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Welsh Parliament

Economy, Trade, and Rural Affairs Committee

Inquiry: The Foundational Economy

Ref: FE18

Evidence from: Equality and Human Rights Commission



Consultation response

The Foundational Economy

Consultation details

Title of consultation: The Foundational Economy

Source of consultation: Economy, Trade and Rural Affairs
Committee

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About us

The Equality and Human Rights Commission is the independent equality regulator for England, Scotland and Wales and is a UN-recognised 'A' status National Human Rights Institution. The Commission has a statutory mandate to advise Government and Parliament on matters relating to equality and human rights, and to promote and protect equality and human rights across Britain.

We welcome the opportunity to contribute to the Economy, Trade and Rural Affairs Committee's inquiry into the foundational economy. We would be happy to discuss any aspect of our response with Committee members.

Background / Context

The Welsh Government is the first national government to take up the Foundational Economy approach. This approach considers how Welsh Government spends its money in Wales and how the government can make better decisions on how to spend it.¹ Estimates suggest the foundational economy provides four in every 10 jobs in Wales and receives one pound in every three that we spend.²

The Welsh Government Prosperity for All: Economic Action Plan published in December 2017³ identified the foundational economy as a key area of action. The Welsh Government committed to support four foundational economy sectors including tourism; food; retail and care.

¹ Institute of Welsh Affairs

² Cynnal Cymru

³ <https://www.gov.wales/prosperity-all-economic-action-plan>

1. To what extent has the Welsh Government embedded support for the foundational economy into its overall approach to economic development? What further steps should it take to do this?

1.1 Foundational Economy Workforce

1.1.1 The foundational economy in Wales largely consists of relatively small businesses with an estimated 248,000 enterprises active in Wales in 2023. The majority of these (99.3%) were small and medium sized enterprises (SMEs) with up to 250 employees and 94.6% of enterprises (0-9 employees) were micro enterprises.⁴

1.1.2 Employment in foundational economy sectors such as tourism, retail, food and drink and social care are strongly associated with having a majority of women workers, a youthful age profile, a predominance of part-time working and high employee turn-over.⁵ There is clear evidence that the gender pay gap is greater for part-time workers; there are issues in foundational economy sectors in relation to fair reward; job security, worker voice and representation.

1.1.3 For example our inquiry report into the experiences of lower-paid ethnic minority workers in health and social care⁶ published in 2022 showed that there was a low awareness of employment rights and a fear of raising concerns amongst lower-paid ethnic minority workers in the adult social care sector in Wales.

⁴ <https://www.gov.wales/size-analysis-businesses-2023>

⁵ <https://www.bevanfoundation.org/wp-content/uploads/2021/07/Fair-Work-what-should-be-done-FINAL.pdf>

⁶ <https://www.equalityhumanrights.com/our-work/inquiries-and-investigations/experiences-health-and-social-care-treatment-lower-paid>

2. Welsh Government Retail Forum

2.1 The Welsh Government set up the Retail Forum in March 2021. It was established to enable the Welsh Government to work with business and employer representatives and trade unions in the retail sector to develop a shared vision for a successful, sustainable and resilient retail sector that offers fair, secure and rewarding work. We were pleased to see that collective action included in the Together for Retail: A Wales Retail Forum Action Plan includes championing workforce equality; diversity and inclusion at all levels and embedding fair work principles by promoting the Real Living Wage, the benefits of the Economic Contract and the role of trades unions.

2.2 We recommend the work of the retail forum is evaluated to determine the impact of its work on the foundational economy workforce, including for data of workers with protected characteristics.

3. Social Care Fair Work Forum

3.1 The Welsh Government set up the Social Care Fair Work Forum (SCFWF) in September 2020.

3.2 The emerging priorities of the Forum for 2024 include social care workforce partnership; pay and progression; focus on employee rights, voice and representation and international recruitment.

3.3 Our Experiences of health and social care: the treatment of lower-paid ethnic minority workers report recommended that the Welsh Government should:

3.4 Work with the Social Care Fair Work Forum and other key stakeholders to review whether providers are offering guaranteed hours in social care (in accordance with Regulation 42 The Regulated Services (Service Providers and Responsible Individuals) (Wales) Regulations 2017) and resolve any barriers to meeting those requirements.

We also recommend that:

3.5 In developing the pay and progression framework, the Social Care Fair Work Forum and local authorities in Wales should take into account the issues facing ethnic minority staff identified in our inquiry report, Experiences from health and social care: the treatment of lower-paid ethnic minority workers and consider how the new framework can help address these, including through the use of positive action measures to address under-representation and barriers to progression.

3.6 The Welsh Government fulfil its PSED obligations by developing new, and improving existing, sector-wide national structures for gathering more comprehensive health and social care workforce data on the protected characteristics, including race.

3.7 The framework includes provisions to support the characteristics of employee voice and collective representation; security and flexibility; safe, healthy, inclusive working environment and legal rights respected and given substantive effect characteristics.

3.8 The framework is strengthened by including an additional aim that focuses on the removal of discrimination against people with protected characteristics throughout the employment journey.

3.9 Although the framework will be voluntary and limited to workers providing direct care, we recommend the Welsh Government publish a timeline for the roll out across the sector and what evaluation and potential review of the scope of the framework is planned.

3.10 Apprenticeships should be explicitly referenced in the framework. There is a risk that by excluding apprenticeships anyone considering starting an apprenticeship may consider that apprentices will not be offered the same opportunities as other staff members.

3.11 Robust disaggregated data is collected on people starting and completing apprenticeships, as well as whether these workers are retained once qualified. This data is vital to have a clearer picture as to the effectiveness of the apprenticeship pathway in recruiting and retaining a diverse workforce.

4. Economic Contract

4.1 The Economic Contract is part of the Welsh Governments 'Prosperity for All - Economic Action Plan'.⁷ The Welsh Government states the Economic Contract “has been designed to enable the Welsh Government to develop a new and strengthened relationship with business and to drive inclusive growth and responsible business behaviours, including increasing the availability of fair work and decarbonisation.”

4.2 In particular, “the Economic Contract will require businesses seeking investmentto demonstrate Fair Work (as defined by the Fair Work Commission), including permitting trade union access as a minimum requirement.

4.3 The Economic Contract therefore, presents a significant opportunity to drive inclusive growth and responsible business behaviours, including increasing the availability of Fair Work – and promoting equality and human rights considerations within the workplace.

