

Scottish Care Response to Scottish Parliament Human Rights Inquiry March 2018

Who we are

Scottish Care is the representative body for independent social care services in Scotland. This encompasses private and voluntary sector providers of care home, care at home and housing support services across the country. Scottish Care counts over 400 organisations as members, which totals over 830 individual services. Scottish Care is committed to supporting a quality orientated, independent sector that offers real choice and value for money. Our aim is to create an environment in which care providers can continue to deliver and develop the high quality care that communities require and deserve.

In relation to older people's care, this sector provides 89% of the care home places in Scotland and over 50% of home care hours. There are more older people in care homes any night of the week than in hospitals - as at 31st March 2016 there were 873 care homes for older people providing support to 33,301 residents any night of the year, with 89% of these residents located within the independent sector.

The independent sector, which Scottish Care represents, employs over 100,000 professional paid staff which constitutes the largest health and care workforce in Scotland next to the NHS and around half of the total social services workforce.

The role of human rights for Scottish Care

Scottish Care welcomes this opportunity to respond to the Health & Sport Committee's inquiry.

At Scottish Care, we believe that human rights - which state that every person must be treated with dignity, respect and without discrimination - have to be the starting point for people providing and delivering services. Importantly, we need to promote acceptance that these rights do not diminish when an individual accesses social care, including residential care, regardless of his or her mental or physical condition.

In 2010, we worked in partnership with the Scottish Human Rights Commission to develop *Care about Rights*¹. This was a project which developed training and awareness raising resources relating to the care and support of older people. The aim was to empower people to understand their human rights and increase the ability and accountability of those who have the duties to respect, protect and fulfil rights.

In 2015, we worked alongside older people to develop a *Convention on the Rights of Residents in Care Homes for Adults and Older People*². This document outlines what rights they believe need to be promoted and protected to ensure their time in care is empowering, dignified and fulfilling. A similar project was undertaken in 2016 with

¹ Scottish Human Rights Commission (2010) <http://careaboutrights.scottishhumanrights.com/>

² Scottish Care (2015) <http://www.scottishcare.org/wp-content/uploads/2016/06/Convention-on-the-Rights-of-Residents-in-Care-Homes-for-Adults-and-Older-People-3.pdf>



individuals who access home care services to create a *Convention on the Rights of Adults and Older People Receiving Care at Home and Housing Support*³.

Scottish Care regrets that at present there is not a UN Treaty to explicitly defend the human rights of older persons but we acknowledge that in 1991 the UN produced the *UN Principles for Older Persons*. This declaration is an important statement on the human rights protection which must be afforded to older people and should be used in the UK to shape policy making and practice.

At Scottish Care we work directly with older people to empower them to understand and claim their rights. We also work with our members who are providing care services to support them to take a human-rights based approach which respects, protects and fulfils these rights in practice.

We are pleased that the new *Health and Social Care Standards* will further serve to embed human rights in the delivery of services. However, as we have stated elsewhere, we remain concerned that the enabling of staff through training and development to understand human rights and to foster their adherence in a care context will be negatively impacted by the failure to dedicate any additional resources to the implementation of the *Health and Social Care Standards*.

Over the last two years we have been speaking to older people to help us understand the human rights issues which may affect us as we get older. We have focused specifically on health and social care but understand that there are also many other issues - including loneliness, poverty and poor housing - which can all be examined through a human rights lens.

Participation and engagement

Can the Scottish Parliament empower people to make them more aware of their rights under domestic and international human rights law and to help build a strong human rights culture in Scotland?

In our work with older individuals who use care and support services and with their families, Scottish Care has encountered a range of diverse attitudes and levels of awareness in relation to human rights. Many individuals possess a mature understanding that human rights lie at the core of the relationships which are central to their care and support. Yet for many others - and probably the majority - human rights are considered, if at all, as having little to do with what they experience or deliver in their care. It is this 'awareness gap' which concerns us. As we roll out the new *Health and Social Care Standards* we are concerned that without significant investment in awareness raising efforts, individuals will not be able to fully exercise their rights and to hold rights bearers accountable because, put simply, they do not know what their human rights are and their relevance to the care context.

We therefore consider that it should be a matter of priority for the Scottish Parliament to encourage all departments of Government to ensure that resources are made

³ Scottish Care (2016) <http://www.scottishcare.org/wp-content/uploads/2016/06/Care-at-Home-Convention.pdf>



available to help embed an understanding of human rights and how they impact upon specific policy areas. Part of this is to ensure that there is an adequacy of information available to the general public should they believe that there has been an infringement or breach of their individual human rights. Whilst recourse to law should always be a last resort the lack of human rights-based case law in Scotland, especially in social care, is, we believe, a matter of regret.

Scottish Care acknowledges that since the inception of the Scottish Parliament, our social care legislation has been firmly rooted in human rights principles and law. This is especially true of the Mental Health Care and Treatment Act, Adults with Incapacity legislation, the Adult Support and Protection Act and most recently the Self-directed Support Act. Regretfully, despite a strong and robust human rights legislative foundation we have seen little evidence of the implementation of human rights principles in the enactment of specific legislation, most especially the Self-directed Support Act.

We need to create a Scotland with citizens who are confident in knowing and upholding their own human rights and those of others, be it in the wider community or in the workplace. Significant investment and prioritisation needs to take place to ensure that all citizens become much more than just 'aware' of their rights but rather that they become 'confident' in their articulation and defence. Sadly, at the present time in Scotland human rights dialogue is a conversation for the committed few and their defence the activity of a small minority rather than the responsibility of the majority.

