Healthcare Assistants and Support Workers in the NHS and social care settings.*

4. Close to home

In November 2011 the Commission published *Close to home*,⁵ the findings of its inquiry into older people and human rights in home care. The inquiry was conducted using the Commission's formal legal powers⁶ and extended to older people (over 65) wanting or receiving home care in England.

Close to home found that, although half the older people who gave evidence were satisfied with their home care, many others had experienced poor treatment, neglect or patronising, ageist attitudes. The cases of most concern were where older people were not supported to eat and drink or had been left without access to food and water or in soiled clothes and sheets. Some were subjected to financial abuse. In other cases, older people were ignored by care workers rushing to complete tasks, were strip-washed by workers who talked over them, were confined to their bedroom by being put to bed in the early afternoon, or were unable to participate in their community because they received no support to leave their home.

Our assessment in *Close to home* was that many of these examples of poor treatment were likely to be breaches of the human rights of the person receiving care – specifically Article 3 of the European Convention on Human Rights (prohibition of inhuman or degrading treatment), Article 8 (right to respect for private and

family life) or Article 1 Protocol 1 (right to peaceful enjoyment of possessions). In one case, neglectful treatment could have contributed to the death of the service user, indicating a potential breach of Article 2 (right to life).

The *Close to home* evidence revealed a number of interlinked factors that increased risks to the human rights of older people using home care. These included poor commissioning practices by local authorities combined with a lack of understanding about their human rights obligations, the impact of age discrimination in assessment and provision of home care, under-investment in care workers, a lack of informed choice about care entitlements, and an inadequate legal and regulatory framework.

In some cases the poor treatment was because of unsuitable care workers, but in general we found care workers to be dedicated, hard-working people operating under challenging conditions, receiving low pay and sometimes with limited support. Their daily timetables often allowed only short time slots (sometimes 15 minutes) to deliver essential home care, including intimate personal care, to the older people they visited. This could sometimes result in care tasks not being finished. We received evidence of staff not being paid for travel time and also having insufficient time to travel between care visits. It is likely that these

⁵ Equality and Human Rights Commission (2011) *Close to home: An inquiry into older people and human rights in home care* (www.equalityhumanrights.com/uploaded_files/homecareFI/home_care_report.pdf).

⁶ Under Section 16 of the Equality Act 2006.

sorts of conditions contribute to high staff turnover rates.⁷

To tackle the systemic barriers that Close to home identified as putting human rights at risk, the inquiry report concluded with a list of 25 recommendations.⁸ These were directed at government departments, the Care Quality Commission, local authorities and others. In summary, these recommendations called for:

- more effective monitoring so that human rights are properly incorporated into the ways in which local authorities commission home care and systems are put in place in order that problems in care delivery come to light early;
- watertight protection to close gaps in legal protection; and
- better guidance for older people so that they have clear information about their human rights when making decisions about home care plus guidance for local authorities about their human rights obligations.

Since Close to home was published we have worked with others to help to ensure that its recommendations have been adopted. This has included producing user-friendly guidance for older people and their families about home care and human rights⁹ (November 2012) and practical guidance on human rights for local authorities commissioning home care services¹⁰ (April 2013). We have also fed into the work of other organisations including the Care Quality Commission's advisory group on their themed inspection programme of home care providers.

In this report, we present our analysis of the steps that others have taken in response to the Close to home recommendations and explain what we propose to do next to ensure that older people's human rights are protected and promoted in home care.

⁷ On average one in four care workers leave their employer each year (Skills for Care (2013) *NMDS-SC Briefings Issue 20 – Meeting the future workforce challenges of adult social care* (www.nmds-sc-online.org.uk/Get.aspx?id=780048)).

⁸ www.equalityhumanrights.com/uploaded_files/homecareFI/home_care_report.pdf, p. 95, Conclusions and Recommendations.

⁹ Equality and Human Rights Commission (2012) *Your home care and human rights* (www.equalityhumanrights.com/uploaded_files/your_rights_to_home_care_web_low_res.pdf).

¹⁰ Equality and Human Rights Commission (2013) *Guidance on human rights for commissioners of home care* (www.equalityhumanrights.com/uploaded_files/homecareFI/guidance_on_human_rights_for_commissioners_of_home_care_v11_may.pdf).

5. The recommendations review

Methodology

Between 9 November 2012 and 18 January 2013 an on-line survey was sent to 152 English local authorities that commission home care. In total, 101 authorities (66 per cent) responded by our initial deadline. Six authorities submitted information by email following closure of the on-line survey. Although their responses were not received in time to be analysed in the survey report, they have informed this recommendations review. A further 40 local authorities submitted responses in September 2013, which will be analysed in October 2013. The two authorities that did not respond are listed in Appendix A. Three other authorities were discounted for statistical purposes.

Recognising the significant leverage that local authorities have as commissioners of home care to protect human rights in this sector, the Close to home inquiry directed nine detailed recommendations at them. The element of our review that focused on local authorities has been the most intensive.

It is important to be aware that the research report¹¹ about the survey is based on local authorities' own interpretation and understanding of their human

rights and equality obligations. To gain a clearer picture of what authorities had done and get a better understanding of some of the more common responses, the Commission carried out its own in-house analysis of documentation which was submitted alongside the survey replies. We also conducted desk-based research, talked to stakeholders (for example, the United Kingdom Homecare Association, Unison and the Low Pay Commission's Secretariat¹²) and held 15 telephone interviews with local authority officers.

Commissioning practices

Close to home recommended that local authorities should review their home care commissioning policies and practices so that older people's human rights would be better protected and promoted.¹³ At a minimum, local authorities were asked to review:

- systems for making complaints;
- potential age bias in Resource Allocation Systems¹⁴ and care planning policies, including support for community participation;
- whether their commissioning policies and practices met the diverse needs of older people; and

11 Equality and Human Rights Commission (2013) *Older People and Human Rights in Home Care: Local Authority Responses to the EHRC 'Close to home' Inquiry Recommendations*, Research Report 89, Manchester.

12 The Low Pay Commission is the independent statutory body set up to advise the Government about the National Minimum Wage.