⁷ <https://www.gov.wales/sites/default/files/publications/2019-02/prosperity-for-all-economic-action-plan.pdf>

4.4 In our consultation response to the Reconstruction Strategy for Wales Business and Regions consultation in September 2020 we recommended “The Welsh Government should strengthen and maximise the opportunities presented by the Economic Contract to drive inclusive growth and responsible business behaviours, including promoting equality and human rights”.

4.5 The Economic contract was refreshed and reintroduced in January 2022. We responded to the Welsh Government consultation on the Economic Contract with recommendations. These included:

- **Equality and human rights considerations being at the heart of decision making.**
- **Reminding employers/businesses of their legal obligations under the Equality Act 2010 and the Public Sector Equality Duty.**
- **Ensuring all data collected is disaggregated by protected characteristic, monitored for trends and strategies put in place to address any disproportionate impacts. This will enable Welsh Government to know which groups of people are being positively or negatively impacted by its economic policies.**
- **Being used as a lever to drive forward the implementation of the six characteristics of fair work.**
- **The Fair Work Commission report highlighted the real living wage as an important pillar of Fair Work. The Welsh Government should use its review of procurement and other levers such as its code of practice: ethical employment in supply chains, fair work and the economic contract to encourage employers in Wales to pay the real living wage.**

- **Supporting Welsh Government’s apprenticeship policy which identifies apprenticeships as an essential ingredient of economic success and a vital tool in building a stronger, fairer and more equal Wales; and further promoting fair work by ensuring inclusive apprenticeships that are available to all young people.**
- **The new indicators suggested to ensure clear and consistent standards, should include an equality focus to ensure the promotion of inclusive workplaces. The EHRC Measurement Framework for Equality and Human Rights may help with the setting of equality and human rights related indicators.**
- **Revised guidance for government officials and businesses in line with the contract refresh should have an equality theme.**
- **Economic contract negotiators and relationship managers should have ongoing equality and human rights training to develop understanding of the requirements of equality legislation. Guidance for employers is available on our [website](#).**

4.6 These recommendations remain relevant and should be taken forward and **we recommend the Committee asks the Welsh Government for clarification of which of these recommendations have been taken forward.**

4.7 We note that in April 2024, Cwmpas and OB3 Research were commissioned by the Welsh Government to undertake an evaluation of the refreshed Economic Contract. We understand the aim of the evaluation is to provide an independent assessment of the impact of the Economic Contract by ascertaining to what extent any behavioural changes amongst businesses can be directly attributed to the Economic Contract.

4.8 We recommend the evaluation considers the equality and human rights impacts of the contract, including on protected characteristic groups and that the final evaluation is published when completed.

5. The Socioeconomic Duty (SED)

5.1 The socioeconomic duty was enacted in Wales in March 2021. The overall aim of the duty is to deliver better outcomes for those who experience socio-economic disadvantage.

5.2 We recommend relevant public authorities, including the Welsh Government consider how the socioeconomic duty can be used better to tackle socioeconomic disadvantage through the foundational economy.

6. Data

6.1 We recommend the Welsh Government works with the evidence units and key stakeholders in the foundational economy to address data gaps, ensuring that all data is disaggregated by protected characteristics.

2. Given the cross-portfolio nature of the foundational economy, how should the Welsh Government create a co-ordinated approach to mainstreaming support for foundational economy sectors across government?

Not answered

3. Which of the Welsh Government's foundational economy policy initiatives have been most successful, and why? Which have worked less well, and why?

Not answered

4. What examples of best practice exist in different foundational economy sectors and places within or beyond Wales? How could the Welsh Government better support partners to deliver best practice, and to scale it up where appropriate?

Not answered

5. What progress has been made in using procurement to strengthen the foundational economy since our predecessor Committee looked at this issue in 2019? What further actions are required to deliver greater progress, and what innovative examples of best practice could be built on?

5.1 Equality Act 2010 and the Public Sector Equality Duty (PSED)

5.1.1 Most public authorities in Wales are subject to the PSED.

5.1.2 The ‘general duty’ of the PSED aims to ensure that public authorities and those carrying out a public function consider how they can positively contribute to a fairer society through advancing equality and good relations in their day-to-day activities. The duty ensures that equality considerations are built into the design of policies and the delivery of services and that they are kept under review. This will achieve better outcomes for all. Public bodies are required to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation and other conduct that is prohibited by the Act.
- Advance equality of opportunity between people who share a relevant protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not. The guidance refers to

these three elements as the three ‘aims’ of the general duty and so when we discuss the general duty we mean all three aims.

5.1.3 The Equality Act 2010 states that:

- Where an authority is a contracting authority proposes to enter into a relevant agreement on the basis of an offer which is the most economically advantageous it must have due regard to whether the award criteria should include considerations relevant to its performance of the general duty.
- Where an authority that is a contracting authority proposes to stipulate conditions relating to the performance of a relevant agreement it must have due regard to whether the conditions should include considerations relevant to the performance of the general duty.

5.1.4 **The Committee may wish to refer to our guidance on Procurement – a guide for listed public authorities in Wales in 2023.**⁸

5.1.5 Most public authorities in Wales covered by the general duty are also covered by the specific duties⁹. The specific duties set out the steps that listed bodies in Wales must take that will help to demonstrate that they are meeting the general duty.

5.1.6 Regulation 18 of the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 sets out that: when procuring works, goods or services from other organisations on the basis of a relevant agreement, a listed body in Wales must:

⁸ <https://www.equalityhumanrights.com/guidance/public-sector-equality-duty/procurement-guide-listed-public-authorities-wales-0?return-url=https%3A%2F%2Fwww.equalityhumanrights.com%2Fsearch%3Fkeys%3Dprocurement%2Bwales>

⁹ The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011

- Have due regard to whether it would be appropriate for the award criteria for that contract to include considerations to help meet the general duty.
- Have due regard to whether it would be appropriate to stipulate conditions relating to the performance of the contract to help meet the three aims of the general duty.

5.1.7 We recommend that consideration be given to ensuring that public authorities and bodies carrying out public functions¹⁰ in relation to the foundational economy are aware of and meeting their procurement obligations under the Equality Act including the PSED.

6. Social Partnerships and Public Procurement (Wales) Act (SPPP(W)A)

6.1 The Socially Responsible Procurement Duty is due to come into effect later this year and will cover the full procurement cycle. It will require specified public bodies to consider socially responsible public procurement when carrying out public procurement; set procurement objectives in relation to well-being goals; and publish procurement strategies.

