

RCN Scotland's response to the Scottish Government consultation on a Human Rights Bill for Scotland

<https://consult.gov.scot/equality-and-human-rights/a-human-rights-bill-for-scotland-consultation/>

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Introduction

RCN Scotland broadly supports the Scottish Government's approach to a Human Rights Bill. We also support the idea that human rights should underpin public services.

However, we have two major and related concerns to do with the proposed right to the highest attainable standard of physical and mental health. This right is in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and so in this response we will call it the Article 12 right.

Question 42 of the consultation paper asks: How can the Scottish Government and partners effectively build capacity across the public sector to ensure the rights in the Bill are delivered?

Our first concern

Our first concern is to do with the capacity of public authorities to deliver services that are compatible with human rights.

Based on the text of the consultation paper, the matter of capacity seems to be thought of in terms of public authorities being able to get to grips with what the law will say they have to do. The Human Rights Taskforce recommendations 17 and 18 talk mainly about guidance. Recommendation 18 is that:

- The Scottish Government takes steps to ensure that public authorities are supported to effectively implement the framework through provision of adequate resources and clear guidance on their duties. (Part 9 of the consultation on page 51).

The word framework refers to the legal framework that will be created by the Bill. The consultation goes on to say:

- Capacity building across government and public authorities will be essential to ensure effective implementation. We will develop a plan, working closely with our recently established Implementation Working Group, which is aligned with our work to build capacity in relation to UNCRC Bill implementation, reform the operation of the Public Sector Equality Duty in Scotland, and further embed equality and human rights across government and public services.

We are concerned that the consultation does not consider capacity in terms of staffing frontline services. If that is not done, we are worried that it will not be possible for individuals to enjoy the Article 12 right or for it to be enforceable in any meaningful way.

The Article 12 right is enforceable against the state, in the form of various public sector organisations, usually called 'public authorities.' In Scotland the main public authority that provides health care is NHS Scotland. Many independent providers deliver physical and mental health and care services on behalf of public

authorities. They are either private or third sector organisations. They do this under some form of contract, whether that is with the NHS, local authorities, or Scottish Government. They would have human rights obligations under the Bill because of the proposal in part 7 of the consultation on page 29. Under the heading ‘Who the duties will apply to’ it says:

- In relation to private actors, as a starting point we would wish to mirror the UNCRC Bill’s proposed approach. This applies the duties of the Bill to bodies carrying out functions of a public nature, including private bodies acting under a contract or other arrangements with a public body.

What this means is that the NHS and contracted health and care providers will have practical frontline responsibility for running services that are compatible with the Article 12 right.

Fulfilling that responsibility is only partly about whether service managers understand what the legislation says and what it requires.

It is mainly about there being enough of the right staff in the right place at the right time to actually deliver, in practice, the safe and effective care that will enable delivery of the Article 12 right.

The consultation suggests that, at first, public authorities, like the NHS, and contracted health and care providers will only be subject to what the consultation calls Minimum Core Obligations (MCOs). But even MCOs will place considerable responsibility on the NHS and providers. The case study about the Article 12 right (in part 7 on page 32) makes this clear when it says that the MCOs for this right should include:

- at the very least: access to and equitable distribution of health facilities, goods and services without discrimination, especially for those vulnerable and marginalised.

Access and equitable distribution are not easy things to achieve. To deliver that MCO and to ensure that the Article 12 right can be enjoyed and enforced, the NHS and contracted health and care providers will need to be safely and fully staffed and resourced. That is far from the case just now.

The latest published figures for staff vacancies in nursing and midwifery in NHS Scotland refer to the period ending 30 June 2023.

¹ They show a shortfall of 5,616.6 wholtime equivalents which is a rate of 8%. The rate for allied health professionals is 6.9% and for medical and dental consultants it is 8%.² For GPs the latest available figures give a rate of 8.7% and for general practice nurses 11.7%.³ In the social care sector the overall staff vacancy rate is 8.1% and for nursing in that sector it is 16.2%.⁴

RCN Scotland’s most recent workforce report⁵ highlighted multiple challenges to addressing this problem, including less take up of student nurse places than there were places available:

Overall, there were nearly 600 fewer nursing students starting university in autumn 2022 than the Scottish government's recommended intake target of 4,536 (SFC, 2022). There are particular shortfalls of new nursing students in learning disabilities where there are 40% fewer students than planned (66 fewer students), in mental health nursing with 16% fewer students (139 fewer students), and in adult nursing where 12% fewer students than planned began degree courses in autumn (page 24).

These figures give real cause for concern that there will not be enough new nurses coming through to ensure full and safe staffing in future.

The Health and Care (Staffing) (Scotland) Act 2019 is due to be implemented from 1 April 2024. It places similar safe staffing duties on the NHS and on "any person who provides a care service." The core of each duty is:

to ensure that that at all times suitably qualified and competent individuals... are working in such numbers as are appropriate for

(a) the health, wellbeing and safety of patients,

(b) the provision of safe and high-quality health care, and

(c) in so far as it affects either of those matters, the wellbeing of staff

The Scottish Ministers have a duty under the Act to take all reasonable steps to ensure the NHS has enough nurses, midwives and medical practitioners (i.e., doctors) to fulfil this duty.