Parliamentary procedure and process

Are there further steps the Scottish Parliament could take to ensure that people's human rights are being taken into consideration when the Scottish Government and public authorities are creating policies?

Equality and Human Rights Impact Assessments

Scottish Care is concerned that whilst there has been a developed process of equality impact assessments in the statutory sector, these have become little more than a paper based and tick box exercise. There is real potential in utilising impact assessments to ensure that there is thorough and robust consideration of the potential negative impacts of any proposed legislation, policy development or project intervention, most especially upon the lives of those with protected characteristics. We do not consider that there is evidence that this has taken place in a sufficiently robust manner and degree. Equally we have been dismayed at the lack of recourse or action taken against those who have failed to do more than achieve a basic fulfilment of their legal duties and requirements under the Equality Act 2010.

We consider that there is a very real potential in revitalising and renewing the impact assessment process by developing a mandatory Equality and Human Rights Impact



Assessment approach. Work has already been undertaken by a range of partners in this regard⁴.

This work, we would contend, has evidenced positive benefit. Scottish Care would like to see the Scottish Parliament and other public bodies ensure that there are mandatory equality and human rights impact assessments.

Further to ensure the quality of such work we would recommend that stakeholder groups be established to ensure appropriate independence of thought and robustness of assessment in each Government policy area. It would be important that such groups engage with and as far as possible include those most directly impacted by legislative change or policy intervention. Equality and Human Rights Impact Assessments (EQHRIAs) have to follow the whole process of policy development, from initial conception and planning, through the developmental stage by means of consultation and engagement, and lastly to include a robust assessment which is continuous and ongoing on the human rights impact of proposed changes. There needs to be clearer evidence of policy change and alteration if and when it is discovered that the proposed policy has a detrimental or negative impact on the human rights of individuals or communities.

We are also convinced that EQHRIAs cannot simply be reserved for some selected areas of activity within the Scottish Parliament – they have to be engaged and adopted for all activity. In particular we would encourage the use of a robust, independent EQHRIA process in the setting and adoption of the Scottish Budget.

Accountability

Could the Scottish Parliament do more to ensure that international treaties, for example, the United Nations Convention on the Rights of the Child (UNCRC) and other international human rights obligations are being followed in Scotland?

There is a reasonable process for ensuring compliance and accountability within some of the International Treaties. We would, however, contend that the current system has gaps. In the context of the constituency of interest that most concerns Scottish Care, we very much regret that there is often insufficient focus on the rights of older people within some of the examinations of human rights obligations. We have argued elsewhere for the necessity of developing a distinctive Convention on the Rights of Older Persons. In the absence of such a treaty Scottish Care would like to see the Scottish Parliament hold its own periodic inquiry into the equality and human rights of older persons in Scotland. The basis of such a process could be the utilisation of the 1991 *UN Principles for Older Persons*.

However, as well as the more high-level issues of accountability towards obligations arising from international treaties, Scottish Care remains concerned that there is a lack of a robust and independent process to assess the impact of legislation which the Scottish Parliament has itself passed. For many individuals accessing social care in Scotland there has been a significant failure in the implementation of the Self-

⁴ See: <https://www.equalityhumanrights.com/en/advice-and-guidance/equality-and-human-rights-impact-assessment-project>



directed Support Act. Others, including Audit Scotland⁵, have commented upon this at length. However, the particular concern of Scottish Care in our submissions on this area, has been the perceived and experienced differential treatment of older people in accessing Self-directed Support. It has been and remains our contention that this is a breach of individual human rights and a contravention of not only the SDS Act but the Equality Act 2010. We deeply regret that there has not been any robust human rights analysis on the implementation of this (and other) social care legislation.

Scottish Care would propose the establishment of a mandatory duty to undertake an independent audit of the human rights impact of any new legislation two years after its commencement. Such an automatic process and action would significantly aid the ability of the Parliament to act as a transparent human rights guarantor and to ensure that those with responsibility to act as duty bearers and actors achieve their aims to respect, protect and fulfil rights.

Please also tell us about of any other comments you feel are relevant to the inquiry

In our work across Scotland, Scottish Care uncovers many instances which are tantamount to the pervasive and systemic age discrimination. In September 2016 the United Nation's Expert on Older Age, Rosa Kornfeld-Matte, stated that current international provisions are not sufficient to fully protect older people's rights, and she called on states to consider a new convention.

It is the view of Scottish Care that the time is now right for serious consideration to be given and exploration made of whether Scotland needs its own Convention of the Rights of Older Persons and/or an Older Persons Commissioner as is the case in Wales and Northern Ireland.

The creation of a convention for older people in Scotland would not add new laws and rights but would go a long way to ensure equal treatment for older citizens, not least by demanding adequate financial provision for that group of the population. Equally an Older Person's Commissioner would be a champion and advocate for the human rights and equal treatment of older persons. Older Scots should not be the victims of discrimination in employment, in accessing public services, in social care or in hospital treatment. Human rights do not have a use by date – they do not diminish with age.

Scottish Care is happy to be contacted if further information is required.

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⁵ Audit Scotland (2017) <http://www.audit-scotland.gov.uk/report/self-directed-support-2017-progress-report>