6.2 There is an overarching duty to take account of social, economic, environmental and cultural well-being when carrying out all large procurements. This will apply to all contracting authorities and their procurement. All contracting authorities will also be required to publish objectives on how their procurement activity will contribute to well-being goals.

6.3 We previously expressed concern at the lack of reference to the PSED in the consultation documents for the SPPP(W) Bill and the explanatory memorandum. We recommended that guidance was given to assist listed public authorities in understanding their

¹⁰ Annex A, <https://www.equalityhumanrights.com/guidance/public-sector-equality-duty/technical-guidance-public-sector-equality-duty-wales>

obligations under both pieces of legislation - SPPP(W)A and the PSED.

6.4 Recommendation 14 in the Senedd Equality and Social Justice Committee Stage 1 Report on the General Principles of the Social Partnership and Public Procurement (Wales) Bill¹¹ states:

- “The Welsh Government should set out how it proposes that the Public Sector Equality Duties procurement regulation and the socially responsible procurement duty align, and how it intends to ensure that public bodies subject to both duties understand how the duties will work together”.

6.5 This recommendation was accepted in full by the then Deputy Minister Hannah Blythyn MS, who committed to ensuring the PSED would be taken forward through the guidance that would accompany the SPPP(W)A.

6.6 The Commission is concerned that a lack of guidance to accompany the implementation of the SPPP(W)A is likely to both cause confusion and miss an opportunity to maximise the impact of any synergy between two pieces of legislation placing duties on procurement.

6.7 We recommend that any guidance to accompany the implementation of the socially responsible procurement duty considers how this new procurement duty and Regulation 18 of the PSED specific duties for Wales will interact, so that listed public authorities in Wales have clarity on how to comply with both duties.

7. Social Partnership Council (SPC)

7.1 The SPPP(W)A introduced a procurement subgroup of the SPC to provide information and advice to the SPC about the procurement duties imposed on contracting authorities.

¹¹ <https://senedd.wales/media/f1dnmz0e/cr-ld15470-e.pdf>

7.2 We recommend this sub-group includes consideration of how the procurement obligations under the Equality Act including the PSED obligations on public authorities are being implemented and advise the SPC accordingly.

8. The national framework for the commissioning of care and support in Wales: Code of practice

8.1 The Code sets out the national framework for the commissioning of care and support services. The code itself identified that “across Wales there are already many examples of good commissioning and procurement practices but there is inconsistency in the way that care and support services are commissioned”.

8.2 The seven principles for commissioning care and support include principle five – “sustainable care and support is built on fair work and pricing. Commissioning practices must support employers to improve the status, well-being and working conditions of health and social care workers with the aim of parity of esteem and terms and conditions across sectors”.¹²

8.3 Previous research by the Association of Directors of Social Services (ADSS) Cymru has highlighted a lack of understanding amongst commissioners about what is required in relation to equality¹³. We are pleased to be working with the Welsh Government to contribute towards the development and implementation of a toolkit for commissioners on equality, specifically complying with the Socio-Economic Duty (SED) as well as the Public Sector Equality Duty.

¹² The national framework for the commissioning of care and support in Wales: Code of practice

¹³ Rebalancing care and support programme consultation

9. Rebalancing care and support

9.1 We responded to the Welsh Government Rebalancing care and support programme consultation in August 2023 (Annex A). Within this consultation response we made recommendations to the Welsh Government some of which were in relation to the standards for commissioning care and support and the Social Care Fair Work Forum’s pay and progression framework.

9.2 We remind the Welsh Government of the importance of monitoring the implementation of the standards for commissioning care and support set out in the national framework for the commissioning of care and support in Wales: code of practice.¹⁴

9.3 As the code of practice itself acknowledges “...there is inconsistency in the way that care and support services are commissioned”.¹⁵ Ensuring the standards and the principles for commissioning care and support are upheld will help to address this and will help the Welsh Government to ensure that fair work characteristics are enshrined within the sector.

¹⁴ <https://www.gov.wales/national-framework-commissioning-care-and-support-code-practice>

¹⁵ <https://www.gov.wales/national-framework-commissioning-care-and-support-code-practice>

10. Experiences of health and social care: the treatment of lower-paid ethnic minority workers

10.1 One of the key findings of our 2022 report on the experiences of health and social care: the treatment of lower-paid ethnic minority workers was that the commissioning out of adult social care, and outsourcing of some roles in health, has resulted in more insecure work and poorer pay and terms and conditions than for those directly working for the public sector. This was found to be disproportionately affecting lower-paid ethnic minority workers who are more likely to be working in these indirectly employed roles in adult social care.

10.2 Our report recommended that the Welsh Government should provide leadership to public bodies commissioning care services and ensure that guidance relating to the commissioning of public services is in place to:

- **Set out clear expectations for commissioners on the contractual obligations with regard to providing detailed and consistent workforce datasets for all contracts.**
- **Ensure more evidence-based, improvement-focused and transparent compliance with the PSED, and**
- **Ensure that commissioning helps address the poorer outcomes faced by ethnic minority workers and there are checks in place for assessing compliance with such guidance.**

6. How effective have the Welsh Government's actions to deliver fair work in foundational economy sectors been? What further steps should it take within its devolved powers to progress this agenda, and how can it work with the UK Government to drive improvements in non-devolved areas?

6.1 Fair Work

6.1.1 The Fair Work Commission published its report, Fair Work Wales in 2019.¹⁶ This report made 48 recommendations to the Welsh Government which included a definition of fair work: “Fair work is where workers are fairly rewarded, heard and represented, secure and able to progress in a healthy, inclusive environment where rights are respected”. It also included six characteristics of fair work and a commitment that the promotion of equality and inclusion would be integral to all six characteristics:

- Fair reward
- Employee voice and collective representation
- Security and flexibility
- Opportunity for access, growth and progression
- Safe, healthy and inclusive working environment
- Legal rights respected and given substantive effect

¹⁶ <https://www.gov.wales/fair-work-wales>

6.1.2 In 2017 the Code of Practice on Ethical Employment in Supply Chains was published. This identified 12 commitments which included publishing policies and an anti-slavery statement; training staff; making sure unlawful and unethical employment practices are not found within supply chains and it required organisations to consider paying all staff above the real living wage.

6.1.3 The code is voluntary. Signing up to it isn't a condition of receiving a grant or contract. By April 2024 over 600 organisations had signed up to the code¹⁷ which is a small fraction of the organisations that could have signed up,¹⁸ despite the fact that organisations receiving public funding are in practice expected to sign up.

