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Scottish
Human Rights
Commission

A National Care Service for Scotland – Consultation Response

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Introduction

The Commission welcomed the Feeley Review and its recommendations for a radical shift in adult social care provision towards one with human rights, equity and equality at its heart. The Commission has long expressed concerns that the existing social care system does not deliver people's human rights in practice and falls short of its promise. In October 2020, the Commission published a report on the impact of COVID-19 on social care which highlighted not only the detrimental impact of the measures taken in the wake of the pandemic on the human rights of those using social care, but also longstanding problems within the system which resulted in failures to realise people's human rights in practice.[1]

We believe that placing human rights at the heart of a new social care system is essential to fixing these problems. Key to that shift, is ensuring, as Feeley identified, that human rights must be embedded in a way that is **consistent, intentional and evident**, as well as accountable in practice. We believe the proposals have some way to go to achieve this. While committed to a human rights based approach (HRBA) in principle, the proposals are lacking in explicit consideration of the relevant human rights and their implications. A human rights based approach requires that all aspects of those requirements are engaged with and built into the various aspects of a new system – from commissioning and procurement, through eligibility and assessment, to complaints and redress. Equally, they must be explicitly embedded in regulatory frameworks and workforce arrangements. In this response, we elaborate on the human rights framework which applies to social care and its application to key elements of the proposals.

Scope

Our comments primarily centre around rights found within the Convention on the Rights of Persons with Disabilities (CRPD), most specifically the right to independent living. The Feeley Review was, of course, focused on adult social care placing it squarely within the remit of CRPD. We recognise that the National Care Service (NCS) consultation expands that scope significantly to take in areas including

Justice Social Work, Alcohol and Drug Services and Children's Services. Our views on this expansion of scope are detailed below, however, in summary, we query whether a sufficient case has been made. In order to continue the good work of the Feeley Review in taking a HRBA, co-production with people impacted by each of those services would be necessary before it could be established that there is a case for their inclusion in a National Care Service. In the meantime, we consider that a National Care Service which addresses the pressing needs of those who use adult social care should be delivered. Although there may be a case for expanding the scope of the National Care Service, even over time, it would be disappointing if the significant opportunity to create a service which delivers disabled people's rights was diluted or delayed by broadening the scope of the NCS beyond what was intended.

An adult social care system should be explicitly built around CRPD rights, the principles of which may have application to these wider areas. However, it must be appreciated that the wider scope of these areas brings with it a range of other human rights considerations. For example, Justice Social Work would require more extensive engagement with rights contained in the European Convention on Human Rights, including the right to liberty, right to life, prohibition of inhuman and degrading treatment.

A Human Rights Based Approach (HRBA)

In taking a HRBA, the Commission recommends employing the PANEL principles (Participation, Accountability, Non-discrimination and equality, Empowerment and Legality). Applied to these proposals, the following aspects become evident:

Participation	While the Feeley Review contains and is shaped by the views of people with lived experience of adult social care, the same cannot be said for the broad range of other areas proposed to fall within the scope of the National Care Service. In relation to Alcohol and Drug Services there is acknowledgment that people with lived

	experience of problematic substance use should be included in a collaborative, rights based and participative approach to the design of services, however, this does not follow through to other areas, such as Children’s Services, Justice Social Work, Mental Health etc. Engagement at least equivalent to the Feeley Review would be necessary to determine the issues, problems and possible solutions to improving outcomes in these areas.
Accountability	Gaps in accountability were a key strand of the Feeley Review and also our monitoring report, highlighting problems both before and during the pandemic. While aspects of accountability are considered in the proposals, these primarily relate to the governance structures within and around the NCS and its accountability to Scottish Ministers. Significant aspects of accountability for individual social care decisions remain unaddressed. We have highlighted possibilities for greater accountability in our response and particularly in the section on ‘Complaints and putting things right’
Non-discrimination and equality	The Equality and Human Rights Commission has prepared a detailed response highlighting the steps that would be required to embed equality into the new system. It is important that explicit consideration is given to measures to address inequalities in order to fulfil this requirement of a HRBA.
Empowerment	It is welcome that a number of areas do focus on empowering people who use social care, carers and staff. The GIRFE model has the potential to

	bring increased transparency, clarity and empowerment for those who use social care and we have made suggestions as to the additional considerations necessary to embed human rights. While we have not commented in detail on some of the specifics of proposals to support the workforce, these do have the potential to afford them a stronger voice and greater recognition of their value, which we support.
Legality	This is the main element where we believe there is significant work to be done. The defining characteristic of a HRBA is that it engages with human rights standards and works to embed them in all structures and processes from the outset. This means engaging with the requirements of the human rights framework and applying it consistently, evidently and intentionally to each proposal.

