

## **National Care Service (Scotland) Bill – Response to Detailed Call for Views**

**September 2022**

---

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.

[www.scottishhumanrights.com](http://www.scottishhumanrights.com)

---

## Response to General Questions

**The Policy Memorandum accompanying the Bill describes its purpose as being “to improve the quality and consistency of social work and social care services in Scotland”. Will the Bill, as introduced, be successful in achieving this purpose? If not, why not?**

The Policy Memorandum explains that one of the ways in which the NCS aims to achieve its purpose is to take a human rights based approach. The Commission supports this intention, however, we believe the Bill requires further specification of human rights standards in order to make this a meaningful vehicle for delivering improved quality and consistency.

The Commission believes that placing people’s human rights at the heart of the NCS is essential to achieving a radical shift in social care provision towards one with human rights, equity and equality at its heart, as recommended by the Feeley Review.

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.<sup>1</sup>

The Commission welcomed the Feeley Review and, in particular, its conclusion that human rights must be embedded in a way that is **consistent, intentional and evident**, as well as accountable in practice. While committed to a human rights based approach in principle, the Bill and Policy Memorandum are lacking in explicit consideration of the relevant human rights and their implications. There are opportunities to embed more concrete human rights standards and duties throughout the Bill, as we will explain below.

Particular human rights implicated in the delivery of social care provision are due to be incorporated into the legal framework of Scotland via a Human Rights Bill in the current parliamentary session. It will seek to incorporate the Convention on the Rights of Persons with Disabilities, 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 robust human rights based approach will help to shape a transformative social care system which delivers people's rights in actual practice.

### **Is there anything additional you would like to see included in the Bill and is anything missing?**

Across the Bill, more meaningful specification of relevant human rights requirements is required. A human rights based approach requires explicit consideration of the human rights relevant to the issue at hand. It requires that all aspects of those requirements are engaged with and built into the provisions of the legislation. In order to apply this, we set out here an outline of the human rights framework with regard to social care provision.

#### **The Human Rights Framework**

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

1. 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).

## 2. 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 (CRPD) and the International Covenants on Civil and Political and on Economic, Social and Cultural Rights (ICCPR and ICESCR). 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 CRPD). These are the rights which will be incorporated via the new Human Rights Bill, making them legally enforceable.

## 3. The right to independent living (Article 19 CRPD)

The Commission believes that the right to independent living, specifically, is fundamental to the development of a rights-based NCS. Accordingly, we believe the requirements of the right, as set out in Article 19 CRPD and elaborated by the UN Committee on the Rights of Persons with Disabilities, should be more explicitly embedded in key areas of the Bill.

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.*

The UN Committee on the Rights of Persons with Disabilities has elaborated on the specific requirements of the right in its General Comment no 5 on Article 19<sup>2</sup> (GC5), which aims to assist States in the implementation of Article 19 and to fulfil their obligations under the Convention. It 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**”.

The elements of Article 19 can be summarised as follows:

- **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<sup>3</sup>. 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.

There is scope, even within the outline nature of the Bill, to incorporate these core aspects, which we address in relation to specific provisions below.

### **Eligibility criteria**

The Bill appears to be silent on the question of eligibility criteria, namely whether they will continue to exist and, if so, how and by whom they will be determined. Currently, eligibility criteria act as a gateway to accessing social care and accordingly, one's human rights. Defining them in a manner which is compliant with human rights standards is therefore key to ensuring the NCS can deliver its human rights intentions. GC5 requires that eligibility criteria for access to assistance should feature an assessment based on a human rights approach to disability, focusing on the requirements of the person that exist because of barriers within society rather than the impairment. The assessment must take into account, and follow, a person's will and preferences and ensure the full involvement of persons with disabilities in the decision-making process.

Our monitoring report identified the well-known problem that local eligibility criteria can lead to inequality of different criteria being applied across the country, meaning that the level of support and the amount a person could be expected to pay are contingent on where a person lives. A National Care Service offers an opportunity to remedy these inequalities.

Given their pivotal role in access to human rights, we believe responsibility for eligibility criteria, or any other means of determining access, should be clarified in primary legislation, with a requirement for them to be established in a human rights-compliant manner.

