

**CONSULTATION SUBMISSION on**

**The New National Health and Social Care Standards**

**January 2017**

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is the national human rights institution for Scotland and is independent of the Scottish Government and Parliament in the exercise of its functions. The Commission has a general duty to promote human rights and a series of specific powers to protect human rights for everyone in Scotland.

The Commission welcomes the opportunity to respond to the consultation on the New National Health and Social Care Standards. The Commission has been a member of the Project Board since for a number of years and, through the Scotland’s National Action Plan, has provided periodic advisory input to the development of the Standards. We thoroughly welcome the commitment to the new Standards taking a human rights based approach. Embracing the importance and the practical application of human rights to the provision of health and social care services has the potential to deliver effective services which produce better results for both service users and staff in a culture which respects, protects and fulfils human rights obligations.

**Q1. To what extent do you think the Standards will be relevant and can be applied across all health, care and social work settings?**

In order for human rights to achieve the added value intended, we believe there are two important considerations.

* The Standards must contain a comprehensive reflection of human rights principles and standards. They must accurately reflect the content of human rights standards. We consider that the five Principles underpinning the Standards provide a strong basis which reflects the principles of human rights law. The Standards themselves have the task of going beyond this and reflecting the more detailed content of human rights standards that have been elucidated through internationally agreed laws. In order to meaningfully employ a human rights based approach, each Standard should look to what relevant human rights standards say that can help illuminate what a good standard of care is.
* They must do so in a way which translates those standards into practical application in health and social care settings, in a way capable of being easily understood by service users and staff. The Standards must provide as strong a basis as possible for those applying them to apply human rights simply by applying the Standards, without requiring detailed human rights expertise themselves. In the remainder of this response, we have highlighted areas where the wording of the Standards can perform this task, suggesting statements that more accurately reflect human rights standards in practical terms.

Considering the Standards as a whole, we believe that some human rights content is well reflected, while other content requires further analysis and nuance in order to ensure it accurately reflects the human rights position. We will raise particular issues in response to particular Standards below, however, we believe a comprehensive human rights analysis of each Standard would be beneficial, particularly as the reference point for resolving any issues which emerge from the consultation.

It is important to highlight the importance of taking account of the full range of human rights that are applicable[[1]](#footnote-1). We note that the Glossary to the consultation defines human rights as *“enshrined in UK legislation under the Human Rights Act”*, however this covers only the rights within the European Convention on Human Rights (ECHR). The UK is also obliged to respect, protect and fulfil international human rights standards which it has signed up to. In Scotland, the Scottish Parliament and Ministers have a responsibility to observe and implement international obligations, including international human rights treaties within the areas of its devolved competence. Those obligations are:

* International Covenant on Civil and Political Rights (ICCPR)
* International Covenant on Economic, Social and Cultural Rights (ICESCR)
* International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
* Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT)
* Convention on the Rights of the Child (CRC)
* Convention on the Rights of Persons with Disabilities and its Optional Protocol (CRPD)

**Q3. Standard 1: I experience high quality care and support that is right for me. To what extent do you think this Standard describes what people should expect to experience from health, care and social work services?**

**Is there anything that is missing or should be added to this standard?**

In Q4 below we discuss the benefits of setting out the requirement for proportionality, an important human rights concept. Proportionality can assist in the interpretation of a range of Standards. For example

**1.33***. “I enjoy meals and snacks which meet my cultural and dietary needs”*. There are likely to be some restrictions on this in a care setting, where there is restricted choice. Which cultural needs must be met and which would there be a justification for not providing? Bringing proportionality into this question may help shape a decision e.g. it would be difficult to envision refusing a religious requirement, such as Halal meat, being proportionate, whereas there might be a proportionate justification for not meeting a cultural request such as spicy food.

**1.40-1.44 (Protection)**: The human rights requirement to take practical steps to address situations where there is a real and immediate risk to life[[2]](#footnote-2) seems to be missing. 1.44 alludes to this but is aimed more at ensuring awareness of the need to share information. The duty itself should also be set out.

We suggest:

*“All reasonable steps are taken to protect me from risks to my life, including risks from self-harm and suicide.”*

Statement 7.24 in relation to children and young people would also help address this area, if applied generally (“*If I go missing, people take urgent action to protect me, including looking for me and liaising with the police and other agencies, and my family”*)

**Q4. Standard 2: I am at the heart of decisions about my care and support. To what extent do you think this Standard describes what people should expect to experience from health, care and social work services?**

**Is there anything that is missing or should be added to this standard?**

**2.3**: This Standard deals with aspects of proportionality, an important human rights concept which lies at the heart of many rights. It means that an intervention which affects a person’s rights must be thought through to ensure that it is the minimum required to achieve the desired aim without unduly restricting someone’s rights . A full understanding of concepts such as this mean that a human rights based approach in health and social care can assist in balancing risk and quality of life considerations and can provide a common framework of rights and responsibilities for everybody.