13 Close to home recommendation 9.

14 Commonly used systems by which local authorities allocate money from available adult social care budgets, according to set criteria, to contribute to a service user's individual budget.

- whether their commissioning policies and practices supported a properly skilled and trained workforce.

Because of the new ban on age discrimination in services,¹⁵ the survey also asked local authorities whether they had reviewed their care planning policies and Resource Allocation Systems to identify any age bias that had become unlawful because of the ban.

Our findings show:

- In total, 77 of the 101 local authorities that responded to the survey reported having taken some action to review their commissioning practices in the light of Close to home.
- When local authorities that had taken no action to review particular commissioning practices explained their failure to do so, most said this was because they believed they were already fully compliant with their human rights obligations.
- Of those authorities that had taken some action to review their commissioning practices, 66 (86 per cent) identified at least one policy or practice area that needed addressing to better protect older people's human rights.
- The most common area reviewed (by 71 of the 77 local authorities that had taken some action in response to this recommendation) was whether their commissioning practices were conducive to the development of a sufficiently skilled and supported local workforce. This was also the area where the highest number of local authorities (40) identified scope for improvement.

- However, only 15 per cent of these local authorities had reviewed all five of the policy and practice areas we had asked them to review.

- When examining their policies in the light of the new ban on age discrimination in services, 69 authorities (68 per cent of those authorities who responded to the survey) said they had reviewed their Resource Allocation Systems and their policies for care planning and community support to see whether potentially unjustifiable age discrimination existed.
- Nine local authorities found this to be the case with their Resource Allocation Systems while eight found a potentially unlawful bias in their policies for care planning and supporting community participation.
- Three of the local authorities that had identified such an age bias said they had received Counsel's advice on whether the practice was objectively justifiable, and therefore lawful.¹⁶ Of these, two had been advised that the practice was lawful.

Complaints systems

Given the Close to home finding that older people are reluctant to complain even when faced with poor standards of home care, it was disappointing that only 34 of the 77 authorities that had taken some action to review commissioning practices found opportunities for improvement in identifying barriers that older people may face in making complaints. However, some of the local authorities that took action submitted examples of positive practice they had developed to support older people in raising concerns about their home care.

¹⁵ In October 2012, age discrimination in services became unlawful (under the Equality Act 2010).

¹⁶ Under Section 13(2) of the Equality Act 2010, age-based practices are lawful if they can be objectively justified – that is, a proportionate means of achieving a legitimate aim.

One local authority's review concluded that there was a need to do more to make it easier for people to raise concerns about services and had developed a number of initiatives to address this:

'[We have] planned a 'tell us what you think' day, recruited additional Volunteer Quality Monitors, produced a 'making a complaint' film, widely distributed complaints and comments leaflets to hospitals/GP surgeries and have invited complainants to be involved in overall engagement processes working towards service improvement.'

Local authority – Midlands

Similarly, during their review, another local authority noted that older people did not always know how to raise concerns and/or were anxious about raising concerns for fear of 'losing services' or 'getting carers into trouble'.

To address this issue, they reported that:

'Direct face to face conversations with recipients of home care are now included as part of our quality monitoring arrangements. All social work reviews now include an opportunity for people to comment on their current service provision and this feedback is fed back to the quality monitoring team so that it forms part of our risk assessment of providers.'

Local authority – East of England

In the context of Close to home's evidence that many older people who receive or need home care are unlikely to complain, even when essential care needs are not met or poorly provided for, it seems that some local authorities need to pay more attention to developing user-friendly and effective feedback channels in order to form a clearer picture about home care service provision.

Age bias in resource allocation and care planning

The Close to home evidence revealed ageist attitudes towards older service users and also concluded that age discrimination might influence the amount and type of home care provided to people aged over 65, to the direct detriment of their human rights. So, for example, this could mean that people over 65 who rely on home care for their independence are left without support to get out of their homes.

The Equality Act ban on age discrimination in services came into force on 1 October 2012 (after Close to home was published). As a result of this ban, the way in which home care services are assessed, commissioned and delivered must not discriminate directly or indirectly because of age unless this can be objectively justified. Age-related harassment and victimisation are also outlawed. Local authorities were therefore asked what steps they had taken to ensure that they could objectively justify existing age-based criteria in their resource allocation and care planning policies, and particularly those related to supporting community participation.

Although we were pleased that 59 local authorities (77 per cent of those that had taken some action to review commissioning practices) looked at potential age bias in their Resource Allocation Systems, it is disappointing that only 50 authorities did so in relation to their care planning policies and support for community participation.

Some authorities acknowledged that Close to home had helped them to tackle age bias. For example, one northern local authority noted:

‘Older people tended not to have support plans which helped them go outside their home. Most support plans were felt to be quite prescriptive around personal care tasks and the processes we used did not encourage flexible planning to meet changing needs. This was an area we had been looking at for some time, but the Close to home report helped to add weight to the issues.’

Nine authorities reported finding unlawful age bias in their Resource Allocation Systems and eight in policies for care planning and support for community participation. A small number of authorities concluded that the age bias was objectively justified. This is significant because it suggests that some authorities appear to be adopting a systematic approach to addressing the new age discrimination ban in services – a few in the light of Counsel’s advice – although we lack sufficient evidence to determine whether these approaches are legally sound.

Diverse needs of older people

Close to home evidence showed that often the diverse needs and choices of older people were not adequately taken into

account in home care commissioning practices and care planning. In some cases this meant that the differing needs of older people receiving home care were not always respected – for example, their cultural needs or sexual orientation.

Local authorities were therefore asked to assess their commissioning and care planning practices to identify potential areas for improvement in meeting the diverse care needs of older people. Of the 77 authorities that had taken some action to review this aspect of their commissioning practices, 35 identified areas for improvement. Good practice by local authorities included the following positive examples.

One local authority in the Midlands identified the need to ensure that people with learning difficulties had complaints literature in an ‘easy read’ format.

Another authority in the North East said that they commission providers who can specify recruitment and working practices that reflect the cultural, ethical and religious needs of their catchment population.