**The Scottish Government proposes that the details of many aspects of the proposed National Care Service will be outlined in future secondary legislation rather than being included in the Bill itself. Do you have any comments on this approach? Are there any aspects of the Bill where you would like to have seen more detail in the Bill itself?**

The Commission [responded to the Scottish Government's consultation](#) on a National Care Service, where we identified a range of areas in which human rights could and should be built in in detail. In this response, we have identified areas where human rights standards can be built into specific provisions of the Bill. However, given the lack of detail in the Bill and the reliance on regulations, opportunities to give more meaningful and robust specification to human rights duties are limited. In particular, the remedies and sanctions available in respect of complaints (s.15) are a key vehicle for human rights accountability, however their detail is left to regulations. There must be a commitment that specific human rights standards will be built into regulations and further planning around the NCS.

## **Questions on specific provisions**

### **Section 1 – The National Care Service Principles**

The Commission welcomes the recognition in Principles that “the services provided by the National Care Service are to be regarded as an investment in society that— (i) is essential to the realisation of human rights”. However, much of the language in Section 1, while closely related to human rights, is expressed in different terms, leaving it open to much looser interpretation. Expressing the Principles by reference to the relevant human rights standards would provide a much more

consistent, intentional and evident use of a human rights based approach. It would allow for direct reference to be made to the content of the relevant human right, providing both clarity of interpretation and improved accountability. As the Principles inform the rest of the Bill, there is an important opportunity to embed human rights standards in a more specific, robust way, which will lend substance to the Bill's rights based approach. In particular, Ethical Commissioning is defined by reference to the Principles (at Section 10). Commissioning built around the principles of independent living is of fundamental importance to realising human rights requirements.<sup>4</sup> If the Principles were amended to make explicit reference to independent living, this would have to be built into an Ethical Commissioning Strategy.

**Section 1(a)(ii):** Enabling people “to thrive and fulfil their potential” is closely related to the right to independent living. The principle should be more explicitly grounded in the right to independent living with the addition of the language “**to realise their right to live independently and participate in the community**” This is in line with the Feeley Review, which recommended that the purpose of social care make explicit reference to independent living.<sup>5</sup>

**Section 1(e):** This section requires that “opportunities are to be sought to continuously improve the services provided by the National Care Service in ways which— (i) promote the dignity of the individual, and (ii) advance equality and non-discrimination”. Continuous improvement is closely related to the idea of progressive realisation, which relates to economic, social and cultural (ESC) rights such as the right to health, and many elements of the right to independent living. Progressive realisation recognises that the realisation of ESC rights cannot be achieved overnight. States are therefore required to move, as expeditiously as possible, towards the full realisation of ESC rights, with deliberate, concrete steps. The understanding of progressive realisation brings with it clear obligations, such as obligations to use the maximum available resources, and clear principles to be applied in situations where any backsliding is at issue. The principles could be strengthened by reference to these duties i.e. in ways which “**progressively realise the economic, social and cultural rights of the individual**”.



We believe **a principle should be added** which recognises the requirement that runs throughout CRPD that persons with disabilities **should be supported to participate in all aspects of life and the community** (also reflected in Recommendations 31 and 39 of Feeley). This means 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).

## **Sections 6 and 7 – Strategic Planning by Scottish Ministers and Care Boards**

Article 19 imposes 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” (GC5 para 42). This requirement is of central importance to the right to independent living and we believe it should be explicitly stated as a requirement for the strategic planning of both Scottish Ministers and Care Boards.

## **Section 11 – National Care Service Charter**

A human rights based approach requires that people are empowered to know and claim their rights. The creation of a Charter setting out the rights of individuals and interested parties as they relate to the NCS can be an important vehicle for doing so. According to the Policy Memorandum, the Charter will “provide a clear pathway to recourse should their rights in the Charter not be met”. In order for the Charter to meaningfully further a human rights based approach, two aspects must be considered:

1. The Charter must take as its starting point an identification of relevant human rights (outlined in the Human Rights Framework above) and explicitly reference the content of those rights, in particular, the right to independent living. We would like to see a commitment to this effect.
2. Accountability for delivery of the Charter must be clear. At present, the Bill does not provide any indication of how delivery of the

Charter will be monitored or what consequences will follow if it is not fulfilled. Monitoring of the delivery of the Charter could be carried out by an independent body, who would be responsible for scrutiny and redress where people's rights are not being realised.