¹⁷ <https://www.gov.wales/fair-work-commission-recommendations-progress-report-2024-html#:~:text=Recommendation%2022%3A%20with%20regard%20to,of%20businesses%20not%20in%20receipt>

¹⁸ <https://businesswales.gov.wales/news-and-blog/code-practice-ethical-employment-supply-chains>

6.1.4 Recommendation 22 of the Fair Work Wales report recommended that “..signing up to the Code (of practice on ethical employment in supply chains) should be made a requirement of Welsh public bodies and those organisations in receipt of public funding.”¹⁹ The 2024 Fair Work Annual Progress report²⁰ stated that “ongoing work has indicated that making the Code of Practice mandatory, in its entirety, would potentially have a number of unintended and undesirable consequences. Better traction, commitment, and delivery can be achieved by engaging, explaining, and encouraging organisations to sign up, as opposed to mandating them to do so”.²¹

6.1.5 Recommendation 18 recommended that “...public money should be provided only to organisations fulfilling or working towards fulfilling fair work..”.²² The latest annual progress report suggests that this recommendation is in progress and that rather than implementing this recommendation as it is written, the Welsh Government has instead focused on “improving the reach and impact of the Economic Contract and Code of Practice on Ethical Employment in Supply Chains” and the role of the socially responsible procurement duty.²³

¹⁹ Fair Work Wales report, Fair Work Commission

²⁰ <https://www.gov.wales/fair-work-commission-recommendations-progress-report-2024-html>

²¹ <https://www.gov.wales/fair-work-commission-recommendations-progress-report-2024-html#:~:text=Recommendation%2022%3A%20with%20regard%20to,of%20businesses%20not%20in%20receipt>

²² <https://www.gov.wales/fair-work-commission-recommendations-progress-report-2024-html#:~:text=Recommendation%2022%3A%20with%20regard%20to,of%20businesses%20not%20in%20receipt>

²³ <https://www.gov.wales/fair-work-commission-recommendations-progress-report-2024-html#:~:text=Recommendation%2022%3A%20with%20regard%20to,of%20businesses%20not%20in%20receipt>

6.1.6 We recommend the Welsh Government monitors the reach and impact of the Economic Contract, Code of Practice on Ethical Employment in Supply Chains and the socially responsible procurement duty, on protected characteristic groups and addressing key and persistent inequalities.

6.1.7 Recommendation 48 recommended that “..key administrative data are collected systematically by the Office for Fair Work to help monitor progress and to inform annual reporting on Fair Work Wales”.²⁴ The Fair Work annual progress report 2024 notes that the Welsh Government has developed a set of fair work outcome measures which enable the tracking of progress across the fair work characteristics. The report says that the Welsh Government will consider how it publishes or reports on those measures. **We recommend the Welsh Government reports on these fair work measures to ensure transparency and visibility of progress in this area.**

7. Experiences of health and social care: the treatment of lower-paid ethnic minority workers

7.1 Our Experiences of health and social care: the treatment of lower-paid ethnic minority workers report also recommended that the Welsh Government should:

- **Use our inquiry findings and recommendations to advance fair work for lower-paid ethnic minority workers, including in relation to the Social Partnership and Public Procurement (Wales) Act; and**

²⁴ <https://www.gov.wales/fair-work-commission-recommendations-progress-report-2024-html>

- **Take into account the experience of lower-paid ethnic minority workers in its pursuit of fair work and in its social partnership engagement and use this inquiry and our ‘Is Wales Fairer? 2023’ report to inform its approach to improving and measuring outcomes.**

**Annex A – Rebalancing Care and Support Programme
consultation response.**

Rebalancing Care and Support Programme

Consultation details

Title of consultation: Rebalancing Care and Support Programme

Source of consultation: Welsh Government

Consultation Number: WG466649

Date: 14 August 2023

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Introduction

1. The Equality and Human Rights Commission is the independent equality regulator for England, Scotland and Wales and is a UN-recognised 'A' status National Human Rights Institution. The Commission has a statutory mandate to advise Government and Parliament on matters relating to equality and human rights, and to promote and protect equality and human rights across Britain.
2. Upholding rights and equality in health and social care is one of our priorities in our business plan for 2023/24.²⁵ We welcome the creation and development of a strategic National Framework for care and support with the aim to set standards for commissioning practice, reduce complexity and rebalance commissioning to focus on quality and outcomes.
3. We respond below in order of the consultation chapters and questions. Our response does not cover every question, and we have indicated in our full response which questions (or aspects of a question) we are addressing. To contextualise our responses and recommendations, we have set out at Appendix 1 some of the key relevant domestic and international equality and human rights legal obligations. We have recently published our [social care approach](#) which sets out a set of nine guiding principles, which are underpinned by equality and human rights legislation, these are included at Appendix 2. We recommend that the Welsh Government use these principles to guide reform of social care. We recognise that the consultation is wide-ranging. This submission provides strategic advice on the key equality and human rights

²⁵ EHRC (May 2023) [Business plan 2023 to 2024](#).

considerations that we recommend should inform the creation and development of the National Care Framework, National Office for Care and Support, as well as to strengthen Regional Partnership Board arrangements.

4. Our response draws on our [Guiding Principles for social care](#) that reflect domestic and international human rights and equality law and best practice (set out in full at Appendix 2). We also draw upon recommendations from our 2023 and 2022 inquiries into challenging decisions in adult social care²⁶ and the experiences of lower-paid ethnic minority workers in health and social care.²⁷
5. We welcome the attention the Welsh Government is giving to adult social care and hope that this response will helpfully inform the creation and development of the National Care Framework in Wales; National Office for Care and Support and strengthen Regional Partnership Board arrangements.

²⁶ EHRC (February 2023) Inquiry report: [Challenging adult social care decisions in England and Wales](#).

⁴ EHRC (June 2022) Inquiry report: [Experiences from health and social care: the treatment of lower-paid ethnic minority workers](#).

Our response

1. Part 8 - Code of Practice - National Framework for Commissioned Care and Support

Question 1.1 & 1.2: Do you think the principles and standards set out in the Code will help to ensure Wales-wide consistency in commissioning processes and practice and reduce duplication and complexity?