One local authority in the South East has produced a Lesbian, Gay, Bisexual and Transgender Support Toolkit for the whole of the adult social care system, including home care.

However, few examples were provided overall. So although the attention to this element of the review seemed promising, the lack of tangible examples means that we do not have the evidence to show that real progress has been made in meeting the diverse needs of older home care service users.

Commissioning for a skilled and supported workforce

The low status, pay and a lack of investment in care workers was identified in Close to home as a major factor creating risks to older people's human rights. In particular, the Close to home evidence showed that the skills required to provide quality home care and levels of responsibility expected of care workers are not reflected in their pay and general working conditions. This is likely to influence staff retention and the high turnover of care workers visiting older people. Local authorities were therefore asked to review commissioning practices to assess how effective they were in ensuring the delivery of care by a sufficiently skilled, supported and trained workforce.

Compared with other areas, our findings on commissioning for a skilled and supported workforce show that this was the most likely area to have been addressed by local authorities and the area where the highest number had identified opportunities for improvement. Out of the 77 authorities that had taken some action to review their commissioning practices, 70 had assessed their practices to determine whether they helped to ensure a skilled, supported and trained home care workforce. Of these, 40 authorities had identified an area for improvement.

However, we were disappointed with the lack of practical examples about what authorities had done, or were planning to do, in order to change their commissioning practices with a view to improving the status and conditions of the local care workforce. For example, although some authorities acknowledged that better training should be available for home care workers and outlined steps that

they had taken to support this, only one made reference to the significance of staff terms and conditions. This is a concern, given the need to tackle high levels of turnover in the sector and retain and develop skills.

General

It is encouraging that over three-quarters of the local authorities who responded to the survey have taken some action to review their commissioning policies and practices. We were also pleased that the majority of those who conducted reviews found areas where they could improve their policy and practice to better promote older people's human rights.

However, we are concerned that 21 local authorities thought there was no need to conduct any of the reviews that we recommended. In most cases this was because they took the view that their commissioning policies and practices were already compliant with their human rights obligations. This perception does not fit with the Close to home findings on local authorities' levels of understanding about implementing human rights obligations. Neither is it supported by our review of the documentary evidence submitted by local authorities alongside their survey responses and survey verbatim comments which tended to indicate a limited understanding of, and low levels of compliance with, their human rights obligations.

The costs of care

The Close to home recommendations asked local authorities to ensure that contracted providers can pay at least the National Minimum Wage to care workers (including travel costs and payment for time spent travelling) and endorsed

the recommendation of the Low Pay Commission that commissioning policies of local authorities should reflect the actual costs of care, including at the very least the National Minimum Wage.¹⁷ This is a recommendation which the Low Pay Commission has consistently made.¹⁸

Close to home evidence from local authority staff and independent sector home care providers showed deep concern about the impact of commissioning at low hourly rates on care workers' pay and conditions and – in turn – on the quality of service delivered.

Our survey therefore asked local authorities how they used resources to meet service users' assessed needs while ensuring that care workers could be paid at least the National Minimum Wage. Questions included whether they had asked providers to reduce the cost of the care they provided since Close to home was published; whether they set maximum or minimum prices for provider bids; and the rates they paid for an hour of day-time home care.

Our findings show:

- 57 per cent of the authorities that responded to the survey had not requested or required providers to reduce the cost of care, while a fifth (21 local authorities) had increased the rates they were prepared to pay.
- Seven had requested a reduction in the rates paid; eight had required care providers to reduce the cost of care; and six had not yet requested or required a reduction in rates but were planning on doing this during the next year.

- Around a third of local authorities (34) set a maximum commissioning price and under a fifth (18) set a minimum price. Some of these set both.
- The lowest rate paid for an hour of day-time home care was £8.98, with 20 local authorities paying £11.00 or less.
- Some local authorities are starting to use costing models to calculate how much they should pay for commissioned home care.

Commissioning rates

There are significant pressures on local authorities to reduce their spending. Budgets assigned to adult social care, which make up a large proportion of local authority spending, are coming under particular pressure. The latest survey from the Association of Directors of Adult Social Services highlights a reduction of £2.68 billion in adult social care spending since 2010, with further reductions expected.¹⁹ At the same time, demand for adult social care is growing owing to the rapidly ageing population.

In order to control the costs of care, around a third of the authorities that responded to the survey set maximum levels for the prices they are willing to pay for care services. While local authorities may think setting a maximum price allows providers to quickly assess whether or not they should submit a tender, unless the maximum price reflects the actual costs of care, this may constitute a risk to the human rights of service users by creating incentives to reduce the quality of care provided. The maximum hourly contract rates set by some local authorities were at a level that could make this risk a reality.

¹⁷ Close to home recommendations 14 and 25.

¹⁸ In its latest report, the Low Pay Commission recommended that local authorities should include a clause in their contracts with providers to ensure that care workers get paid at least the National Minimum Wage (www.lowpay.gov.uk/lowpay/report/pdf/9305-BIS-Low_Pay-Accessible6.pdf).

¹⁹ www.adass.org.uk/index.php?option=com_content&view=article&id=914&Itemid=489.

Setting a minimum price may – depending on the level – be a more concrete indication of a commitment to a minimum quality standard.

Impact on older people getting home care

A major concern is that the low rates paid under some local authority contracts could make it difficult for providers to meet the assessed needs of older people in ways that protect their human rights. In particular, squeezing hourly rates, or placing too much emphasis on cost rather than quality, may increase the risk of rushed visits. It may also lead to ‘call cramming’, whereby providers over-book visits on a care worker’s rota, making it impossible for them to spend the allocated time on each visit. The Close to home report found that being at the receiving end of home care, including intimate personal care, delivered in limited time slots (which might be shortened owing to unpaid travel time and unrealistic schedules) can be degrading and undignified, particularly as older people are unlikely to complain.

The low pay and poor conditions of care workers are likely to be contributing to the high staff turnover rate in the home care sector. Evidence from Close to home showed that most older people preferred care to be delivered by workers with whom they had built up a relationship and that regular changes of care workers, some of whom might have little experience, carries inherent human rights risks.

