Inquiry into regulation of care for older people

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 our 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 provide evidence to the Health and Sport Committee on whether the regulatory system ensures care services for older people are providing good quality and appropriate care.

The starting point for the Commission’s response to this inquiry is that good quality and appropriate care must comply with human rights law and best practice. The regulator body, Social Care and Social Work Improvement Scotland (SCWSIS), as a public body must comply with the rights set out in the Human Right Act (The Act) (s6) and similarly most services must also comply with the Act. Furthermore the legal and regulatory framework related to older peoples care must be interpreted in accordance with European Convention rights in light of the Human Rights Act (s3 of the Act).

The Commission believes an increased understanding of how human rights relate to the role of SCWSIS and to older people care service delivery will assist in ensuring good quality, person centred and appropriate care. This is supported by the evaluation report findings of the Commission’s work on older people’s care- “Care about Rights”.

Working with care providers, the former Care Commission, Scottish Care, Age Scotland, service users and others to develop the “Care about Rights” training package assisted the Commission to identify where human rights can add value to improving service delivery and strengthen the effectiveness of the scrutiny and regulation.

Legal Framework

The key human rights framework protections relevant to this response are:

- The European Convention on Human Rights
- The Human Rights Act 1998
- The Scotland Act 1998
- Universal Declaration of Human Rights
- International Covenant on Economic Social and Cultural Rights
- Convention on Rights of Persons with Disabilities
Can we be confident that the regulatory system is picking up on care services where the quality of care is poor?

The Commission welcomes the architecture of regulation, scrutiny and improvement that we have for older people’s services in Scotland as an important and necessary part of ensuring human rights standards are met. There are nevertheless examples of poor practice which are picked up by a range of organisations, the media or through the complaints processes of the regulator and others which illustrate that incidences of poor practice persist and institutional cultures which do not reflect human rights values remain.

The Commission believes that a better understanding of human rights by services, the regulator and commissioning bodies will help to drive up standards and prevent poor quality of care. The Commission has recently developed in partnership a training and awareness raising package related to the care and support of older people called “Care about Rights”. Training has been delivered, through a variety of means to care service providers across the country as well as with outreach groups of older people. The project is being independently evaluated by GEN, the University of Bedfordshire and Queen Margaret University and interim findings of the evaluation reported in August 2011 suggest that care services found the materials to be helpful in assisting them deliver quality care.

Some of the findings of the report were based on a survey of care provider participants in the human rights training programme. The results of the survey and comments by those interviewed as part of the evaluation clearly demonstrate the value that an increased understanding of human rights brought to their work delivering services for older people. For example:

- ninety three percent of respondents now feel that improving the way that care providers balance risk in decision making is a potential benefit of applying a human rights based approach;
- ninety seven percent now feel that a human rights based approach can help providers develop positive relationships with service users and families;
- eighty six percent feel that a human rights based approach could help resolve conflict.

Some of the comments from care service participants in the evaluation process reflect how human rights can improve service delivery and the value of increased understanding and explicit linkages. Comments reported to us include:

- “...It [Care About Rights] is aligned with and adds value to professional and occupational standards – it is not new! Human rights are built into the care standards and Care About Rights is a tool to bring this to forefront in a delivery setting…”
• “It helps us to look at the issue of proportionality in all that we do in terms of care provision and the balance of risk – a particular example would be around the use of locked doors in care homes”
• “It helped in a conflict situation with family members regarding a client receiving a care service and the carers. Using the Care About Rights Framework we were able to resolve the issue to everyone’s satisfaction and I felt by using this the client was being heard, and listened to. I also use the scenarios regularly with staff in training”

We believe it is essential for both the health and care regulatory bodies to have a thorough understanding of human rights to assist them identify and address appropriately poor practice and drive up standards. While the National Care standards are underpinned by human rights principles this shared understanding cannot be assumed in practice and must be fostered through collaborative engagement in the issues.