1. We welcome the standards set out in the code. However, we believe these standards could be strengthened further to ensure that they are underpinned by equality and human rights principles outlined in [our approach to social care](#) (outlined below and in Appendix 2). We make comments on standards 3, 5, 6 and 10 but all standards should be underpinned by equality and human rights principles.
2. We confirm that we will be working with Welsh Government to contribute towards the development and implementation of a toolkit for commissioners on equality, specifically complying with the [Socio-Economic Duty \(SED\)](#) as well as the [Public Sector Equality Duty](#), which we refer to throughout this consultation response.

3. We recently published our view on how equality and human rights should inform approaches to social care,²⁸ setting out nine principles that we ask the Welsh Government to strive for when making decisions about social care frameworks, funding and reform. These principles are detailed in Appendix 2 of this document. Our vision is for a social care system that is: available, accessible, and person-centred; where people have choice and control, community and connection and can access effective redress; and which is robustly regulated, with support for unpaid carers and a valued workforce.
4. One of the principles is that there should be ‘a valued workforce’ with fair recruitment, pay and treatment, and opportunities for training, development, and progression. This principle emphasises the important role that a valued workforce plays in improving care standards and upholding service users’ rights.

Comments on the standards

5. In reference to Standard 3 to ‘Collate relevant and accurate data to ensure that commissioning is based on meaningful data and ensure there is sufficient analytical capacity and capability to inform robust commissioning planning’. Our [inquiry into challenging adult social care decisions in England and Wales](#) found that meaningful data collection and analysis is not happening often enough, in relation to challenges and complaints experiences of people challenging local council’s decisions about adult social care and support.
6. We recommended that the Welsh Government and relevant stakeholders work with local authorities to improve the collection, analysis, and reporting of social care users’ equality data;

²⁸ EHRC (May 2023) [Our approach to social care](#), including the [nine principles](#).

including those who complain about or challenge decisions. This should be considered alongside other data around user satisfaction and used to identify and address poor outcomes experienced by people who share protected characteristics.

7. Our inquiry report into 'Experiences from Health and Social Care: the Treatment of Lower-paid Ethnic Minority Workers' highlights that gathering comprehensive, accurate equality data, including on workers in lower-paid and commissioned-out roles, can help employers and commissioning bodies demonstrate they are complying with the requirements of the Public Sector Equality Duty (PSED). Independent sector providers, of which there are many in adult social care in Wales, may be subject to the PSED if they exercise public functions. In our Wales Policy Briefing, we recommended that the Welsh Government fulfil its PSED obligations by developing new, and improving existing, sector-wide national structures for gathering more comprehensive health and social care workforce data on the protected characteristics, including race.²⁹
8. **Standard 3** provides a list of evidence on which commissioners must base decisions. There is currently no reference to the workforce. We recommend this addition to the list: "equality issues impacting on the workforce and information to account for how commissioning decisions will impact on workers with protected characteristics".

²⁹ Equality and Human Rights Commission. 2022. Experiences of Health and Social Care: The Treatment of Ethnic Minority Workers Wales Briefing, Recommendation 1, p.5

9. **Standard 5** sets a standard to Measure 'value' by people's experience of and outcomes from care & support. The standard sets out the other measures that define value as: a) standards of quality and safety; b) environmental impact; c) additional social value; and d) cost. Following our inquiry into challenging adult social care decisions we advise that analysis of complaints data, including by protected characteristics, would strengthen local authorities understanding of people's experience of and outcomes from care and support. We therefore recommend that this is added as a measure of 'value' for this standard. Not having robust data on complaints leaves local authorities unable to identify whether some protected characteristic groups are more or less likely to complain than others, and the reasons for this. In our inquiry we recommended that:

- 'The Welsh Government should lead and support key stakeholders involved in the sector-led improvement of adult social care in Wales to ensure complaints intelligence and learning is central to wider sector-led improvement'.

10. **Standard 6** requires that all care and support services are underpinned by Fair Work principles. Work has already been undertaken by the Welsh Government, through the Social Care Fair Work Forum, to address the challenges faced by the social care workforce in Wales, in particular the fair reward characteristic. We welcome that **standard 6** requires statutory partners:

- Take ownership and accountability for PSED considerations when making decisions on commissioning and outsourcing that affects the workforce.
- Publish evidence-based Equality Impact Assessments which assess the impact that commissioning and outsourcing decisions will have on groups with protected characteristics, including ethnic minority workers.

- Monitor providers to ensure the required workforce data is provided – but we recommend a requirement that this data is analysed and used to inform decision making.
11. To strengthen this standard, we recommend that local authorities and health boards must also:
- Consider ways in which the existing procurement process and duties can be used to improve compliance with the PSED’s general duty; for example, by considering how the equality issues outlined in our report on [‘Experiences from health and social care: the treatment of lower-paid ethnic minority workers’](#) can be incorporated into the principles of the Social Value Wales Model, tendering and contract management process.
 - Develop a procurement strategy that is equality impact assessed and takes into account the equalities issues which impact on groups of workers who share protected characteristics.
12. We are pleased that the Social Care Fair Work Forum has already made progress in addressing the fair reward characteristic. However, it is important that the remaining characteristics of employee voice and collective representation; security and flexibility; opportunity for access; growth and progression; safe, healthy, and inclusive working environment and legal rights respected and given substantive effect, also underpin care and support services.
13. As referenced above the work undertaken to provide the real living wage to social care workers in Wales is a significant step forward for the sector. However, there is still a lot of work to do to ensure the remaining fair work characteristics underpin commissioning of care and support services.

14. Our report referenced in point 1.44 highlighted challenges faced by lower-paid ethnic minority workers in the sector, many of which relate to the characteristics provided by the Fair Work Commission listed above.
15. We welcome that **standard 6** requires that care and support services are commissioned ethically and underpinned by fair work principles. We recommend the wording in the specification is strengthened. For instance, the description specifies that local authorities and health boards should support employers to improve status, wellbeing and working conditions in social care and to achieve parity across statutory, private and third sectors.
16. We welcome the inclusion of **standard 10** to ‘Evidence pro-active working to address inequalities and promotion and fulfilment of human rights.’ The standard outlines the requirements of Local Authorities to demonstrate how they are meeting the Public Sector Equality Duty (PSED) and other human rights obligations. To strengthen this standard, we recommend the code of practice refers social care commissioners to what is required of them to comply with the PSED and their human rights obligations. We have outlined in Appendix 1 text setting out this requirement in relation to the Public Sector Equality Duty (PSED).

It is clear under the code that commissioners must embed the 7 principles of effective and ethical commissioning within their commissioning practices. However, the wording used to describe the principles is less clear as it refers to ‘should’ rather than ‘must’ in places. We would advise that a consistent approach to terminology is used when referring to the principles so that obligations are clear.