The question of adequately funding a new National Care Service which will truly realise people's human rights will also require consideration of human rights budgeting. The government has an obligation to maximise its available resources[2] in order to fulfil its human rights commitments and progressively realise rights. The importance of this specific obligation is that developing a budget through a human rights lens is not just about ensuring that the government is using its existing resources efficiently, effectively and without discrimination. It is also about ensuring that the government is making the necessary effort to generate additional resources and whether those efforts are adequate and equitable.

Human rights budgeting involves[3]:

- examining a country's human rights international human rights obligations and commitments;
- analysing the human rights concerns facing different groups;

- designing policies that respond to those concerns;
- allocating adequate budget to implement those policies;
- monitoring of whether the money was spent as planned, what was delivered and to whom; and
- evaluating whether the policy was implemented and what impact it had examining a country’s human rights international human rights obligations and commitments.

This approach could be applied both to funding of the National Care Service at a national level, and to decisions about commissioning and the use of budgets at a local level.

The Human Rights Framework

Social care engages a broad range of human rights across both the European and international human rights systems.

European Convention on Human Rights (ECHR)

ECHR rights in relation to social care include, but are not limited to, the right to life (Article 2), the prohibition on torture, cruel, inhuman and degrading treatment (Article 3), the right to liberty (Article 5), access to justice (Articles 5 and 6), the right to private and family life (Article 8), and the prohibition on discrimination (Article 14).

United Nations International Human Rights Treaties

Social care engages a range of rights set out in other international human rights treaties, including the Convention on the Rights of Persons with Disabilities and the International Covenants on Civil and Political and on Economic, Social and Cultural Rights. These include the right to an adequate standard of living, food and housing (Article 11 of ICESCR), the highest attainable standard of physical and mental health (Article 12 of ICESCR) and the right to live independently and be included in the community (Article 19 of the CRPD). While these rights place binding legal obligations on States (such as the UK and Scotland) who have signed and ratified these treaties, they are not currently directly protected in domestic law, and cannot be relied on by an individual to bring a case in the domestic courts. This situation is, however, about to change with the incorporation of four UN treaties into Scots Law via a Human Rights Bill introduced to the Scottish Parliament in the current parliamentary session. It will seek to incorporate CRPD, along with the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Elimination of All Forms of Racial Discrimination. Incorporation of these treaties (and the Convention on the Rights of the Child which has already passed the Bill stage) will bring with them legally enforceable requirements to ensure the realisation of the human rights they contain.

Crucially, therefore, the establishment of a National Care Service must anticipate and prepare for this change by doing as much as possible to build those human rights into its core. Failing to do so would mean that the system would need to be retrofitted to ensure compliance with human rights duties. Moreover, of course, a human rights based approach will help to shape a transformative social care system which delivers people's rights in actual practice.

The Right to Live Independently and Be Included in the Community and Social Care (Article 19 CRPD)

The Convention on the Rights of Persons with Disabilities interprets already existing human rights standards in the context of the lives of disabled people. The Convention takes a social model approach. Disability rights advocates have long promoted the social model of disability, which locates disability not in a person's impairment, but rather recognises that disability arises where societal structures, whether environmental, attitudinal, informational or other, fail to accommodate a person with impairment, creating barriers to the inclusion and participation of people in society. The implication of the social model is that policy and legislation must focus on how exclusionary structures can be addressed, whether through design, support, accessible information or other means.

Article 19 develops the principle of the social model into a right, enshrining in rights language the requirement to ensure that disabled people have the support they need to live in the community on an equal basis with others. Article 19 represents a stark contrast to the historical context and lived experience of many disabled people, including in Scotland, who until relatively recently were often held in institutional settings, unable to access community services, purely on the basis of disability. Article 19 sets out that:

> States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:
>
> (a) Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
>
> (b) Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
>
> (c) Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.