This has been shown to assist in balancing issues of risk such as the use of restraints, door locking, allowing people to leave care home settings, the use of medication or restricted diets, against the rights of the individual to choice, control and autonomy[[3]](#footnote-3) . Central to resolving these issues was the understanding that you might interfere with an individual’s rights where it is properly justified and proportionate, that is the minimum necessary interference taking account of the individual’s views and decision making. This approach counter-balanced what was sometimes seen as a risk averse approach of services, intent on safeguarding the individuals.

Human rights provide a framework for communication between professionals, individuals using services and family members, helping to resolve tensions in the way in which care was delivered. Bringing these considerations front and centre would help to increase the understanding and positive acceptance of a human rights based approach and its applicability.

An understanding of proportionality is essential where a range of rights come into play (qualified rights in terms of the ECHR):

* The right to private and family life (Art.8), covers a person’s dignity and autonomy. Examples:
  + Autonomy and self-determination: to conduct your own life as you choose, including in ways seen to be harmful e.g. diet choices, access to phones or the internet, engaging in social or recreational activities, use of personal information, quality of care
  + Participation in decision making e.g. informed decisions about treatment or care, support for decision making etc
  + Privacy e.g. personal privacy at home or in care home, use of personal information etc
  + Family life e.g. separation from spouse in residential care, social isolation
  + Physical and psychological integrity e.g. poor quality care. Would cover issues such as intrusive bodily searches but some situations of seclusion, inadequate service provision
* Freedom of thought, conscience and religion (Art.9). Examples:
  + Respect for cultural or religious requirements
  + Opportunities for prayer or to wear religious clothing
  + Providing support to enable people to participate in their normal religious practices, such as dietary requirements at meal times and in care and support plans
* Freedom of expression (Art.10). Examples:
  + Supporting and allowing people to express their views and opinions
  + Allowing access to information
* Freedom of assembly and association (Art.11). Examples:
  + People receiving care services and their families may protest about the quality of care
  + Workers’ right to join or not join a workers’ union

Proportionality has been partially reflected in places in the Standards (at 2.3 and under Standard 6: “and where my liberty is restricted by law”), however, the principle is of much broader application. These rights may be restricted in a whole range of care settings where a person is not necessarily deprived of their liberty. They may be a consequence of generally applicable rules to facilitate the running of a facility and they may indeed be justified, however, a consideration of proportionality is essential to determining this.

We consider that statements capturing proportionality should sit somewhere that reflects the fact that they run throughout. 2.3 begins to capture the necessary elements of proportionality, however not all aspects are covered.

We suggest that the following statements would capture the essential elements of proportionality:

*“any restrictions on my independence, choice or control will be for clearly identified reasons. I will be supported to be involved as I can be in agreeing any restrictions”*

*“my independence, choice or control will be restricted as little as is necessary to meet those reasons”*

*“if restrictions apply to me, they will be regularly reviewed to decide whether they are still necessary”[[4]](#footnote-4)*

**2.13**: Support for decision-making is an essential component of many human rights obligations, in order to protect a person’s autonomy[[5]](#footnote-5). Even greater emphasis is placed on this by the Convention on the Rights of Persons with Disabilities which requires that a person must be supported to make decisions, rather than those decisions being made on their behalf by others[[6]](#footnote-6). The concept of support is also disability neutral, as everyone, regardless of disability, uses forms of support to make decisions (e.g. seeking advice from friends, professionals etc). This is as opposed to a line being drawn between those who have capacity and those who don’t. We are very pleased to see this need for support reflected in so many places in the standards (e.g. 1.18, 2.16). There are areas where this needs to be reflected by shifts in emphasis towards the focus being on a person’s own choices being upheld, with support to do so where necessary, rather than “best interests” decisions being made by others.

We suggest:

*“I am supported to* ***maintain and develop*** *my relationships with my family and friends and partner,* ***in accordance with my wishes, as much as possible****”*

This also captures the right to private and family life[[7]](#footnote-7), whereby everyone is entitled to enjoy this right, although some restrictions may be justified and proportionality would have to be taken into account.

**2.15**: We suggest:

*“I make choices and decisions about all day to day aspects of my life, including managing my own money, how I dress, what I eat and how I spend my time,* ***with support to make healthy and safe choices****”*

This should reflect the need for support which may be required to facilitate this decision-making and would help to address issues of tension, such as balancing the need to ensure people receive adequate nutrition with autonomy to choose one’s own diet.