Impact on care workers’ pay

From the information given by local authorities that responded, the lowest rate paid for an hour of day-time home care was £8.98, with a fifth of local authorities

paying £11.00 or less. It is difficult to see how some of the lower rates submitted reflect the actual cost of care, a major proportion of which is worker’s wages, which must be at least the National Minimum Wage.

Our finding that only a fifth of the authorities that responded had increased the rates they were prepared to pay for home care since November 2011 is perhaps to be expected in the context of severe financial restraint. However, even in areas where authorities have kept rates stable, this represents a cut in real terms to providers because the costs of care that they provide have risen since November 2011, most notably following the increase in the National Minimum Wage from £6.08 to £6.19 on 1 October 2012.

The combination of working conditions and low rates of pay may result in home care workers, in effect, being paid less than the National Minimum Wage because they may not be paid for elements such as travel time or travel expenses.²⁰ Our findings about the levels at which local authorities are commissioning care suggest that cost pressures on providers are getting more severe. This makes it less likely that care workers’ pay and conditions will improve and is more likely to exacerbate high staff turnover rates.

Of the local authorities that responded to the survey, 22 stated future contracts will ensure that home care staff employed by external providers are paid a minimum of the local Living Wage.²¹ While this is a welcome development, some authorities currently committed to supporting the local Living Wage commission home care from providers at rates that appear unlikely to cover this cost and other key elements such as training, supervision and provider overheads.

²⁰ Resolution Foundation (2013) *Does it pay to care? Under-payment of the National Minimum Wage in the social care sector.*

²¹ www.livingwage.org.uk.

Currently only 20 local authorities include a clause in their contracts requiring providers to pay workers an hourly rate in line with National Minimum Wage legislation, including travel time. However, around a quarter of local authorities indicated that they will definitely not be doing this in the future, with the rest either committed to including such a clause (28 per cent) or unsure about inclusion (45 per cent).

In order to help authorities to ensure that contracts require providers to pay care workers a proper wage, we have suggested a draft contract schedule which can be used for this purpose (see Appendix B).

Costing models

Costing models can be used to ensure that all necessary cost elements are included in the calculation of the final rate to be paid to external providers. These include workers' pay, National Insurance contributions, training, supervision, travel time, travel expenses and provider overheads. The model calculates how much is allocated to each of these. The use of costing models comes in the wake of recent judgments in legal challenges to rates used by local authorities when commissioning residential care home placements. The most recent case²² establishes that, in this sector, the actual cost of care must be conscientiously considered by local authorities with reference to evidence and, if this is to be done using a cost tool, that tool must be defensible and include all relevant factors.

It is encouraging that a few local authorities are starting to use costing models to calculate how much they should pay for commissioned home care. We know that Brighton and

Hove and Leicestershire are using carefully constructed costing models which transparently demonstrate that all elements needed to ensure quality home care services are included in the commissioning rates that they pay. A costing model which seemed to reflect nearly all of these key areas was the one developed by Brighton and Hove Council.

Brighton and Hove Council examined a number of existing tools and then developed a costing model to set a fair rate for their home care. They benchmarked rates with other councils and consulted existing providers, to see not only what rate providers would view as realistic, but also which elements of the previous package they wanted to keep. Providers highlighted the importance of access to free training for care staff, which was retained.

The Council agreed payment of the local Living Wage (£7.09/hour in 2011) as it wanted to attract and retain the right calibre of staff. The costing model was then used to build in relevant costs in order to set the rate at a fair level for all providers. These included staff on-costs, training, travel costs and provider overheads. The rate was set at the same level for all providers, with the intention of raising standards to a consistently high level and – through the payment of the same fair rate to workers – maintaining a stable local care market. The rate was £14.50 per hour with enhanced payments for calls shorter than an hour, bank holidays and complex cases.

²² South Tyneside Care Home Owners Association & Ors, R (on the application of) v South Tyneside Council, Court of Appeal – Administrative Court, June 28, 2013, [2013] EWHC 1827 (Admin).

The United Kingdom Homecare Association has developed a costing model,²³ originally designed to assist their members in the calculation of a fair price for social care services but now also freely available for others to use, including local authorities. The United Kingdom Homecare Association model is intended to provide entirely open and transparent calculations of how costs have been established. It has been used extensively.

The transparent use of carefully considered costing models that take comprehensive account of all elements of the actual costs of care will make it clear to providers that local authorities expect care workers to be properly paid, trained and supported. This approach by authorities is also more likely to create a good quality and sustainable care market better suited to ensuring a higher standard of home care for older people.

Commissioning short care visits

Close to home highlighted concerns about the commissioning of short home care visits lasting 15 minutes or less, particularly where these included the provision of personal care.²⁴ We found that this practice can result in care workers being forced to rush and older people being left without essential support such as help to eat, drink or have a wash. With these findings in mind, we asked local authorities about whether they commissioned short visits.

It was encouraging that just under a third of local authorities that responded to the survey reported that they do not commission any personal care visits of

15 minutes or less. But around half of authorities (57) continue to commission 15-minute visits to provide personal care (such as help with washing, dressing and eating) and, for 15 authorities, the number of these short care visits has increased.

We found some evidence that commissioning practices relating to short visits were being revised in response to the Close to home recommendations.

One local authority fed in the findings of the Close to home report to a working group set up to review the commissioning of 15-minute care slots. As a result of this review, a list of care tasks which should not be included in 15-minute care calls has been developed. These are: bathing; hoisting; encouragement and support to eat a prepared meal/drink; assisting to dress/undress; assisting to toilet/with toileting; and assisting with continence aids including continence pads and catheter care (this includes elements of personal care).

Local authority – North of England

Despite some encouraging findings, a number of authorities are contracting for home care services at rates which may cause threats to human rights by jeopardising the quality of the home care that providers are able to deliver. There is also evidence that some authorities are using costing models which do not take account of important elements such as workers' travel costs, travel time and essential overheads.

²³ www.ukhca.co.uk/CostingModel/.