In its General Comment no 5 on Article 19[4], which aims to assist States in the implementation of Article 19 and to fulfil their obligations under the Convention, the UN Committee on the Rights of Persons with Disabilities defines independent living as meaning **“individuals with disabilities are provided with all necessary means to enable them to exercise choice and control over their lives and make all decisions concerning their lives”.** It has confirmed that “individualized support services must be considered a right…For many persons with disabilities, access to a range of individualized support services is a precondition for independent living within the community.”

Article 19 should be understood as a key mechanism through which to ensure that the human rights of older and disabled people are respected, protected and fulfilled and, accordingly, a guiding force for the whole project of creating a National Care Service.

We have, therefore, used Article 19 and its General Comment ("GC5") to inform our response throughout, providing specific detail on elements that would need to be built into the proposals.

We believe that the following key elements of Article 19 must be more explicitly embedded in the proposals:

- **Choice and control** over all aspects of life, large to small; from where and with whom to live, to daily schedule, routine and lifestyle. Legal capacity (Article 12 CRPD) is a precondition to this, meaning that people must be provided with support to exercise their decision-making capacity, no matter their degree of impairment;
- **Self-chosen communities** and living arrangements;
- **Empowering, individualised support** which must be seen as a right, not social care.
- **De-institutionalisation**. An institutionalised setting is any setting where you lack choice and control over what happens on a daily basis or you are forced to accept particular arrangements[5]. Article 19 requires that institutions must be replaced with independent living support services.
- **Social inclusion** and the facilitation of participation in all aspects of civic life.

These should be the core principles on which the NCS is built and measured.

Independent living means disabled people are provided with all necessary means to enable them to exercise choice and control over their lives and make all decisions concerning their lives. This understanding should be built into the creation of all aspects of a NCS.

Improving Care for People

Access to Care and Support

We support the findings of the Feeley Review detailing the problems with the existing system. These are also echoed by our own findings in our social care monitoring report which found that, before the pandemic, people requiring support and unpaid carers faced challenges to both the accessibility and availability of social care, with inequalities relating to geography, identity and socio-economic status evident. We found that "[t]here is an opportunity to invest in a social care system, based on human rights, capable of delivering the outcomes which are enshrined in the Convention on the Rights of Persons with Disabilities". We therefore welcome the proposals to remove barriers to accessing care and support by

- Removing eligibility criteria in their current form
- Moving away from a focus on risk to a focus on enabling people to access the care and support they need to lead a full life
- Prioritising prevention and early intervention
- Making it easier for people to move easily between different types of care and support
- Involving the people of Scotland in the design, development and delivery of support from the outset and continually

All of these aspects have the potential to embed the right to independent living, if it is fully reflected and embedded in the model. Our research found that "[t]he international human rights legal framework should inform the provision of social care much more strongly". We understand that Getting It Right For Everyone (GIRFE) is the model by which this will be achieved and we understand that it is intended to be rights-based. In order to do so, the model must reflect the core elements of the right to independent living, namely:

- Being **"*based on the relationships that are important to the adult and relentlessly focused on putting the adult at the centre of decision-making*"** must reflect the following:

- Individual choice extends beyond the place of residence to "all aspects of a person's living arrangements: the daily schedule and routine as well as the way of life and lifestyle of a person, covering the private and public spheres, every day and in the long term." (GC5 para 24)
- There must be sufficient options to choose from to meet those personal wishes. "This is the case, for instance, where informal support by the family is the only option, where support is unavailable outside of institutions, where housing is inaccessible or support is not provided in the community, and where support is provided only within specified forms of residence such as group homes or institutions" (GC5 para 25)
- Eligibility criteria must "take into account, and follow, a person's will and preferences" (GC5 para 61). The right to choice and control applies no matter the degree of legal capacity nor the level of support required to exercise it (GC5 para 20). Delivering this requires serious engagement with Article 12 CRPD, the right to equal recognition before the law, which sets out the requirement for ensuring every person, regardless of support need, is not denied their right to exercise legal capacity. As detailed in General Comment no.1[6] this requires the development of supported decision-making mechanisms to ensure that decisions are not made by substitutes on behalf of the individual, nor in their "best interests". Rather, they must be based on the individual's will and preferences. "Persons with complex communication requirements, including those who use informal means of communication (i.e. communication via non-representational means, including facial expression, body position and vocalization) must be provided with appropriate supports enabling them to develop and convey their directions, decisions, choices and/or preferences and have them acknowledged and respected" (GC5 para 17). The Feeley Review notes that there is work underway on developing supported decision-making[7], however, this requirement and associated mechanisms to provide it must be built into

GIRFE. It should be noted that this is a minimum core element of the right to independent living and as such must be prioritised.