17. Across all 10 standards and the wider code it is important that consideration is given to people with protected characteristics, to enable a different approach or adapted service to be delivered as required. To enable this to be done effectively it is important to have robust data on both the local population and the available workforce, which includes disaggregated data by protected characteristics for both services users and workers.

18. One of the Commission's nine principles is that there should be 'a valued workforce' with fair recruitment, pay and treatment, and opportunities for training, development, and progression. This principle emphasises the important role that a valued workforce plays in improving care standards and upholding service users' rights.

Procurement

19. The code requires statutory partners to comply with current procurement legislation and guidance when undertaking the procurement of services. We recommend that a list of relevant legislation such as Regulation 18 Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 and the Social Partnership and Public Procurement (Wales) Act 2023 be included in this section.

Using data to support commissioning of services.

20. The code suggests that commissioners should encourage providers to provide workforce data to Social Care Wales. As providers are discharging public functions; we recommend that contract clauses must include requirements for providers to provide workforce data.

Equalities and Human Rights

21. We welcome the inclusion of Paragraph 1.70 which requires that commissioning of care and support service must take into account equality to improve outcomes for the population of Wales. We recommend that the paragraph more clearly sets out the expectations of commissioners in relation to equality and human rights to ensure its effectiveness. We recommend that the paragraph should explicitly reference the need for commissioners to have due regard to the PSED and Socio-Economic Duty (SED) rather than the principles of equality and diversity.
22. Paragraph 1.70 sets out a list of legal requirements, of which commissioners must take account. Previous research by the Association of Directors of Social Services (ADSS) Cymru has highlighted a lack of understanding amongst commissioners about what is required in relation to equality. We will be working with the Welsh Government to develop a specific toolkit for commissioners on the PSED.
23. We also recommend that commissioners must demonstrate that they have taken into account the reports listed with commissioning care and support services, through annual reporting mechanisms.

Carers

24. In relation to the requirement to establish accurate evidence, including data on carers, we would recommend that any data collected should be disaggregated by protected characteristic.

2. Pay and Progression Framework proposals

Question 2.1 The principle of the pay and progression framework is to offer a national framework that can support the principles of fair work. Do you believe it can support that ambition and the benefits outlined above?

1. In 2019 the [Fair Work Commission report](#), Fair Work Wales, defined fair work as “where workers are fairly rewarded, heard and represented, secure and able to progress in a healthy, inclusive environment where rights are respected.
2. This definition includes six characteristics- fair reward; employee voice and collective representation; security and flexibility; opportunity for access, growth, and progression; safe and healthy inclusive working environment; legal rights respected and given substantive effect. The promotion of equality and inclusion is integral to all six characteristics.
3. In June 2022, we published the report of our inquiry into the experiences of lower-paid ethnic minority workers in health and social care.^[1] Our inquiry considered a range of evidence, including written submissions, interviews and a rapid review of existing evidence.
4. The Commission welcomes the work that the Social Care Fair Work Forum (SCFWF) is doing to address many of the key findings and recommendations within our inquiry report.

Our report into experiences from health and social care found that:

- There is a lack of robust workforce data on lower-paid ethnic minority workers, particularly in adult social care.
 - Some lower-paid ethnic minority workers report they are treated differently from White British workers, experiencing bullying, harassment and abuse related to race; unsupportive line managers and less favourable treatment in allocation of hours and duties; have worse employment outcomes, including training and progression opportunities and over-representation in disciplinary procedures.
 - The commissioning out of adult social care, and outsourcing of some roles in health, has resulted in more insecure work and poorer pay and terms and conditions than for those directly working for the public sector.
 - Lower-paid ethnic minority workers in the health and adult social care sectors, particularly migrant workers, are less likely to be aware of their employment rights.
 - Lower-paid ethnic minority workers are fearful of raising concerns and complaints about working conditions or treatment in health and adult social care workplaces.
5. Our review of the available evidence indicated that social care workers frequently experience subtle, underhand forms of racism from colleagues and managers, which can be difficult to prove or act upon.^[2]
6. We welcome the development of a pay and progression framework as part of the forum's wider work, and its aim to support people to develop the skills they need to deliver high-quality care and to develop and progress in their careers. We consider this should specifically address the needs of ethnic minority social care staff, by using the full range of positive action measures available to address under-representation and barriers to progression.

Recommendation:

7. In developing the pay and progression framework, the Social Care Fair Work Forum and local authorities in Wales should take into account the issues facing ethnic minority staff identified in our inquiry report, *Experiences from health and social care: the treatment of lower-paid ethnic minority workers*^[5] and consider how the new framework can help address these, including through the use of positive action measures to address under-representation and barriers to progression.

Recommendation:

8. Our inquiry report highlighted that gathering comprehensive, accurate equality data, including on those in their workforce in lower-paid and commissioned-out roles, can help employers to show that they are complying with the requirements of the Public Sector Equality Duty (PSED). Independent sector providers may be subject to the PSED if they carry out a public function. Commissioning bodies may stipulate similar requirements through contractual requirements for certain equality policies or procedures. In our report, we recommended that the Welsh Government fulfil its PSED obligations by developing new, and improving existing, sector-wide national structures for gathering more comprehensive health and social care workforce data on the protected characteristics, including race.
9. The Commission believes that in its current form the framework is likely to promote some characteristics of fair work. It is however too early to say whether the framework will support fair reward, as there are no indicative pay scales or expected terms and conditions included within the consultation. Having clear and consistent job bands should provide a solid foundation upon which to build. It is important that the terms and conditions of the social care sector are comparable with the health sector in Wales.

10. The framework should promote fair work in relation to the opportunities for access, growth, and progression characteristics if it is implemented effectively. The detailed job bands: the commitment that skills, knowledge, and understanding can be acquired on the job or the result of gaining qualifications or formal learning, and the development of resources and toolkits once the framework is developed, should all facilitate growth and progression. An ongoing obstacle with strategies and frameworks is that often the implementation gap means that they don't always deliver the change that is intended. It is important that ongoing monitoring and evaluation of the framework is put in place to enable this to be addressed should it arise.
11. There is currently nothing in the draft framework that will support the characteristics of employee voice and collective representation; security and flexibility; safe, healthy, inclusive working environment and legal rights respected and given substantive effect characteristics.

Question 2.2 Do you have any suggestions about how the framework might be improved to help meet its ambitions?