In our workforce report, we set out our hopes for the Act's effect, but we set that in context:

- Effective implementation of the Act is expected to address some of the workforce challenges in the NHS and care homes. However, the Act itself is not a single solution to the nursing workforce crisis in Scotland...This ground-breaking safe staffing legislation – the first of its kind in the UK to cover both health and care – will only make a long-term positive difference for the nursing profession, and those who rely on their care, if services have the nursing establishment they need. The staggeringly high number of nursing vacancies in Scotland must be addressed with urgent action before the Act is fully implemented in April 2024. The Act provides tools to facilitate safe staffing levels across health and care, but its successful implementation relies entirely on retaining and recruiting more nurses.

If this does not happen the Article 12 right will be unenforceable in any meaningful sense.

Our first answer to question 42 is this: Make sure that Health Boards and any person who provides a care service fulfils their duties under the Health and Care (Staffing) (Scotland) Act 2019 and that Scottish Ministers fulfil theirs, particularly their duty in section 12IG as inserted into the National Health Service (Scotland)

Act 1978 by section 4 “to ensure appropriate staffing: number of registered healthcare professionals etc.”

We also suggest that the Human Rights Bill is drafted to make it clear that there is an interdependency between the enjoyment and enforceability of the Article 12 right and the provisions of the Health and Care (Staffing) (Scotland) Act 2019.

Our second concern

Our second concern is that there is no consideration in the consultation of the enforcement of the Article 12 right against the state by its employees. This right would apply to all state employers and employees but here we are concerned with employers and employees in the NHS and contracted health and care providers. That is where most of our members work.

There is no appreciation either of how this right (or others) interact with employment law more widely, or with the employment tribunal system.

The likely problem can be illustrated as follows: An employee of the NHS or of a contracted health and care provider believes that they have been denied the enjoyment of their Article 12 right by their employer. The employee argues that their physical and mental health is suffering because the employer arranges their work on a basis that, whilst technically legal, makes it impossible in practice for them to enjoy the highest attainable standard of physical and mental health. This would not be an individualised claim to do with, for example, bullying by a colleague. It would be a claim that the employer’s system was at fault, regardless of individual behaviour.

For example, an NHS nurse has to regularly work unpaid extra hours at the end of their shifts to properly complete paperwork and handover to the next shift. This is because (a) the Health Board cannot staff its establishment (that is the number of staff posts it needs, and is funded for, to be considered fully staffed) so that everyone on every shift is in a similar position, and (b) there is an unofficial -but demonstrable- management expectation that working these extra hours is the norm. In our example, this means that the nurse has insufficient time outwith their contracted working hours to travel to and from work safely and affordably; source and prepare healthy food; look after their children; exercise; attend counselling; and so on.

If it was established that there was a direct line between the employer’s actions and the breach of the employee’s Article 12 right the employee would be entitled to a remedy. But it is hard to see what that would look like in this situation. What would happen if the remedy required action on the part of the Health Board or the Scottish Government which neither had any chance of being able to deliver? For example, if the Health Board consistently failed to staff its establishment or if the Scottish Government chose not to fund sufficient student nursing placements to contribute to the filling of registered nursing vacancies. There would be a serious risk that no real remedy could be delivered. If that were to be the case, then, once again, the Article 12 right would be unenforceable in any meaningful sense.

We are reminded of other rights which are enshrined in law but have no significant remedy when breached. Some of the rights in the Patient Rights (Scotland) Act 2011 would fall into this category.

Our second answer to question 42 is this: The Bill must contain clear remedies that an employee can seek and must set out courses of action an employee can take to secure that remedy, if the imposition on that employee by their employer of a system of work organised in a particular way breaches, or is likely to breach, their Article 12 right.

Conclusion

If the Article 12 right, and other human rights, are to be enjoyed and enforceable in practice, the public authorities and contracted providers with human rights obligations must be in a position where they have a fair chance of being able to run services that are compatible with those rights. This means they must be planned, organised and resourced with these obligations specifically in mind.

If this does not happen these providers and services will be being set up to fail. If, as a result, the Article 12 right, and the other proposed rights, have no appreciable benefit to the citizen, those rights and the very concept of human rights itself are at risk of being degraded.

We do not want to see this happen and we trust that the Scottish Government does not wish that either. To make sure it doesn't happen we urge the Scottish Government to act on our arguments, and on the suggestions that we give in our two answers to question 42.

¹ Published on 5 September 2023

² <https://turasdata.nes.nhs.scot/data-and-reports/official-workforce-statistics/all-official-statistics-publications/05-september-2023-workforce/dashboards/nhs-scotland-workforce/?pageid=9984>

³ <https://publichealthscotland.scot/publications/general-practice-workforce-survey/general-practice-workforce-survey-2022/>

⁴ <https://data.sssc.uk.com/data-publications/30-vacancy-reports/305-the-2021-staff-vacancies-in-care-services-report>

⁵ <https://www.rcn.org.uk/About-us/Our-Influencing-work/Policy-briefings/sco-parl-nursing-workforce-in-scotland-report-030523>