Inquiry into regulation of care for older people

Equality and Human Rights Commission Scotland

The Equality and Human Rights Commission was established in statute by the Equality Act 2006 and came into being on 1 October 2007. The Commission is the independent regulator in Great Britain for equality, human rights and good relations. In Scotland, our human rights mandate is shared with the Scottish Human Rights Commission. We welcome the opportunity to contribute to the Health and Sport Committee’s scrutiny of the regulation of care services for older people in Scotland.

The Committee has set one key question for this inquiry - does the regulatory system ensure care services for older people are providing good quality and appropriate care? In response, the Commission would argue that a rigorous equality and human rights framework is a necessary precondition for the best possible care services for older people, and for the effective regulation of these services. A failure to embed equality and human rights concerns in the design and delivery of services for older people has a direct impact on the quality and appropriateness of these services.

To this end, the Commission believes that changes to equality regulations in Scotland represent a significant opportunity to better integrate equality into the design, delivery and inspection of services for older people in Scotland.

We would also highlight policy and regulatory work carried out by the Commission itself which can provide essential learning on how to better apply equality and human rights principles into the regulation and inspection of public service delivery in general, and care services for older people in particular.

This response will therefore consider three main areas: the public sector duties under the Equality Act 2010; the Commission’s collaborative regulation work in Scotland; and our inquiry into home care in England.

Changes to Equality Law and Regulation in Scotland

In April 2011 the new public sector equality duty came into force in Scotland, England and Wales. In Scotland, the duty will in due course be supported by specific equality duties on key public authorities, including local authorities and audit, scrutiny and inspection bodies. Scottish Ministers are currently consulting on the scope and content of these duties, which are designed to help public authorities meet the requirements of the general duty, will be subject to scrutiny and approval by the Scottish Parliament.

The general equality duty requires Scottish public authorities to pay 'due regard' to the need to: eliminate unlawful discrimination, victimisation and harassment; and advance equality of opportunity and foster good relations.
These requirements apply across the 'protected characteristics' of age, disability, gender reassignment, pregnancy and maternity, race, religion and belief, sex and sexual orientation. The new duty replaces the three previous duties relating to race, disability and gender equality.

The purpose of the general duty is to require authorities to proactively consider equality when carrying out their work. The duty encourages the mainstreaming of equality into authorities’ core business so it is not a marginal activity but a key component of what authorities do.

The general duty applies across an authority’s functions. This means that the duty applies to policy-making, service provision, employment matters, and in relation to enforcement or statutory discretion and decision-making. It also applies to a public authority’s functions in relation to procurement and the contracting out of services. In addition, the duty applies to private and voluntary bodies which are carrying out public functions, but only in respect of those functions.

‘Due regard’ comprises two linked elements: proportionality and relevance. The weight that public authorities give to equality should be proportionate to how relevant a particular function is to equality. The greater the relevance of a function to equality, the greater the regard that should be paid to that function. This raises a number of pertinent issues for the committee and the inquiry, for example:

- Given that age is now recognised as a ‘protected characteristic’, how will public authorities demonstrate due regard in delivering or commissioning care services for older people to ensure that they have considered the need to eliminate discrimination and harassment of older people, advance equality of opportunity and foster good relations?

- How will public authorities demonstrate due regard in gathering information to help inform strategic and spending decisions on how best to meet the needs of older people and allocate finite public resources as effectively as possible?

- How will public authorities which deliver or commission services for older people demonstrate due regard to ensure that the specific needs of different groups of older people are being met, for example through the provision of culturally and linguistically accessible services for older BME people?

- How will regulatory and inspection bodies demonstrate due regard in inspection practice and assessing risk? How will the public authorities they are responsible for assist this through self-evaluation?

The Scottish Parliament plans to consult on new specific duties this autumn to set out how key public authorities, including councils and health boards, will be required to go about meeting the requirements of the general duties. While
the final scope and content of the duties is of course a matter for ministers and the Scottish Parliament, we would anticipate that the specific duties will include requirements relating to setting equality outcomes, evidence gathering and impact assessment. The commission will be publishing codes of practice and non-statutory guidance to assist public authorities in implementing the duties effectively.

**Collaborative Regulation**

The EHRC and its predecessor bodies have over many years developed strong relationships with the audit and scrutiny sector in Scotland, and in 2011 will be working collaboratively with Audit Scotland to identify ways of better addressing equality in their scrutiny work.