**Are there any particular weaknesses in the current system?**

The Commission believes an explicit linkage to human rights standards in regulation and training will improve quality of care for older people. The development of the Care about Rights project allowed us to identify some areas where we believe an understanding and application of a human rights based approach by the scrutiny, regulation and improvement body and by care services could better contribute to driving up standards.

Many providers we spoke to raised their concerns around dealing with issues of risk and safety in a way which would satisfy the regulator and family members without violating individuals’ rights. This concern was reported to lead to a risk averse approach to the management of care issues resulting in disproportionate interferences in the rights of older service users and inappropriate restrictions placed on individuals rights. This highlighted to us a lack of understanding of fundamental human rights principles as they apply in practice which can detract from person centred, rights based care.

A thorough understanding of how human rights relate to the National Care Standards puts individual service user’s rights at the centre of decision making and provides a framework of understanding across the services, the regulator and the public. This common understanding should also assist to reduce inconsistencies and subjectivity in regulation where they might occur. The National Care Standards are underpinned by the human rights principles of dignity, privacy, choice, safety, realising potential and equality and diversity and it can easily be illustrated where the National Care Standards directly relate to human rights standards. (e.g. Article 8 of the ECHR corresponds to a range of standards in the National Care Standards for Care Homes for Older People etc)

We believe that applying these Standards in practice in a way which meets the rights of the individual and is person centred however requires a deeper understanding of the human rights framework. For example, if you consider Standard 16 from the National Care Standards for Care Homes for Older
People which states “You have the Right to a Private Life” it will be essential to understand not only the premise of the standard but also the extent to which the right to privacy might be interfered with, for example in order to meet an individuals personal care needs or to keep them safe from harm. The concept of proportionality, or minimum necessary interference to met an aim, inherent in the human rights framework allows for service providers and the regulator to make this assessment. The underpinning principles such as privacy and safety may at times come into conflict and understanding human rights can assist in resolving this tension.

Human rights are therefore an important tool for aiding interpretation of the Standards and decision making and a means of resolving issues and improving service delivery. In this way human rights intersect and support the role of the regulators to improve service delivery and must be fully understood throughout the regulation process. We are pleased at the engagement of the former Care Commission to date in increasing understanding of human rights and SCSWIS will continue to actively seek to improve understanding of human rights both as an organisation and in it’s improvement role with service providers.

The Commission also believes that in order to ensure the realisation of the rights of older people using care services the whole range of factors which impact upon the quality of care must be considered including the commissioning, resource, capacity and workforce issues. For example, the Commission contributed its views to the Scottish Procurement Directorate Joint Improvement Team Guidance on Social Care Procurement in 2010 outlining the human rights considerations to be taken into account in social care commissioning and procurement. In particular our concerns centred around the participation of service users and the potential that prioritisation of cost considerations over quality considerations may drive down standards. We welcomed inclusion of human rights criteria in defining quality of services in the final guidance produced this year and hope this will be implemented in practice.

In order to improve the quality of care the system of regulation and enforcement should connect, therefore, to the interdependencies in the system. It is hoped that the new body SCSWIS will use its powers to draw attention to systemic factors which may underlay poor service delivery. We hope the new body will have the capacity and resources to support its improvement role as well as ensuring services do not fall below minimum standards.

**Does the system adequately take into account the views of service users?**

The genuine participation and involvement of people using services in all decisions affecting their rights, with the involvement of their families and carers where necessary, is key to ensuring a person-centred approach and human rights based service provision.
We welcome that the regulator encourages the views of services users to be heard and participation in the design and delivery of care. We also welcome that service users views are sought through the inspection process. It will be important that this continues and also becomes an integral part of commissioning practices of services where there has historically been a lack of consultation and participation with the users of services.

**Does the registration and regulatory system provide an appropriate basis for the regulation, inspection and enforcement of integrated social and NHS care in the community?**

The shift in the balance of care for older people from acute and residential facilities to home based care as outlined in the Reshaping Care of Older People agenda will inevitably also require a corresponding shift in regulation. This is likely to require collaboration between the different agencies such as SCSWIS and Health Improvement Scotland and further consideration of what will be appropriate as the services we provide evolve to meet increasing demand and needs.

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