²⁴ By personal care we mean physical assistance given to an older person in connection with everyday tasks, such as eating or drinking, toileting, washing or bathing, dressing, oral care, or the care of skin, hair and nails.

Understanding and mainstreaming human rights

The Close to home recommendations asked local authorities to do three things to mainstream human rights into their home care commissioning practices.²⁵

These were:

- incorporating human rights obligations into their decision making and their commissioning and contracting practices;
- the provision of human rights training for their elected members; and
- the inclusion of ‘third party rights’ clauses in provider contracts to give older people better individual human rights protection and a direct avenue for legal redress against home care providers.

These particular recommendations were intended to mitigate the Close to home inquiry findings that many local authorities were not using home care assessment and commissioning practices in ways that optimised opportunities to protect the human rights of older people. A related inquiry finding was that authorities tend not to understand what it means to comply with the Human Rights Act and often fail to appreciate that they are also subject to positive obligations to promote and protect human rights.

Our findings show:

- Almost three-quarters (74) of authorities said that they were taking action to mainstream human rights obligations into their decision making and their commissioning and contracting policies, while 19 others said they planned to do so in future.

- Of the 74 taking action, 19 said that they had incorporated human rights principles into their service specifications and other tendering, commissioning and procurement processes.
- Eight authorities said they had not taken any action or had no plans to do so. Five of these said this was because they were confident that their current policies and practices already fully promoted and protected human rights. Of the other three, one cited insufficient staff resources and another the impact of financial constraints, while the third gave no particular reason.
- Only a third of respondents (33) had taken, or were currently taking, action on leadership by delivering human rights training to elected members. Just over a third (35) planned to do so in future.
- Of those that provided training for their elected members, only a few made it compulsory and no indication was given of how many members attended sessions.
- 71 local authorities do not include third party rights clauses in their current care contracts.²⁶ However, 51 of these reported that they intended to include such a clause in future.
- Several local authorities raised legal uncertainty as a barrier to the incorporation of such clauses in their contracts.

²⁵ Close to home recommendations 8, 11 and 13.

²⁶ Clauses giving service users the right to challenge breaches of their human rights for which the care provider is directly responsible.

Our conclusions on mainstreaming human rights

Incorporating human rights in decision making and commissioning

Good practice on mainstreaming human rights was apparent, often from the same authorities that had done most on commissioning practices and the cost of care. For example, one local authority appears to have taken a well developed, systematic approach to integrating human rights into their home care commissioning practice.

There were other examples from local authorities that had taken on board the recommendations from Close to home:

‘The report [has had] a positive impact on the way we tendered for domiciliary care this year and was the basis for the questions we asked providers and [how we] reached a conclusion on successful providers... Service specification and contract now contain relevant sections on Human Rights and the effects of such.’

Local authority – North of England

‘The EHRC report proved to be of significant value in enabling us to review and benchmark the terms and conditions and service specification which we had developed during 2011 in advance of retendering all of our commissioned domiciliary care activity during 2012.’

Local authority – Greater London

Mainstreaming human rights

In relation to mainstreaming human rights into decision-making processes, one local authority reported that during the tendering process they require providers to give evidence of practice that protects human rights at each stage.

To assess this, they conduct surveys, telephone questionnaires, one-to-one interviews and observation visits with the providers.

The local authority provided supporting evidence of their practices in the form of a tender questionnaire together with the scoring criteria, and a list of the questions (and the scoring criteria for these) asked at the tender presentation/interview stage.

The criteria by which tenderers are assessed demonstrated a strong focus on human rights. For example, tenderers are marked on, among other aspects: their understanding of outcome-based and person-centred approaches; how they ensure that their implementation increases service users’ independence and empowers them to manage and direct their own support; and how they work with partners to ensure that service users are supported to increase participation within their communities and maintain their social and civic identity.

The local authority also submitted their domiciliary contract for service providers. Within this, they have inserted a clause that specifies the need for service providers to comply with the provisions of the Human Rights Act and that evidence of non-compliance will entitle the purchaser to suspend the service.

However, documents submitted to the survey and survey verbatim comments showed that, for a number of other local authorities, there was a degree of confusion between their obligations under the Human Rights Act and those under the public sector equality duty (PSED).²⁷ For example, to illustrate how they ensured that human rights obligations were built into their commissioning practices, a few authorities sent equality impact assessment forms.²⁸ These contained a series of questions designed to determine whether the authority was fulfilling the ‘due regard’ requirements of the PSED, together with an additional tick-box question merely asking whether or not human rights obligations had been addressed.

As explained in the Commission’s guidance on human rights for commissioners of home care,²⁹ when planning and commissioning home care services, it might also be possible to assess the impact on equality at the same time as assessing their compliance with human rights obligations. But if authorities adopt this approach, they must properly consider both. This means recognising the different nature of PSED obligations compared with legal duties under the Human Rights Act. In particular, the PSED is a duty to have no more than due regard to the need to advance equality, eliminate discrimination and foster good relations, whereas the Human Rights Act imposes clearer and more specific legal obligations relating to the promotion and protection of a wide range of rights and freedoms.

Training for elected members

We know from the Close to home inquiry findings that clear and explicit leadership on human rights from elected members and senior managers enables those commissioning home care to make decisions supporting the delivery of high-quality services that protect human rights. It is disappointing, therefore, that only a third of local authorities had taken action to deliver human rights training for elected members and, where this was being delivered, there was little evidence about whether it was compulsory.

While 35 authorities said they planned to take action to provide such training in the future, 33 told us they had no plans to do so. We are very concerned about this lack of attention to leadership training on human rights because it risks policy decisions connected with scrutiny and leadership roles being made without a proper understanding of human rights obligations and their relevance to home care.

Third party rights clauses

The Close to home recommendation about including third party rights clauses in local authority contracts with providers was to provide some human rights protection for service users, allowing them to seek legal redress against the provider if their human rights are breached.³⁰

²⁷ Section 149 of the Equality Act 2010.

²⁸ Although compliance with the PSED does not require formal equality impact assessments, many public authorities find them helpful and continue to use them.