12. We welcome the aims of the pay and progression framework for the social care workforce in Wales. However, there are opportunities for it to be strengthened. We believe there should be an additional aim that focuses on the removal of discrimination against people with protected characteristics throughout the employment journey.

13. We understand that the framework is an initial draft and as such much of the detail is yet to be developed. Nonetheless it is disappointing to not be able to comment on a careers map of opportunities for progression within the sector; anticipated pay scales and broader terms and conditions. We note the framework will be voluntary and limited to workers providing direct care, it would be helpful to get a sense of when the framework will be rolled out across the sector and what evaluation and potential review of the scope of the framework is planned.

Features of the framework

14. The features of the framework section confirms that apprenticeships are funded at every job band, but they are not specifically referenced in the framework. We believe apprenticeships should be explicitly referenced in the framework. There is a risk that by excluding apprenticeships anyone considering starting an apprenticeship may consider that apprentices will not be offered the same opportunities as other staff members.

15. It is important that robust disaggregated data is collected on people starting and completing apprenticeships, as well as whether these workers are retained once qualified. This data is vital to have a clearer picture as to the effectiveness of the apprenticeship pathway in recruiting and retaining a diverse workforce.

Job Bands

16. In the detailed outline of job bands, we would recommend the inclusion of “a commitment to equality and human rights, and how these principles should be enshrined in your approach to

delivering social care and an inclusive workplace”, into all job bands (A-E). In relation to skills, knowledge and understanding we would recommend the inclusion of “an understanding of the Equality Act 2010 and the Human Rights Act 1998 and how understanding of these can assist in ensuring inclusive, respectful, dignified care and creating an inclusive workplace”.

17. We are concerned at the reference in the values and attributes section relating to health and wellbeing. We agree that individuals are best placed to understand if/when they may need support to address health and wellbeing challenges. However, the reference seems to suggest that individuals are required to manage their own health and wellbeing. Line managers should also have a responsibility to support staff in identifying any challenges and what support is available. For managerial bands we would also recommend the inclusion of knowledge of the PSED and how to demonstrate due regard to the three aims of the general duty. It is critical that line managers (job bands C-E) understand corporate disciplinary and grievance procedures, and where to signpost staff members to learn more about their rights within the workplace. It is also critical that line managers understand the duties to eliminate discrimination and advance equality of opportunity for both service users and workforce in their care.
18. For job bands D and E there is no reference to the values and attributes of empathy and compassion. Within a sector that provides care to those in vulnerable situations we would expect workers in all bands to demonstrate these two values.
19. For job band E, social care manager, we recommend that handling identity-based complaints and grievances be included as a requisite skill/knowledge, including the ability to handle complaints/concerns raised relating to racial harassment and bullying.

Question 2.3 What may be the barriers to the framework achieving its ambitions?

Assessment of Impact

20. The Social Care Fair Work Forum as set up by the Welsh Government is required under Regulation 8 of the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, to carry out an assessment of the impact of policies and procedures. The assessment needs to consider how due regard to the three aims of the General Duty has been shown. These are:

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

21. A robust assessment of impact, that engages with protected characteristic groups and/or their representatives will identify potential negative impacts that could affect the effectiveness of the strategy. This will then enable mitigating factors to be put in place to minimise/remove these impacts.

Sector buy-in

22. A lack of buy-in from the sector, from leaders through to front line workers, could have a negative impact on the effectiveness of the framework. It is vital to ensure that meaningful engagement takes place with the workforce, future workers, and relevant stakeholders throughout the development and implementation of the strategy. Given the fragmented nature of the sector and the low levels of unionisation, the Social Care Fair Work Forum (SCFWF) needs to give careful consideration

to the most effective way to engage with different groups. Unless there is sector wide understanding of, and agreement with the approach, the framework is unlikely to be effective in delivering a motivated, engaged and valued, health and social care workforce, with the capacity, competence, and confidence to meet the needs of the people of Wales.

23. It is also important that the forum monitor and evaluate the implementation of the framework once finalised. This will ensure that there is less opportunity for an implementation gap to develop, but also gives opportunities to identify what is and isn't working so that the strategy can be revised.

Differential treatment and a lack of training and progression opportunities

24. Our inquiry report highlighted the differential treatment and lack of training and progression opportunities for lower-paid ethnic minority workers. We welcome the aim to support people to develop the skills they need to deliver high-quality care and to develop and progress in their careers. We consider this should specifically address the needs of ethnic minority social care staff, by using the full range of positive action³⁰ measures available to address under-representation and barriers to progression.

3. Proposed functions of a National Office for Care and Support

³⁰ <https://www.equalityhumanrights.com/en/advice-and-guidance/employers-what-positive-action-workplace>

1. We welcome the proposals to establish a National Office for Care and Support. The Office will have an important role in ensuring that social care commissioners understand and meet their obligations under equality and human rights legislation when commissioning services. The National Office should play a role in demonstrating leadership on equality and human rights through meeting its obligations under the Public Sector Equality Duty and international human rights frameworks, and work to build understanding and capacity in the sector to address existing inequalities and barriers for people with protected characteristics in accessing care and support services.

Question 3.1: Do you agree with the design for the National Office? If not, what design would you suggest?

2. The establishment of a National Office for Care and Support within the existing governance model and existing functions of Welsh Ministers, will mean that it will need to comply with the Public Sector Equality Duty, the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 and the Socio-Economic Duty, when exercising its functions.
3. The Public Sector Equality Duty (PSED) provides a tool and is a requirement for Welsh Government and public bodies to mainstream equality considerations into services and decision-making and improve outcomes for people that receive care and support. The 'General Duty' requires public authorities to have due regard on an ongoing basis to the need to (a) eliminate unlawful discrimination, (b) advance equality of opportunity and (c) foster good relations between those who share protected characteristics and those who do not.³¹ In the context of social care, the PSED applies to public authorities (such as Government departments, local authorities, NHS bodies and regulators) and those who

³¹ [Equality Act 2010](#), s.149.

exercise public functions (for example where a local authority contracts out a service).³²

4. A set of specific duties set out the steps that public bodies in Wales must take to meet the 'General Duty'. These specific duties include setting equality objectives; engaging with people with protected characteristics; using equality evidence; assessing the impact of decisions; and a specific duty on procurement.

Recommendation:

5. The proposed design of the National Office for Care and Support should set out more clearly its legal obligations in relation to equality and human rights, under its governance arrangements.

