Social Care (Self-directed Support) (Scotland) Bill

The Scottish Human Rights Commission

The Scottish Human Rights Commission was established by The Scottish Commission for Human Rights Act 2006, and formed in 2008. The Commission is a public body and is entirely independent in the exercise of its functions. The Commission mandate is to promote and protect human rights for everyone in Scotland. The Commission is one of three national human rights institutions in the UK, along with the Northern Ireland Human Rights Commission and the Equality and Human Rights Commission.

Introduction

The Commission welcomes the opportunity to submit the following comments on the Government’s Draft Social Care (Self Directed Support) (Scotland) Bill (the ‘Bill’).

The Commission recognises the ideals behind the legislation of increased choice, control, independence and dignity but considers there may be areas where the Bill, or implementation of the proposals, could be strengthened to reflect human rights based principles and standards. The below offers a summary analysis of some of the key issues identified.

Legal framework

Relevant human rights instruments referred to in this submission include:

- Scotland Act 1998
- Human Rights Act 1998
- European Convention on Human Rights, particularly Articles 3, 5.6 and 8
- European Social Charter
- UN International Covenant on Civil and Political Rights
- UN International Covenant on Economic, Social and Cultural Rights, particularly Articles 11 and 12
- UN Convention on Rights of Persons with Disabilities, particularly Article 19

Issues identified

The Commission regards the introduction of Self-Directed Support (‘SDS’) as a positive step towards increased choice, control, independence and dignity of those assessed as requiring social care support. In furthering these principles however it is essential that levels of accountability and responsibility for human protections are not lost.

The human rights protections under the Human Rights Act (‘HRA’) 1998, the Scotland Act 1998 and the international human rights treaties ratified by the UK set out both positive and negative obligations and the threshold standards
of public service provision. The state and public authorities, or those performing public functions, retain responsibility for meeting these human rights obligations, regardless of the means of service delivery, and it is essential that functioning accountability mechanisms are in place for the protection of the rights of all individuals.

**General Principles of the Bill**

As drafted the General Principles in the Bill encourage “involvement”, “assistance” and “collaboration” which are, in the Commission’s view welcome. The principles, however, are drafted as process principles as they relate to SDS mechanisms, rather than the underpinning values and context in which SDS sits and the lens through which all of the provisions in the Bill, and additional recommendations we set out below in relation to involvement, assistance and collaboration, should be read.

The Commission recommends the General Principles should take a broader approach which sets the currently drafted principles in the context of participation, accountability, non discrimination, empowerment and legal human rights protections. It is suggested, for example, that preceding the current General Principles, the Bill could set out a statement of intent that the mechanisms in the Bill are to enable all persons to have an equal right to live and participate in the community, with equal choices to others, and that accordingly individuals should be provided with the assistance and support that is reasonably required to enable them to make informed choices and lead independent lives and that authorities must have regard to this in exercising their functions under the Bill.

This recommendation is based on the obligations under Article 19 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD) which asserts the right to living independently and being included in the community. A general principle of this nature sets the context for all provisions of the Bill and subsequent statutory instruments. This may also reframe the provisions of the Bill, in that, for example, involvement is regarded not solely as an obligation around involvement in the assessment of the person’s needs and provision of services, but is linked to the broader objective of participation in the community and empowerment to make choices. Similarly the principle of assistance should be viewed not only as being about support to make choices as to self directed support options but support and assistance to independent living.

This recommendation reiterates the view of the UK Joint Committee on Human Rights Report on Independent Living which stated that “The right to independent living (as defined by Article 19) should be added as an outcome in any forthcoming Bill on adult social care in England “. The Commission believes that this Bill represents and opportunity for Scotland to enshrine the right to independent living in this core piece of social care legislation.

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1 Human Rights Joint Committee - Twenty-Third Report Implementation of the Right of Disabled People to Independent Living, February 2012. para. 65
Information, Advice and Support

As “choice” is a core underlying principle to the Bill it is considered that the Bill must reflect a right to support for decision making at every stage. The Bill as drafted appears to offer assistance to express views and make informed choices as a general principle where “reasonably required” at section 1(3) and provision of information and signposting to assistance at section 8(2). It would be helpful if there was a clear legislative basis and right for support to be provided to individuals and it is considered essential that in practice such advocacy and support is available to individuals in order to ensure the exercise of choice and control is realised.

The Commission notes that section 5 and 15 of the Bill are aimed at providing support to certain individuals with “mental disorder or difficulties communicating” in order to empower them to make use of the provisions under the Bill. However it is recommended that the full implications of the provisions be carefully considered.

According to the European Court if Human Rights case law there should always be a presumption in favour of capacity, support for capacity, and positive measures to enable decision making while people have capacity. Any interference with the right to autonomy must be carefully justified as a necessary and proportionate means of achieving a legitimate aim.  

Article 12 (4) of the Convention on the Rights of Persons with Disabilities states that “States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.”

The Commission wishes to raise a number of potential areas of concern regarding these provisions of the Bill.

Firstly, there may be a risk that such provisions are put into effect where the individual in fact lacks capacity. It must be made clear that where an individual is deemed to lack capacity, that the Adults with Incapacity Act 2000 (AWIA) provisions would apply with the appropriate safeguards.

