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

Equality and Human Rights Commission

The EHRC would like to make a number of points on the Bill as introduced, in relation to its broad policy intentions, particularly with regard to independent living and human rights principles. We also believe it is important to situate the Bill in the context of existing and forthcoming equality law and regulation, which should directly affect how public authorities which will have new powers and duties under the Bill will discharge these.

General Principles, Independent Living and Human Rights: The Commission supports the Bill’s policy intentions, particularly in relation to building more responsive public services and a more rights-based and participatory model of service design and delivery. We are encouraged that ministers are making the links between public service reform and policy areas such as self-directed support. We also feel that self-directed support can and should be situated within the preventative spend and early intervention agenda – investing in people’s ability to make meaningful choices about their own support needs is directly linked to delivering better outcomes for individuals, and reducing what has been described as “failure demand” in Scotland’s public services. The Bill should also be read in light of ministers’ new National Outcome in the National Performance Framework: “Our people are able to maintain their independence as they get older, and are able to access appropriate support when they need it”.

Nevertheless, although independent living is mentioned in the Policy Memorandum, in line with organisations such as Inclusion Scotland and the Independent Living in Scotland Project, we would like to see specific reference to the principles of independent living – and how self-directed support is a necessary (though not in itself sufficient) precondition for independent living – on the face of the Bill.

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1 The Bill “…aims to provide people with choice and control over their support. The wider policy aims are to ensure that services and support become more flexible and responsive to people’s needs (in line with the Christie Commission’s recommendations), 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.” (Policy Memorandum, paragraph 16)


3 www.scotland.gov.uk/About/scotPerforms/outcome/indLiving

4 Independent living is defined by the Scottish Government-Funded Independent Living in Scotland (ILiS) project as “…all disabled people having the same freedom, choice, dignity and control as other citizens at home, a work and in the community. It does not necessarily mean living by yourself or fending for yourself. It means rights to practical assistance and support to participate in society and live an ordinary life.” (www.ilis.co.uk/independent-living)
Important as this would be as a statement of principle, we believe it would also be of practical assistance to professionals working to the new legislation: a useful parallel is the experience of adult protection professionals and the usefulness of the set of principles on the face of the Adult Support and Protection (Scotland) Act 2007 in helping make proportionate balanced and rights-based interventions. Explicit reference to independent living would also support the policy intention of making the cultural shift away from seeing people as merely passive recipients of services, and towards being treated as bearers of rights and responsibilities who are best placed (with assistance) to determine their own needs.

We share the concerns of other organisations, such as the Law Society of Scotland, ILiS and the Scottish Human Rights Commission, about the need for greater clarity at Sections 5 and 15 (regarding, respectively, assistance with making decisions and assistance with assessments) of the Bill. Given that Sections 5 and 15 are intended to apply to people who are capable, but may need assistance, it would be preferable, (and, again, more in line with independent living principles) if the supported person, rather than the public authority, identifies who should provide this assistance.

In line with other concerns raised by the Law Society of Scotland, we would also like to see greater clarity that these provisions apply to those who have capacity but may need to support, but not to those who lack capacity. As the Bill stands, there is a danger that the provisions at Sections 5 and 15 could be applied to a person without capacity, bypassing the human rights and guardianship protections set out elsewhere in devolved legislation (e.g. the Adults with Incapacity (Scotland) Act 2000).

Equality Law and Regulation: As the regulator in Scotland for the Equality Act 2010 and Public Sector Equality Duty (PSED) we must underline the importance equality law and regulation in the context of the Bill.

The General PSED places a requirement on all public authorities, in the exercise of their functions, to pay due regard to the need to:

- Eliminate discrimination, harassment, victimisation, or other unlawful conduct;
- Advance equality of opportunity between people who share a relevant protected characteristic and those who do not; and
- Foster good relations between people who share a protected characteristic and those who do not.

\[5\] The EHRC took evidence from ASP professionals in Scotland as part of its inquiry into disability-related harassment - www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-disability-related-harassment and is now working with Adult Protection Committees to identify how equality and human rights principles, including those on the face of the 2007 Act can be better applied to their work.
The new duty applies across the ‘protected characteristics’ of age; disability; gender; gender reassignment; pregnancy and maternity; race; religion and belief and sexual orientation.

In Scotland, the power to place ‘Specific Duties’ through regulation on named devolved public authorities lies with Scottish Ministers. These duties set out the particular steps that key authorities in Scotland should take to help meet the General Duty. The regulations setting out these duties are currently being considered by the Scottish Parliament⁶, and are subject to its approval, but we anticipate that they will come into force in May 2012.

There are a number of duties contained in the draft regulations, but, crucially, these include a requirement to set equality outcomes (and involve protected groups in identifying these outcomes) and monitor and report on progress. The regulations will also place a duty on local authorities, health boards and others to assess and review all new policy decisions, in order to anticipate, and remove or mitigate negative outcomes for protected groups. In effect, the Specific Duties will provide a framework to inform how local authorities engage with disabled people, older people and others in the design and delivery of self-directed support, and a duty to assess the impact of self-directed support policies in eliminating discrimination, advancing equality of opportunity and promoting good relations.

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⁶ www.legislation.gov.uk/sdsi/2012/9780111016718/contents