  - ***"improving outcomes*****"**: This should more clearly articulate the requirements of GC5 (which were picked up in Recommendations 31 and 39 of Feeley), in particular that services must extend beyond the home, to "employment, education and political and cultural participation; empowering parenthood and the ability to reach family relatives and others; participation in political and cultural life; one's leisure interests and activities, and travel as well as recreation" (GC5 para 29).
  - "***strengths-based support planning process***": GC5 requires that eligibility criteria "should be based on a human rights approach to disability; focus on the requirements of the person that exist because of barriers within society rather than the impairment" (para 61) and focus on the identification of practical solutions to the barriers to living independently within the community. This is an enhancement to the idea of "strengths-based" planning.

It is also crucial that transparency is built into the assessment process. In our research, "several interviewees noted that people and unpaid carers attempting to access support were often not provided with the reasons for decision making around their care package[…] the Court of Session[8] has indicated that local authorities should provide an explanation of their reasoning in arriving at an estimate for the cost of care as an important element of procedural fairness, and interviewees agreed that this was an important element of understanding the process which should be seen more often". This clarity and transparency of reasoning should be a key aspect of the new support planning process.

The GIRFE model should more explicitly reflect the core elements of the right to independent living.

Right to breaks from caring

We welcome the proposal to introduce a right to breaks from caring. An approach which focuses on personalised support to meet the carer's specific needs would be in line with Article 19's emphasis on personalisation. It also requires adequate support services to family carers including, respite, childcare, supportive parenting services, financial support, social support and counselling services (GC5 para 67). Of the options set out, Group B, particularly Option F appear most in line with these requirements. In fact, the provisions set out at Option F provide a model worthy of consideration in respect of other areas, to more clearly articulate and embed duties in respect of human rights. This model of (i) stating the principle; (ii) providing a duty; and (iii) requiring action if that duty is not being met could be written into the support planning process for all, or the legislation as a whole.

The duties proposed in Option F should be considered as a model for embedding human rights principles and associated duties throughout the legislation.

Using data to support care

We agree that improvements need to be made to the way data is shared for individuals and the proposals for data for an integrated social care and health record seem an appropriate way to balance the privacy and consent requirements of human rights law with a need to remove unnecessary barriers to the sharing of information which would support the delivery of care. We believe there may also be a training need accompanying this, so that staff feel confident about when they are permitted, or even required, to share information. The record should also reflect appropriate permissions and consent for people supporting the individual's exercise of choice and control, such as family members.

We agree that there is a need to improve the collection of data to assist care and support across all settings and to inform local and national decision-making, which is key to providing accountability and ensuring the realisation of human rights. Our research found that “Accountability and transparency concerns are also engaged in relation to the monitoring and data collection about people who use and require social care, and their experiences of it. Two of our interviewees noted that the lack of data available to local authorities on people’s take up and experience of social care made it more difficult to see how different groups are affected.” The Equality and Human Rights Commission’s response details the gaps in data on particular groups and the steps required to address them.

In order to realise the right to independent living, the starting point (the “minimum core”) requires collection of consistent quantitative and qualitative data on people with disabilities, including those still living in institutions (GC5 para 38(g)). Some aspects of independent living are to be realised progressively over time. This requires States to regularly conduct analysis providing data on barriers experienced by disabled people and requirements for implementing living in the community (GC5 para 68). We recommend that the collection of data should be framed around each aspect of Article 19 and this should be set out in the guidance on common data standards e.g. How many people still live in institutions? Do people have sufficient options to meet their will and preferences? Does their support enable them to participate in recreation, employment etc.? Do people have accessible information to enable them to exercise choice and control?

Similarly, this applies to the proposal in the following section (Q16) to measure experience of those receiving care and support, their families and carers, which should also tailor its questions around the elements of the right to independent living.

Complaints and putting things right

Accountability is a core element of a HRBA (as detailed earlier in the PANEL principles) and, unfortunately, not one on which the current system succeeds. Both our research and the Feeley Review highlighted the need for a more robust system for individuals to challenge decisions made by local authorities about social care. We consider that the proposals make some contribution to improving this, however, they mainly provide mechanisms for feedback, complaint or learning, but do little to provide the “rapid recourse to an effective complaints system and to redress” recommended by the Feeley Review.