**Q5. Standard 3: I am confident in the people who support and care for me. To what extent do you think this Standard describes what people should expect to experience from health, care and social work services?**

**Is there anything that is missing or should be added to this standard?**

**3.24**: This Standard should make reference to the wider value of learning and development and involvement in dialogue. The CRPD[[8]](#footnote-8) requires

“lifelong learning directed to

1. the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity;
2. the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential;
3. enabling persons with disabilities to participate effectively in a free society”

We suggest the statement for children and young people under Standard 7 (7.20) could be adapt for general applicability here

*“People help me to extend my learning and development and I am supported to achieve my potential in education and employment”*

**Q6. Standard 4: I am confident in the organisation providing my care and support. To what extent do you think this Standard describes what people should expect to experience from health, care and social work services?**

**Is there anything that is missing or should be added to this standard?**

**4.1**: We suggest a further statement should be added to cover ensuring service users know and understand their rights. Empowerment to know and claim your rights is an essential component of a human rights based approach.

We suggest:

*“I am helped to understand what my rights are and how I can get help and support to realise them, including independent advocacy.”*

**4.6**: We suggest strengthening this statement to make it the service’s proactive duty to regularly seek and act on feedback, rather than the responsibility lying only with the individual.

We suggest:

*“I* ***am regularly asked to*** *give feedback on how I experience my care and support and the service uses learning from this to improve”*

**4.17**: Remedy when things go wrong, an important aspect of human rights guarantees, doesn’t seem to be fully reflected here. This statement covers some, but not all of the necessary elements.

We suggest:

*“If I have a concern or complaint, I know this will be taken seriously and dealt with in a fair and impartial manner, without negative consequences. I will be supported to participate in this process and the result will be explained to me. “*

*“If I need support to ensure my views are heard/to make a complaint, I am supported to do so/use the feedback processes”*

**Q7. Standard 5: And if the organisation also provides the premises I use. To what extent do you think this Standard describes what people should expect to experience from health, care and social work services?**

**Is there anything that is missing or should be added to this standard Is there anything that is missing or should be added to this standard?**

**5.6**: There are significant human rights implications arising from the use of CCTV, which require careful consideration of proportionality to be justified. The necessary considerations are set out in this Joint statement by SHRC, Mental Welfare Commission, and the Care Inspectorate[[9]](#footnote-9)

The current statement does not cover all of these aspects, in particular, the careful assessment of proportionality, and should be revised to do so. This is another example where setting out the proportionality requirements across the standards, as the context in which they should be applied, would allow them not to be repeated in relation to each relevant statement.

CCTV is also one specific mechanism for monitoring activity, used at present. We suggest that more general rights-based language should be used to future-proof the Standards. We suggest changing “CCTV” to “*monitoring devices*” or “*restrictions on my privacy”.*

**Q8. Standard 6: And where my liberty is restricted by law. To what extent do you think this Standard describes what people should expect to experience from health, care and social work services?**

**Is there anything that is missing or should be added to this standard?**

We consider that there is a far sharper focus on human rights content in this Standard which, as we have said above, has much broader impact than where a person’s liberty is restricted. We believe it is essential that some of the human rights questions addressed here are embraced throughout the Standards. For example, 6.3 touches on essential elements of proportionality – the need for restrictions to take place as a last resort and for the minimum time necessary – however, it is restricted to the issue of restraint. Separating these important considerations into a separate Standard, applying only to settings where liberty is restricted, risks considering human rights as something only to be considered in the most serious and restricted of settings, whereas a human rights based approach involves using human rights as a much broader lens through which to view health and social care provision. It is also important that these Standards apply where there is no formal provision such as mental health detention or guardianship as de facto detention represents a significant breach of rights in itself.

If there is to be a separate Standard, we would suggest it is for *situations “where my independence, choice or control is restricted”* or *“where decisions are made by others on my behalf”*. This would capture the range of rights which may be restricted (as explained earlier) and allow a place for the requirements of proportionality to be set out. See our earlier suggestions (at Q4) for suggested wording on proportionality.