²⁹ Equality and Human Rights Commission (2013) *Guidance on human rights for commissioners of home care*.

³⁰ Close to home recommended that the definition of ‘public function’ under the Human Rights Act should be extended to include the provision of home care by private and third sector providers in order to address the lack of proper human rights protection for people using home care. This recommendation has not so far been implemented by Parliament, nor has there been a test case to clarify the law.

Some 23 local authorities reported including such a clause. However, we are unsure whether all the clauses currently being used for this purpose are constructed adequately to ensure proper protection. Of the 77 local authorities that reported that they did not include such a clause, 51 said they would like to do so in their future home care contracts. Some of these authorities sought clarification on how this type of clause should be drafted and, in response to this, we have suggested a draft contract schedule for authorities to use (see Appendix B).

Supporting user choice for personalised care³¹

Close to home included recommendations on improving information, advocacy and other systems to support older people's use of personalised home care.³² When properly implemented, personalisation has the potential to enhance older people's choice and control over their care, and so promote their human rights – in particular, their right to respect for personal autonomy.

We know that older people are less likely than younger adults to want to employ personal assistants and direct their own home care by receiving a direct (cash) payment, but some do choose this option. Others may prefer to have a managed account (or virtual budget) whereby the local authority has responsibility for liaising with providers and making payments, while service users choose how the money is spent – for example, by selecting their preferred provider. People can also use personal budgets through third party trusts or other third party services. But none of these options will give older people the full benefits

of choice and control over their home care services unless they also have easy access to support, advocacy, brokerage and information.

Our findings show:

- 52 local authorities that responded to the survey funded brokerage³³ services before the publication of Close to home (November 2011) while 19 have started to do so since then.
- 80 per cent (81) authorities funded professional advocacy services for home care service users. However, only six of these provided us with evidence that they commissioned services specifically designed for older people.
- 90 per cent of authorities had written information available for older people about using home care services – although much of this was web based.
- The majority of brokerage and advocacy services provided by local authorities appeared to be generic and not specifically designed to meet the needs of older people.

General comments on supporting user choice

Most local authorities told us that they were taking steps to develop accessible consumer information about the quality of local home care providers and their specialist areas, but often this seemed to be via web-based information resources. While greater use of on-line platforms to disseminate provider information may be helpful to some service users, and cost effective for those with internet access, local authorities will need to monitor the levels of domestic internet access to ensure

³¹ Personalised care is designed to give service users choice and control and can take the form of direct payments, managed accounts or personal budgets.

³² Close to home recommendations 5, 16 and 17.

³³ Brokerage services take on the responsibility for managing care service users' personal budgets.

that this does not disadvantage their older service users. Office for National Statistics information confirms that internet use tends to drop sharply with age.³⁴

The recommendations review came across some examples of good practice (actual and planned) to support older people to make choices about personalised care. One authority had commissioned a voluntary agency to provide brokerage, peer support and advocacy for older users of direct payments which offers advice, payroll services and assistance with recruiting and employing personal assistants. Another had introduced mobile brokers, who visit people in hospital to offer advice about various care options on discharge. As a result of the Close to home findings, a different authority recognised the need for an advocacy service focused on older people to support personalisation choices. Others told us that they commissioned independent brokerage organisations (usually generic) offering face-to-face home visits and written guidance about their services to support people using personal budgets.

Evidence from the recommendations review suggests that many local authorities had information about home care and systems in place to support choices through personalisation which predates the publication of Close to home. However, the evidence also suggests that there is still a tendency for authorities to rely on generic support services and web-based information which Close to home evidence found may not always be suitable for older people.

Government action and regulation

Close to home directed several recommendations at government departments, the Care Quality Commission and the Local Government Ombudsman to address findings about the inadequate legal and regulatory framework governing human rights and home care, and the lack of awareness on the part of self funders about where to raise complaints.

The recommendations directed at government³⁵ – namely the Department of Health and Ministry of Justice – were that:

- the definition of ‘public function’ under the Human Rights Act should expressly include the provision of home care by private and third sector providers, thus closing a legal loophole;
- there should be a review of the effectiveness of the local authority peer review system which took over responsibility for oversight of commissioning practices after the Care Quality Commission stopped independently monitoring them in October 2010;
- guidance should be produced for local authorities on Human Rights Act responsibilities including positive human rights obligations in the context of the Localism Bill (now Act);
- legislation should bring in a single statutory scheme for adult social care, expressly based on human rights principles – thus putting social care on the same footing as NHS services; and

³⁴ Randall, C (2010) *e-Society*, Social Trends 41, Office for National Statistics.

³⁵ Close to home recommendations 1, 2, 6, 7, 10 and 17.

- the Equality Act 2010 ban on age discrimination in services should be implemented as soon as possible.

The recommendations directed at the Care Quality Commission and Local Government Ombudsman³⁶ were that:

- the Care Quality Commission needed to develop a regulatory model better suited to home care services which, in particular, would incorporate unannounced inspections of care providers and effective ways of capturing the views of older people, and make it easier for care workers to ‘whistleblow’;
- the Care Quality Commission should take steps to encourage direct feedback from older people and their families so that this can be fed into their regulation of home care;
- the Care Quality Commission and Local Government Ombudsman should provide more, and more accessible, consumer information about home care providers and increase intelligence sharing between each other and with local authorities to protect against risks to human rights; and
- the Local Government Ombudsman should do more to raise public awareness about its responsibility for investigating complaints from people who fund their own home care.

Key findings and general comments about action taken by government and regulators

There have been some positive developments since Close to home was published. Some might have happened regardless of the inquiry but

we know that the inquiry evidence and recommendations have been influential to a greater or lesser degree.

Ban on age discrimination in services

The Equality Act 2010 ban on age discrimination in services came into force on 1 October 2012. This means that the way in which home care services are assessed, commissioned and delivered must now ensure that people are not discriminated against (directly or indirectly) because of their age unless this can be objectively justified, and that they are not victims of age-related harassment or victimisation. This will provide some protection against the examples of age discrimination in home care assessment and resource allocation that were detected in Close to home.