In terms of international human rights law, it is important to emphasise that remedies require to be both adequate and effective[9]. The element of adequacy of a remedy is mostly concerned with access to justice, where considerations of accessibility, transparency, legal advice and aid, timeliness, and affordability are ensured. The effectiveness of a remedy, not only takes into account the elements of access to justice, but also requires that an appropriate reparation is issued, and that such reparation is complied with by the competent public authority.

GC5 is very clear that all decisions concerning living independently in the community must be appealable and enforceable as a right and an entitlement (para 81). The planned incorporation of four further human rights treaties, especially CRPD (along with the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of Discrimination Against Women; and the Convention on the Elimination of Racial Discrimination) will be an important means of enshrining relevant rights, however, accountability for those rights requires to be carried through to all public bodies and the systems built around them in ways that are both adequate and effective. In particular, given the already known issues in relation to accountability for social care decisions, we consider that specific accountability mechanisms should be designed into the new system. The duties set out in the section on breaks from caring, accompanied by greater transparency in the process, provide a starting framework to drive human rights requirements into the heart of the assessment process (both set out earlier). However, there remains a gap around rapid redress when things go wrong.

In our research, some interviewees suggested an independent tribunal service as a mechanism to challenge decisions made by local authorities:

“A tribunal process would need to enable people to make relevant referrals, you’d have to decide what the processes for that are. That absolutely would bring local authorities into a scenario where they are no longer in control in deciding and that independent body can have scrutiny, can access any relevant information, can make a decision that is legally enforceable and binding. Absolutely, I think also just knowing that people have the ability to take public authorities to that type of environment, might change the way which local authorities deal with people's concerns, to prevent getting into all that time and cost which could be completely unnecessary. So that system is needed, without that we will continue to have a lack of accountability." (Umbrella organisation)"

We believe that the opportunity to create an independent, accessible mechanism for review, with the power to make binding decisions, should be explored in the creation of the National Care Service.

Additional routes of access to justice will also be necessary to ensure that issues are resolved as early as possible in the process, in ways that are accessible, affordable, timely and effective. A right to independent advocacy could be provided, which would both assist accountability and empower people to know and claim their rights.

We believe that the opportunity to create an independent, accessible mechanism for review, supported by additional routes of access to justice, including independent advocacy, should be explored in the creation of the National Care Service.

National Care Service

We believe that the establishment of a National Care Service has the potential to address the gap between promise and implementation and to remove unwarranted disparities between local authorities. Situating accountability with Scottish Ministers accords with the primary responsibility of the State to ensure the realisation of human rights. If the NCS is to genuinely embed human rights at its core, its strategic direction, quality standards and framework for operational delivery must explicitly build in the human rights requirements set out above. In doing so, the NCS can drive delivery shaped by human rights and measure success against those same goals. By building human rights through from inception to delivery to continuous review and improvement, the NCS could become a true human rights based system.

We agree with proposals to include ‘once for Scotland’, complex and highly specialist social care, and prison social care within the NCS. In particular, we hope that these proposals will address the findings of the Coming Home Report, on out of area placements and delayed discharge for people with learning disabilities and complex needs, and the growing need for social care for older and disabled prisoners[10] which highlighted serious gaps in the protection of the human rights of groups with particular needs which require to be addressed urgently.

We are pleased that the NCS proposes to involve “the people of Scotland” in the design, development and delivery of support and services from the outset and on a continual basis. GC5 expands upon the requirement to involve disabled people in particular in the implementation of Article 19. This includes a requirement that “Decision makers at all levels must actively involve and consult the full range of persons with disabilities including organizations of women with disabilities, older persons with disabilities, children with disabilities, persons with psychosocial disabilities and persons with intellectual disabilities” (para 70). In particular, there is an immediate obligation to enter into strategic planning to replace institutionalised settings with independent living support services “in close and respectful consultation with representative organizations of persons with disabilities” (para 42).