Our collaborative work with scrutiny bodies planned for 2011/12 aims to better embed equalities into their planning and practice in order to drive improved outcomes. We intend that this work should assist the development of more effective regulation for all public services, including those delivering care for older people. The work will fall under three headings: inspection practice, risk assessment and self-evaluation.

In relation to inspection practice, we are developing a partnership with Audit Scotland to assess and promote the public sector’s implementation of the new equality duties, specifically through seeking to improve the equality dimension of the Best Value audit process. The approach will be piloted and developed by the Commission with Audit Scotland, initially during an audit of Stirling Council commencing in April 2011. We will also engage with the wider scrutiny sector in Scotland to ensure that individual bodies understand and meet their obligations under the public sector equality duty.

To this end, we plan to establish an agreement with Audit Scotland and potentially other scrutiny bodies on the necessary steps to support and encourage the public authorities they inspect to pay ‘due regard’, potentially through a resource for inspectors.

We will also work to ensure that the SRA framework gives due consideration to performance on equality as a risk factor. Finally, we will identify opportunities with education authorities, colleges or schools to develop standard robust indicators in order to benchmark their equality performance and improve their own self-evaluation processes, and scope out opportunities with Scottish Government to influence the development of its new benchmarking tool for the education/school sector. Although at this stage, the self evaluation work will concentrate on the education sector, the learning will be applicable to other sectors including adult social care.

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Inquiry into Provision of Home Care for Older People in England

In England, the Commission is conducting an inquiry into how well the home-based care and support system in England is protecting the rights of people over 65. The full report will be published in November 2011, however, interim findings published in June 2011, highlighted many worrying cases, for example:

- people being left in bed for 17 hours or more between care visits;
- failure to wash people regularly and provide people with the support they need to eat and drink;
- people being left in soiled beds and clothes for long periods;
- a high staff turnover meaning some people have a huge number of different carers performing intimate tasks such as washing and dressing. In one case a woman recorded having 32 different carers over a two week period.
- Lack of control over timing of care visits: the inquiry has heard of people being put to bed at 5pm and not helped to get up until 10am, a period of 17 hours.
- Lack of staff awareness and training: some older people have described feeling that their privacy and dignity is not respected. For example we have been told about an older person being regularly undressed by care staff in front of his bungalow window, and another person in front of family members, instead of in privacy. A thorough training process would make sure staff took the simple steps required to avoid these basic mistakes. This would have a huge impact on the day-to-day lives of those they care for.

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2 The evidence for the inquiry is drawn from several sources including a general call for evidence from older people, families, care workers and NGOs; a targeted call for evidence from government (in progress), regulators and other key organisations; and surveys undertaken with local authorities and primary care trusts, and home care providers. Fifty four per cent of local authorities and 250 home care providers in England participated in the surveys. We received a total of 503 written submissions to our call for evidence.

- 344 responses from individuals (older people, their friends and family)
- 58 from organisations; and
- 101 from home care staff.
• Inadequate time to deliver care: the very brief time allocated to homecare visits – just 15 minutes in a number of cases – does not allow even basic essential tasks to be done properly. As a result people sometimes have to choose between having a cooked meal or a wash. The short visits also mean that staff have to rush tasks like washing and dressing.

These examples highlight not just inadequate care – they illustrate what can and does go wrong where equality and human rights are not embedded in the design and delivery of services for older people. It raises fundamental questions for the committee around, for example, how scrutiny regimes assess staff training and awareness, and about how (or if) service users are meaningfully involved in designing the services they rely on. It also raises questions about how regulatory bodies frame inspection practice, for example in looking at not just what is delivered, but at whether the dignity and autonomy of the service user are in all instances given due consideration.

**Conclusion**

In responding then to the key question the committee has set its inquiry, the Commission would argue that more remains to be done to embed equality and rights into regulatory strategy and practice in Scotland, but that there are very important opportunities afforded by the introduction of the new Public Sector Equality Duty (supported in due course by the Scottish Specific Duties), as well as the learning from the Commission’s collaborative work with the post-Crerar scrutiny sector in Scotland, and important work such as the SHRC “Care About Rights” project and relevant EHRC projects in other GB jurisdictions.

Euan Page  
Parliamentary & Government Affairs Manager  
Equality and Human Rights Commission Scotland  
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