The Commission is producing a supplement to the code of practice on services under the Equality Act. This will provide authoritative guidance for service providers, the courts, lawyers and individuals on how the age discrimination ban should operate.

Monitoring adult social care commissioning

In April 2013 the Minister of State for Care, Norman Lamb MP, signalled that the Care Quality Commission will resume responsibility for monitoring and regulating adult social care commissioning by local authorities. The Close to home inquiry received evidence from providers, older people’s organisations and others regretting that the Care Quality Commission’s independent regulatory oversight of commissioning practices was dropped.³⁷ We believe that the Care Quality Commission’s imminent

³⁶ Close to home recommendations 5, 16, 19, 20, 21 and 22.

³⁷ In October 2010 the Care Quality Commission stopped regulating adult social care commissioning.

resumption of this remit has the potential to improve the protection of older people's human rights in home care.

Regulation

Partly in response to *Close to home*, the Care Quality Commission is introducing radical changes to the way in which it inspects, monitors and regulates home care. These include moving away from a 'one-size-fits-all' regulatory model to giving responsibility to specialist teams with relevant expertise on the range of different services under the Care Quality Commission's remit. Our evidence suggests that this represents a positive shift that will lead to better detection of threats to human rights.

In another positive move, the Care Quality Commission has established, and is promoting, a dedicated whistleblowers' helpline. This should help to alleviate the concerns of care workers who gave evidence to the *Close to home* inquiry about attempting to draw attention to bad practice, without success. Also, the Care Quality Commission's increased openness and improved systems for feedback from service users and the public facilitate access to clearer information about provider quality and specialisms, as do their 'provider profiles'.

The Local Government Ombudsman has taken some steps to improve public awareness about its role in investigating complaints from people funding their own home care and intelligence sharing with local authorities and the Care Quality Commission. This has included outreach and engagement through organisations such as Independent Age and the United Kingdom Homecare Association,

and collaborating in a 'signposting' initiative with the Care Quality Commission, Healthwatch England and the Parliamentary and Health Service Ombudsman. However, the Local Government Ombudsman recognises that more work is needed to ensure that older people and their families know how to raise complaints and concerns and feel more able to do so.

Clarifying the scope of the Human Rights Act

Around 89 per cent of publicly funded home care is commissioned by local authorities from private and third sector providers.³⁸ The Commission has received advice from senior Counsel that, following a House of Lords decision in 2007,³⁹ providers of publicly commissioned home care are not performing a 'public function', and consequently their service users do not have the protection of the Human Rights Act. This legal analysis led to a recommendation in *Close to home* that the loophole in the Human Rights Act be closed. The recommendation has the support of Age UK, the British Institute of Human Rights and others.

In contrast, the Government's legal analysis is that private and third sector providers of publicly commissioned home care are subject to Human Rights Act obligations and that it is not necessary to amend the law. Lord Howe, Parliamentary Under Secretary of State at the Department of Health, has made positive statements about the importance of protecting the human rights of home care service users. He has also hosted a round table meeting on human rights and home care (in September 2012) and made a public statement that private home care

³⁸ Laing and Buisson (2013) *Domiciliary Care UK Market Report 2013*, 12th edition. Researched and written by Mickelborough, P.

³⁹ *YL v Birmingham City Council* [2007] UKHL 27.

providers should consider themselves to be covered by the Human Rights Act. While these actions are welcome, the Commission maintains that legal clarity will only be achieved through legislative change or by way of a new test case on this issue.

Single statute for adult social care

By introducing the Care Bill, the Government has taken steps to establish a single statutory scheme for adult social care. Streamlining the current myriad pieces of legislation into one Act should simplify matters. In its Parliamentary briefings, the Commission has drawn attention to the advantages of using human rights principles to expressly underpin the Bill's general duty to promote wellbeing. We have also suggested ways in which the Bill's advocacy provisions could be strengthened.

Guidance

Finally, the Department of Health and Ministry of Justice have told us that they are not intending to produce guidance on human rights for local authorities in the light of the Localism Act. This leaves local authorities without up-to-date, topical guidance on human rights from central government.

6. Overall conclusions

Local authorities

We are encouraged that around 66 per cent of local authorities responded to the survey and that, of these, around three-quarters have taken some action to review their commissioning policies and practices. However, we are disappointed that around one-third of authorities did not respond by our original deadline despite our efforts to give them simple, and, time-saving, ways to do so.

The review revealed that a small number of local authorities are implementing a systematic human rights based approach to the way in which they assess, commission and monitor care services. It is these authorities that appear to have done the most to put the Close to home recommendations into practice and human rights at the heart of what they do. For example, these authorities promote human rights at every stage of the procurement process; train elected members about their care commissioning and human rights obligations; and use transparent costing models.

Close to home found that the low pay and status of care workers, coupled with high workforce turnover rates, was a significant factor exacerbating threats to the human rights of older people. Therefore it was reassuring that the recommendations review made a finding that 71 of the 77 local authorities had taken some action to review commissioning practices and assess whether their practices were conducive to ensuring a well skilled and supported care workforce. However, apart from a handful of notable exceptions, our findings did not convince us that authorities had been able to make significant improvements to the conditions of care workers.

It was disappointing that so few authorities provided human rights training for elected members and, while many local authorities reported having well established information, advocacy, brokerage and other systems in place, many do not appear to take account of the specific needs of older people. We remain concerned about this and the consequent impact on older people's human rights.

Government and others

Close to home evidence suggested that the lack of independent oversight of adult social care commissioning practices could contribute to the risks of threats to human rights going undetected. We therefore welcome the government's indication that the Care Quality Commission will resume responsibility for monitoring adult social care commissioning.

The new strategic direction adopted by the Care Quality Commission over the past six months marks a positive step away from generic inspections to those that are tailored for each sector. This offers the Care Quality Commission the framework to develop a specialised inspection team for home care services. We also welcome steps taken by the Care Quality Commission to encourage views and feedback direct from service users and incorporate this into their provider profiles and general intelligence base.