We suggest the following specific amendments to strengthen the human rights basis of these statements:

**6.1**: *“I experience my human rights being protected where my* ***independence, choice or control*** *is restricted and this complies with relevant legislation”*

**6.2** *“I am* ***supported****[[10]](#footnote-10) to understand how and why* ***people’s interpretation of my behaviour can affect my rights****, including the use of any physical intervention, sanctions or incentives* ***and the reasons for this****[[11]](#footnote-11)”*

**6.3** As discussed, we believe this wording needs to be broadened and applied to a wider range of situations. With regard to restraint in particular, there should also be a requirement to comply with relevant legislation (as in 6.1) as otherwise it might be assumed that it is acceptable to carry out restraint without the necessary legal authority. This statement should also take account of medication/treatment given without one’s consent, such as covert medication.

**6.5** *“If I am restrained or searched, this will be carried out with sensitivity* ***and respect in line with the relevant legislation and guidance. It will be carried out in the least restrictive way necessary to deal with the problem.”***

“sensitivity” does not adequately cover the necessary requirements, such as the need to use the least restrictive means of searching. You could, for example, carry out an overly intrusive restraint/search with sensitivity and respect. Again, reference to the need to comply with legislation is important.

We suggest adding *“I am included in planning and decision-making to support services to become zero-restraint and restriction-free environments.”*

**6.7** *“I can be with my peers, including other people who use the service, except where this has been properly assessed as unsafe.* ***Efforts will be made to work towards ways of including me****.”*

**Q9. Standard 7: And if I am a child or young person needing social work care and support. To what extent do you think this Standard describes what people should expect to experience from health, care and social work services?**

**Is there anything that is missing or should be added to this standard?**

**7.10** We are pleased to see the requirement that the best interests of the child are paramount, which can be found in Article 3 of the Convention on the Rights of the Child, is included. There is an important corollary right to that, however, which is to take account of the child’s evolving capacities to form and express their own views[[12]](#footnote-12). A further statement should be added to this effect.

**Q12. Is there anything that you think we need to be aware of in the implementation of the Standards that is not already covered?**

In order for a human rights based approach to be understood and embraced by those who will be responsible for implementing the Standards, we believe that the new Standards must be accompanied by a programme of training and awareness-raising. This could build on the approach taken in the Commission’s Care about Rights project where around 1,000 care sector managers and workers were trained in taking a human rights based approach to their work, alongside a smaller number of older people and their advocates and Care Inspectorate staff - supported by a resource pack of films, case studies and information.

The results of the follow up survey distributed to training participants indicated that:

* **99%** said they understood what human rights are and how they are applicable to their work, and two thirds reported that Care About Rights has had a significant positive impact in this area.
* **90%** agreed or strongly agreed that they could communicate with colleagues about how human rights could improve the delivery of care.
* **94%** said they understood the relationship between human rights and other legislation after taking part in Care about Rights
* **94%** said they understood the relationship between human rights and the National Care Standards.
* In **all** the above more than half of respondents feel that Care About Rights has contributed positively to their increased understanding.
* **97%** of respondents to the follow up survey feel that a human rights based approach can help care providers develop positive relationships with service users and their families.[[13]](#footnote-13)

1. As explained by the L (Legality) of the PANEL principles <http://www.scottishhumanrights.com/in-practice/human-rights-based-approach/> [↑](#footnote-ref-1)
2. Article 2 ECHR [↑](#footnote-ref-2)
3. As demonstrated by independent evaluations, for example, GEN, The University of Bedfordshire and Queen Margaret University, Evaluation of Care about Rights, Phase 2 report to the Scottish Human Rights Commission, October 2011 [↑](#footnote-ref-3)
4. It is important to reflect a need to work towards removing restrictions. e.g. if there was a policy that someone will be searched every time they return to a setting. Deprivations of liberty in particular require review at appropriate intervals with regard to continuing necessity [↑](#footnote-ref-4)
5. Art.8 ECHR includes a positive obligation to protect individuals from interference with their legal capacity from others and to take reasonable steps to uncover previously stated wishes. Respect for the views of the individual is a requirement in assessing whether deprivations of liberty are justified (General Comment no. 35 on Art.9 ICCPR). [↑](#footnote-ref-5)
6. Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) Article 12: Equal recognition before the law [↑](#footnote-ref-6)
7. Article 8 ECHR [↑](#footnote-ref-7)
8. Article 24(1) [↑](#footnote-ref-8)
9. <http://www.mwcscot.org.uk/media/90969/joint_statement_on_the_use_of_cctv_in_care_facilities.pdf> [↑](#footnote-ref-9)
10. This reflects supported decision-making, as discussed above [↑](#footnote-ref-10)
11. An understanding of the reasons for restrictions is key to participation in decision-making [↑](#footnote-ref-11)
12. Article 12(1) CRC “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.” [↑](#footnote-ref-12)
13. <http://careaboutrights.scottishhumanrights.com/evaluation.html> [↑](#footnote-ref-13)