Scope of the National Care Service

We have concerns about the breadth of areas proposed to be included within the NCS. The case for reform of adult social care being brought under national accountability is well set out by the Feeley Review and backed up by our own research. It addresses issues of a postcode lottery, problems with eligibility criteria and charging policies, a lack of portability of care and weak systems of accountability. These issues are both pressing and longstanding and have a significant impact on the lives of older and disabled people. We do not know whether the solutions designed to address these issues equally fit with all of the other health and social care services proposed for inclusion. We support a desire to reduce complexity for individuals, however, we believe much more engagement with individuals impacted by those services would be required before it could be said that bringing the services within the NCS, rather than reforming them in ways tailored to their issues is the solution. The proposals cite “the protection of human rights” as an automatic consequence of including many of these services within the NCS. We do not think this is self-evident and we would like to see an analysis of the human rights impacted by each of these services and how the NCS would offer further protection, to support this assertion. For example, Children’s Services would require to engage with the Convention on the Rights of the Child where the human rights implications for children with complex health conditions are different from those of young people with offending behaviour.

The exception to this is prison social care where we do believe a case has been made, having been considered by the Feeley Review, and remaining within the realm of adult social care. We would support its inclusion within the NCS on that basis.

National Social Work Agency

We believe it is important to recognise the pivotal role social workers play in delivering human rights in practice. In particular, we have expressed concern that the ongoing shortage of mental health officers has led to diminishing safeguards for those deprived of their liberty[11]. We support proposals which will boost recruitment, retention, training and development for the workforce and enable them to move from crisis support to prevention and anticipatory work.

Reformed Integration Joint Boards

We support the proposal that people with lived experience, unpaid carers and other currently non-voting members will be included as voting members (Q63). This is a good example of embedding the HRBA principle of participation within the system.

Commissioning of services

We agree that the NCS should be responsible for the development of a Structure of Standards and Processes and we believe that this is a key vehicle for meaningfully embedding human rights. We welcome the ambition that the purpose of these proposals is to ensure that commission and procurement delivers a person-centred, human rights based approach. In order to do so, we believe that further specific elements of human rights requirements must be built in to the Structure of Standards and Processes for ethical commissioning.

GC5 imposes a requirement to

- "design tendering processes for providing support services for persons with disabilities living independently in the community that take into account the normative content of Article 19" (para 97(l))
- "establish criteria, in line with Article 19, concerning entities applying for permission to deliver social support for persons with disabilities to live in the community and assess how they perform their duties" (para 65)

Both of these requirements mean that a model of independent living outlining the elements of GC5 must be used in commissioning and procurement. The Structure of Standards and Processes needs to reflect this in the following ways:

- ***Core criteria for decision-making and quality standards for evaluation***: This should specifically refer to the need to detail rights-based criteria and include the core principles of the right to independent living outlined above. It should explicitly state the purpose of independent living i.e. providing people with all necessary means to enable them to exercise choice and control over their lives and participate in their communities. The Feeley Review acknowledged the requirement for deinstitutionalisation, "which means decommissioning, disinvestment and redesign of current services must become a reality and not just an aspiration" (p.73) however we do not see this built upon anywhere in the proposal. This would be an essential criterion of a system taking a HRBA.

- ***National minimum quality outcome standards***: similarly these should be explicitly rights-based.
- The Standards and Processes should also include an emergency decision-making framework for social care, as recommended in our report, to ensure that in situations of crisis, such as the pandemic, people's human rights continue to be upheld

  "The Scottish Government and COSLA should develop an emergency decision making framework for social care which is grounded in rights-based principles of inclusion and participation in decision-making, and transparency. This should also meet critical human rights standards:

  - ensure non-regression
  - be temporary and time-limited
  - be necessary and proportionate
  - be non-discriminatory and mitigate inequalities
  - ensure the protection of a minimum core content of rights
  - consider all other options, including financial alternatives"

The proposal for a professional development programme to ensure appropriate skills to effectively implement ethical commissioning and procurement is an equally vital vehicle for embedding human rights, by ensuring that staff are adequately trained in applying human rights, and in particular independent living, in theory and practice[12]. It will be significantly easier for staff to have the knowledge and awareness to apply human rights in practice if their core elements are built into the system's design, rather than adding an additional layer of work in dissecting and applying them themselves.

The development of a Structure of Standards and Processes for ethical commissioning is a key vehicle for meaningfully embedding human rights. In order to do so, further specific elements of human rights requirements must be built in.