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2 E.g. Evans v UK, 2007 (Application no. 6339/05); Pretty v UK, 2002 (2346/02), Shtukaturov v Russia, 2008, (Application no. 44009/05), Storck v Germany, 2005, 61603/00 (2005) ECHR 406
Secondly, where an individual is assessed as having capacity but requiring assistance, safeguards should be considered to protect against any misrepresentation or abuse of those who may have difficulties in communicating their wishes.

While sections 5 and 15 of the Bill offer support for capacity and decision making rather than removal of capacity it would nevertheless appear necessary that where steps are taken by an authority under sections 5(4) or 15(3) to identify and involve a supporting individual that this should be done with certain safeguards in place. Safeguards could reasonably include, at a minimum, a requirement on the local authority to allow the supported person to identify the supporting individual, a further requirement that the authority should satisfy itself that the person identified to provide assistance is not exercising undue influence and is acting in the best interests of the individual at all times and the option for additional supports to be put in place such as the option of independent advocacy.

Finally, it is considered that there must be provisions for reassessment of an individual’s situation where support has been put in place but capacity is later lost. In such instances it would be essential for the provisions of the AWIA to apply.

Self-directed support options

It is considered that there must be a right of review of choice of options for individuals. The provisions in section 11 provide the option that an individual can make a further choice of options under the Bill only where there has been a “material change of circumstances”, or in “other circumstances as must be agreed between the person and the local authority”. It is recommended that a right of review should exist on the initiation of the individual without such potentially limiting criteria of a “material change of circumstance”. This will provide a safeguard where an individual, for a range of reasons, no longer wishes, or cannot appropriately manage the responsibilities that come with a direct payment, and ensure individuals are not left in situations without appropriate supports and without a right to review their choices.

Individuals’ responsibilities and risk enablement

While the operation of the Bill will inevitably place greater responsibility on individuals in directing their own support, it must be noted, that from a human rights perspective, the responsibility of safeguarding vulnerable individuals, whether supported individuals or privately employed assistants, remains with the state and therefore all necessary measures of safeguarding and protection must be taken.

Human rights assessment

As outlined above, the Commission has some concerns about the operation of the Bill related to the need for supported decision making, the right of review and the rights of persons who may benefit from assistance but have capacity
for decision making. While the Policy Memorandum accompanying the Bill outlines the assessment by the Scottish Government of the potential human rights implications of the Bill the Commission believes that the development of a human rights impact assessment (HRIA) as a means of systematically identifying the human rights impacts of legislation throughout the legislative cycle and post enactment would be a helpful mechanism for future development.3

Other matters

In order for the broader policy objectives of this Bill, as outlined in the Policy Memorandum, to be achieved in ensuring “services and support become more flexible and responsive to people needs” and to “drive a cultural shift around the delivery of support that views people as equal citizens with rights and responsibilities rather than people who receive services” it is considered that further issues must be addressed in the implementation of the system change that the Bill provides. This points to a need for both the mechanisms and implementation of SDS to be underpinned by an outcomes led, human rights based approach.

The issue of eligibility criteria and barriers to access support must be carefully considered to ensure levels of support do not fall below acceptable human rights thresholds leaving individuals in circumstances of destitution or hardship which could breach their right to respect for private, home and family life (Article 8 ECHR) or amount to inhuman or degrading treatment (Article 3 ECHR).

The Joint Committee on Human Rights has reported that the experience in England has been that “in many cases personalisation had not meant an improvement in choice and control over their lives for disabled people but instead a rationalisation of services and a reduction in care funding allocated.”4 The Committee recommends in this regard that the there should be monitoring of “the extent to which choice and control is being diminished or increased by the roll out of personal budgets” and that action should be taken “if the goal of increasing choice and control is not being realised.”5

To assist with the realisation of the policy objective goals it is also considered that a cultural change by authorities and services is essential. Independent research based on evaluation of the Scottish Human Rights Commission’s “Care about Rights” capacity building project demonstrates the value that a

3 Scottish Human Rights Commission Submission to the Scotland Bill Committee, September 2011- 
http://www.scottish.parliament.uk/S4_ScotlandBillCommittee/Inquiries/Scottish_Human_Rights_Commission.pdf; and Human Rights Impact Assessment: 
Review of Practice and Guidance for Future Assessments by James Harrison and Mary-Ann Stephenson, 1 June 2010- 
4 Human Rights Joint Committee - Twenty-Third Report 
Implementation of the Right of Disabled People to Independent Living, February 2012. para. 165 
5 Ibid. para 168
human rights-based approach can bring to care and support services. The research strongly indicates that using this approach assists social care workers to involve service users and families in their decision-making and deliver more personalised services, thereby helping to shift the power dynamic in relationships between services and the people they work for.

It is recommended that this human rights based approach and understanding should become a core competence of all of the health and social care workforce and profession to deliver the cultural shift necessary to realise the potential of this legislation to deliver choice, control and dignity to all individuals.

**Conclusion**

In summary, the Commission considers that the Bill must take into account all of the obligations under the domestic and international framework of human rights and give consideration to the fact that obligations to protect, respect and fulfil the human rights of the individual may not necessarily be fulfilled in and of themselves by virtue of the SDS mechanisms alone without further safeguards, support and assistance.

The Scottish Human Rights Commission
24 April 2012

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6 Care about Rights Project Evaluation, Phase 2 Report to the Scottish Human Rights Commission, GEN, the University of Bedfordshire and Queen Margaret University, October 2011- [http://www.scottishhumanrights.com/careaboutrights/evaluation](http://www.scottishhumanrights.com/careaboutrights/evaluation)