It is an ongoing concern that the legislative framework still does not give adequate protection to people receiving publicly commissioned home care from private and third sector providers, given the Government's clear resistance to taking steps to close this loophole in the Human Rights Act.

We also take the view that, without government guidance on human rights which is relevant to the challenging legal and financial context in which local authorities now operate, they will continue to struggle to understand the practical implications of their human rights obligations generally and in relation to home care.

Norman Lamb MP, Minister of State for Care, has demonstrated a strong commitment to improving the current home care system for both service users and care workers. In taking personal leadership of the Homecare Innovation Challenge with key stakeholders (including the Commission, the United Kingdom Homecare Association and others), he aims to find solutions to the unsustainable home care system which he sees as being in ‘crisis’ and ‘incentivising neglect’.⁴⁰

We hope that this initiative signals the development of a home care system which delivers better quality services, real choices for individuals about how their care is provided, and better protection of the human rights of older people and others who need or receive home care.

⁴⁰ www.telegraph.co.uk/news/politics/10117088/Norman-Lamb-home-help-for-elderly-is-scandal-waiting-to-happen.html.

7. Next steps

In the light of the recommendations review findings, the Commission plans to take the following steps.

1. We will write to all local authorities indicating our findings, promoting our published guidance on human rights for commissioners of home care, and drawing their attention to the sample clauses set out in Appendix B about the National Minimum Wage and third party rights.
2. We have written to the local authorities that did not respond to this review reminding them that failure to do so will result in their being publicly named as non-responders. We have also asked them to publish the steps they are taking to promote and protect older people's human rights in home care services. We will review their progress after publishing this report and will decide on appropriate action if they fail to engage with us.
3. We recommend that all local authorities use costing models which incorporate essential elements for safe and legal care and that they demonstrate transparency about how their home care commissioning rates are calculated by putting costing models on their websites.
4. We have started to discuss our findings with the Department of Health to assist the development measures to assess compliance with the ban on age discrimination in services in relation to health and social care.
5. We will convene a round table with stakeholders to discuss ways of promoting commissioning practices that most effectively support payment of at least the National Minimum Wage to home care workers.
6. We will explore with the Care Quality Commission new ways to address some local authorities' apparent confusion and lack of knowledge about the significance of human rights obligations when commissioning home care.
7. We intend to explore the impact of digital exclusion and potential indirect age discrimination.
8. We will continue to provide briefings to Parliamentarians on the Care Bill about the need to close the human rights loophole and on advocacy. We will also support relevant test cases to clarify the scope of the Human Rights Act.
9. Finally, we will monitor commissioning practices in the context of direct and indirect age discrimination and the public sector equality duty (PSED) and use relevant regulatory approaches, including legal action where this is necessary and proportionate.

Appendix A:

Local authorities that did not provide evidence regarding their response to the Close to home recommendations

London Borough of
Lewisham

Nottingham City Council

Appendix B: Contract schedules on human rights and the National Minimum Wage

A contract can contain a schedule or schedules which set out obligations that are supplementary to the main provisions of the contract.

In response to requests from a number of local authorities, the Commission – with advice from Counsel – has drafted model contract schedules relating to (1) human rights and (2) the National Minimum Wage. These schedules may be adapted by local authorities for use in their contracts with home care providers.

The **first schedule** would have the effect of requiring the provider to act compatibly with the Human Rights Act 1998, and would give users of contracted services a direct right of redress against the provider in the event that their human rights were breached.

The **second schedule** would make it a fundamental term of the contract that the contractor pays the National Minimum Wage to all eligible employees, and keeps records as required by the National Minimum Wage Regulations 1999.

1. Human Rights Schedule

Whereas the parties have agreed that the [Contractor] should be treated as a public authority within the meaning of the Human Rights Act 1998 and should act compatibly with the Human Rights Act 1998.

And whereas the parties have agreed that third parties who are victims of a breach of Convention rights should be able to obtain the judicial remedies identified in the Human Rights Act 1998 against the [Contractor].

A. [Contractor] to comply with the Human Rights Act 1998

In:

- (a) carrying out or purporting to carry out its obligations under this contract; or
- (b) respect of any act or omission relating to the obligations under this contract

the [Contractor] shall comply with the Human Rights Act 1998 as if it was a public authority.

B. Third party rights

- B1. A victim shall have the right to enforce Clause A pursuant to section 1(1)(a) of the Contracts (Rights of Third Parties) Act 1999.
- B2. Without prejudice to the generality of Clause B1, a victim shall have the right to rely on the Convention rights and to obtain the remedies in section 8 of the Human Rights Act 1998 against the [Contractor].

C. Definitions

A “public authority”, “victim” and “Convention rights” shall have the same meaning as in the Human Rights Act 1998.

D. Arbitration, mediation, dispute resolution, alternative dispute resolution and choice of law

- D1. Any claim by a victim under Clause B for breach of Clause A above shall not be subject to any arbitration, mediation, dispute resolution or alternative dispute resolution provisions in the contract without the written consent of the victim.
- D2. This schedule shall be construed and subject to the laws of England and Wales.

E. Priority in the event of any inconsistency

Where any term of the remainder of the contract and this Schedule is inconsistent, the words of this Schedule shall take priority.

2. National Minimum Wage Schedule

Duty of Contractor to pay National Minimum Wage

- A. It is a fundamental term of the contract that the [Contractor] pays the National Minimum Wage under the National Minimum Wage Act 1998 to all eligible employees. The [public authority] may terminate this contract without notice or compensation in the event that the [Contractor] breaches this term.

Duty of Contractor to keep proper records

- B. It is a fundamental term of the contract that the [Contractor] keeps the records required by the National Minimum Wage Regulations 1999. The [public authority] may terminate this contract without notice or compensation in the event that the [Contractor] breaches this term.

Audit

- C. The [Contractor] shall produce and send to the [public authority] a written annual audit of an anonymised random sample of employees demonstrating that the National Minimum Wage has been paid. In particular, the audit shall demonstrate that the National Minimum Wage has been paid taking into account travel time under Regulation 15 and training under Regulation 19 of the National Minimum Wage Regulations 1999.

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