Regulation

Core principles for regulation and scrutiny

We support independent regulation of services and the workforce, which offers a strong form of accountability. The national care standards established by the NCS must embed human rights at their core. We recommend that the Core Principles for Regulation and Scrutiny be amended to reflect this in the following ways:

- **Principle 1**: We are pleased to see explicit mention of human rights-based care in this principle. It should, however, utilise Article 19 to give more specific meaning to "positive outcomes" and "positive impact", with reference to providing people with all necessary means to enable them to exercise choice and control over their lives and participate in their communities.
- **Principle 8**: this should include reference to protecting human rights, alongside reducing inequalities.
- **Principle 9**: this should reflect the explicit obligation to carry out monitoring in full consultation with, and with the participation of, disabled people, through their representative organisations (para 97(n))

Market Oversight Function

We support more active management of the care service market. Human rights obligations, including those under Article 19, include a requirement to actively protect the rights in question. This includes ensuring that private actors to do not jeopardise the enjoyment of human rights by their actions and taking adequate monitoring and regulatory steps to achieve this.   This would support the proposals for a market oversight function for all providers of care (not only large ones). Setting out a legal duty to provide information and enforcement powers are mechanisms with teeth that would allow this function to be used meaningfully in practice.

Valuing people who work in social care

Fair Work

We agree that steps need to be taken to ensure the workforce are appropriately valued and rewarded for their contribution. Our research found that, from the perspective of providers, there were rights challenges in relation to providing an adequate quality of care in a competitive market, as well as in ensuring that staff could enjoy just and favourable conditions of work as set out in Articles 6 & 7 ICESCR and ILO treaties. The creation of national minimum terms and conditions by the NCS could remedy this. The Equality and Human Rights Commission have provided helpful commentary on the equality issues which this could also seek to address.

Training and development

As explained above, ensuring that staff are adequately trained in applying human rights, and in particular independent living, in theory and practice[13] will be crucial to building a human rights based approach into the system and realising rights in practice. Human rights training should be mandatory and cannot be an add-on. Rather, it must be at the core of training requirements to emphasise its central role in the whole mission of the NCS.

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[1] COVID-19, Social Care and Human Rights Monitoring Report (scottishhumanrights.com)

[2] Explicitly identified in Article 2(1) of the International Convention on Economic, Social and Cultural Rights, Article 4(2) of the UN Convention of the Rights of People with Disabilities, and Article 4 of the UN Convention on Rights of the Child

[3] For further information see the resources on our website at hrbw-collected-briefing-papers-vfinal.pdf (scottishhumanrights.com)

[4] Available at Treaty bodies Download (ohchr.org)

[5] The General Comment describes the characteristics of an institutionalised setting: "Although, institutionalized settings can differ in size, name and setup, there are certain defining elements, such as: obligatory sharing of assistants with others and no or limited influence over by whom one has to accept assistance, isolation and segregation from independent life within the community, lack of control over day-to-day decisions, lack of choice over whom to live with, rigidity of routine irrespective of personal will and preferences, identical activities in the same place for a group of persons under a certain authority, a paternalistic approach in service provision, supervision of living arrangements and usually also a disproportion in the number of persons with disabilities living in the same environment. Institutional settings may offer persons with disabilities a certain degree of choice and control, however, these choices are limited to specific areas of life and do not change the segregating character of institutions." (para 16 (c))

[6] Available at Treaty bodies Download (ohchr.org)

[7] The Scottish Mental Health Law Review provides a strong example of a human rights based approach which seeks to engage with the implications of Article 12 CRPD (among others) to build a rights based system. Its work on supported decision-making will be particularly instructive Homepage | Scottish Mental Health Law Review

[8] *PQ as Attorney of Mrs Q v Glasgow City Council* [2018] CSIH 5

[9] For further detail, see our paper 'Adequate and Effective Remedies for Economic, Social and Cultural Rights: Background briefing paper for the National Taskforce on Human Rights Leadership' (December 2020) available at remedies-for-economic-social-and-cultural-rights.pdf (scottishhumanrights.com)

[10] See our Comments on the UK's 40th National Report on the Implementation of the European Social Charter (June 2021) coe-european-social-charter-2021-shrc.pdf (scottishhumanrights.com)

[11] Significant rise in numbers of people being detained for mental health treatment in Scotland | Mental Welfare Commission for Scotland (mwcscot.org.uk)

[12] See para 65 GC5

[13] See para 65 GC5