## **Sections 14 & 15 – Complaints**

Both these Sections and Chapter 4 offer an opportunity to significantly improve accountability for the delivery of human rights in social care.

Accountability is a core element of a human rights based approach 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.

Sections 14 & 15 provide for a complaint to be passed on to an appropriate person but, more crucially, allow the complaints service to “assume responsibility for dealing with complaints about different services at different times.” This has the potential 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 should be both adequate and effective.<sup>6</sup> The effectiveness of a remedy 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 regulations to be created under Section 15 allow for specification of the remedies that are to be available and to create sanctions for failure to comply with the regulations' requirements. Given the importance of accountability, we believe the regulations should be *required* to create this specification, rather than permitted to (“will” rather than “may”).

## **Chapter 4 – Scottish Ministers' Power to Intervene**

We support the provisions in Chapter 4, in particular, the power to seek an emergency intervention order. Human rights obligations, including those under Article 19, include a requirement to actively protect the rights in question. This includes ensuring that private actors do not jeopardise the enjoyment of human rights by their actions and taking adequate monitoring and enforcement steps to achieve this.

## **Section 40 – Visits to or by care home residents**

The Commission [responded](#) to the earlier consultation on ‘Anne’s Law’, arguing that guidance or legislation concerning visiting must respect, protect and fulfil the human rights of residents, their families, and the staff.

In order to do this, guidance/ legislation should set out the main human rights considerations that apply to arrangements for visits as a means of supporting care home managers to make human rights based decisions in individual cases.

As explained more fully in the consultation response, people living in adult care homes already have the right to see and spend time with those who are important to them, this being an aspect of the right to respect for private and family life in Article 8 ECHR. However, this is a qualified right, meaning that in certain situations these visiting rights may need to be balanced against the rights of others, such as the right to life and the right to health.

Any interference with Article 8 rights would need to be justified as being in accordance with the law, in pursuit of a legitimate aim; and necessary in a democratic society. We suggested that where public health needs might seem to require a restriction on visiting, individualised risk assessments would be necessary to determine the proportionality of any intended measure.

While the exact nature and content of the ‘visiting directions’ enabled by this section remains unclear, sections of the Policy Memorandum suggest that the intended effect of the visiting directions will be to replace blanket bans on visiting with blanket permissions.

For instance, paragraph 215 indicates that Anne’s Law “will mean visiting will always be supported in line with directions issued by the Scottish Ministers,” while paragraph 222 notes that:

The expectation among a range of stakeholders is that the legislation should ensure that people who live in adult care homes will be able to have direct contact with people who are important to them in order to support their health and wellbeing, *regardless of circumstances, whether there is a national or local lockdown due to a pandemic or other reasons, such as an outbreak of infectious disease*. By inclusion in the Bill, the Scottish Government will outline provisions which will set out that all care home service providers should ensure that *visiting is always supported* in line with Directions issued by the Scottish Ministers and underpinned by statute.

If s.40 and the consequent directions simply create a presumption that visits will take place, then it will do little to support care home managers to make human rights based decisions in pandemic and other crisis situations where residents’ Article 8 rights must be balanced against the rights of others including staff.

Separately, we previously noted that one potential shortcoming of existing rights protections was in terms of enforcement and accountability. While placing visiting rights on an explicit statutory footing may bring benefits in terms of visibility and awareness, it does little to improve the adequacy and accessibility of mechanisms for review of decisions regarding visiting residents in care homes, which will remain in the hands of over-burdened and costly civil courts.

---

<sup>1</sup> [COVID-19, Social Care and Human Rights Monitoring Report \(scottishhumanrights.com\)](https://www.scottishhumanrights.com)

<sup>2</sup> Available at [Treaty bodies Download \(ohchr.org\)](https://www.ohchr.org)

<sup>3</sup> 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))

<sup>4</sup> GC5 requires States 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(I)); and

“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)

<sup>5</sup> “We suggest the following as a definition: Everyone in Scotland will get the social care support they need to live their lives as they choose and to be active citizens. We will all work together to promote and ensure human rights, wellbeing, **independent living** and equity”, Feeley Review at p.18

<sup>6</sup> 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 \(scottishhumanrights.com\)](https://www.scottishhumanrights.com)