Question 3.2: Do you agree with the vision for the National Office? If not, what vision would you suggest?

6. We welcome the recognition that the vision for the National Office will seek to embed change through promotion of Welsh Government's Strategic Equality Plan and its Anti-racist Wales and LGBTQ+ Action Plans. A survey of social care commissioners by the Association of Directors of Social Services Cymru found that equality in the context of commissioning is an underdeveloped area and one that is not well understood by commissioners.
7. The vision set out for the National Office for Care and Support outlines the expectation that it will input to and align with relevant cross-system work. That list covers legal obligations such as the Wellbeing of Future Generations (Wales) Act 2015 and Welsh Language Standards.

³² More information is available in our technical guidance on the PSED. Equality and Human Rights Commission (19 February 2019), '[Equality Act technical guidance](#)'.

8. The vision for the National Office would be strengthened by making clear reference to the need to meet its legal duties under the Equality Act 2010 including the Public Sector Equality Duty and international human rights obligations.
9. We welcome the role set out for the National Office in the vision to enable, advise, support, and take action to ensure the delivery of national policies, priorities and standards including objectives such as reducing inequalities. The National Office will have an important role to play to ensure that social care commissioners understand their obligations relating to equality and human rights legislation; and have the knowledge to address inequalities in the sector. We will be working with the Welsh Government on developing a toolkit for social care commissioners on meeting their equality obligation for the national toolkit.
10. The vision for the National Office could be enhanced by strengthening the role that it will play to build capacity within the sector to meet its legal obligations and develop better understanding of equality and human rights principles and standards.

Question 3.5: In its positioning within the Welsh Government and providing for a ‘bird’s eye view’ of the social care system, what are the main opportunities, working with local authorities, Social Care Wales, and other key partners, to drive service change and improvement? Please give reasons for your answer.

11. Both our recent inquiry reports which focussed on social care highlighted the lack of equality data as a key issue for the sector. A lack of robust equality data on social care is a key barrier to understanding and addressing existing inequalities. In both inquiries, we made a series of recommendations, (outlined below) to the Welsh Government that would be relevant to the role of the National Office for Care in driving change and improvement in the sector.

12. Our inquiry into racial inequality in health and social care workforces found a lack of robust workforce data on lower-paid ethnic minority workers, particularly in adult social care. Data regarding the workforce and their experience is vital in meeting the Public Sector Equality Duty and the needs of the workforce.

We recommended that:

13. The Welsh Government should work with key stakeholders, including the health and social care sectors, to:

- Fulfil its PSED obligations by developing new and improving existing sector-wide national structures for gathering more comprehensive health and social care workforce data on race and all other protected characteristics, and
- Support organisations to gather and use this data to identify and address poor outcomes experienced by lower-paid ethnic minority workers, including commissioned-out and outsourced workers.

14. Our inquiry report into Challenging adult social care decisions found that the meaningful data collection and analysis (relating to social care complaints) is not happening often enough. Collecting complaints data that can be disaggregated by protected characteristics under the Equality Act 2010 helps local authorities understand how well the needs of different groups are being met. Between 3% and 8% of local authorities collect and analyse data on the protected characteristics of people making informal complaints, and between 7% and 26% do the same for formal complaints.

15. **We recommended** that:

The Welsh Government and relevant stakeholders should work with local authorities to improve the collection, analysis and reporting of social care users' equality data; including those who complain about or challenge decisions. This should be considered alongside other data around user satisfaction and used to identify and address poor outcomes experienced by people who share protected characteristics.

16. The Welsh Government should lead and support key stakeholders involved in the sector-led improvement of adult social care in Wales to ensure complaints intelligence and learning is central to wider sector-led improvement.

Question 3.7: What practical steps can the National Office take to ensure equality of opportunity through social care? Noting the diversity of Wales's communities and people's own circumstances, how can it add value at a national level to ensure people's wellbeing outcomes are consistently met?

17. The establishment of a National Office for Care and Support with the aim to support the implementation of the National Framework provides the opportunity for the Office to play a strategic leadership role in the sector to tackle some of the key inequalities that exist; and build capacity on understanding of and embed equality and human rights principles and standards in commissioning.

18. Evidence suggests that different protected characteristic groups face a range of barriers to good quality social care. The First Ministers Black Asian Minority Ethnic Covid-19 Advisory Group reported that health and social care is seen as difficult to access, with cultural and language barriers. The recent evaluation of the Social Services and Wellbeing (Wales) Act 2014 undertaken by the University of South Wales highlighted the experiences of Black, Asian and Minority Ethnic service users and carers. The research highlighted four key themes of people feeling let down by the system; a lack of time for caring within the care system; people's voices not being heard and not having control; and the impact of racial stereotyping on care and support.
19. The Senedd's Health, Social Care and Sport inquiry into isolation and loneliness cited Stonewall Cymru written evidence that stated "lesbian, gay, bi and trans (LGBT) people are more likely to grow old with less robust support networks. They are also less likely to access support services due to fears of discrimination, lack of understanding and poor-quality care. This combination of factors means that LGBT people (especially older LGBT people) are often highly vulnerable to isolation and loneliness".
20. The setting of national equality outcomes for social care commissioners by the National Office for Care and Support would ensure that commissioners are focussed on developing care services that achieve social value and tackle barriers and inequalities faced by some groups. It would also be one way in which the National Office could demonstrate due regard to the PSED.
21. **We recommend** the National Office for Care and Support should set equality outcomes in the national framework for commissioning to address inequalities faced by groups receiving social care.

22. The Human Rights Act 1998 (HRA) sets out the fundamental rights and freedoms to which everyone is entitled. Public bodies and other bodies carrying out public functions must not act in a way that is incompatible with the rights set out in the HRA, whether they are involved in designing policies and procedures or directly delivering services. This includes care providers who are delivering care arranged or paid for by the local authority, either directly or indirectly, partly or in full.
23. The Welsh Government is required to respect, protect, and fulfil human rights found in international law. The Welsh Government has incorporated some of the rights protected in international treaties into domestic legislation. For example, the Social Services and Well Being (Wales) Act 2014 requires Welsh Ministers to have due regard to the UN Principles for Older Persons and the Convention on the Rights of Child and Part 2 Code of Practice requires Local Authorities to pay due regard to the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and the UN Principles for Older People. Through our recent inquiry into Challenging Adult Social Care Decisions, we found that just over half of local authorities in Wales (55%) reported training frontline decision makers on the UNCRPD.
24. A report by the Older People's Commissioner for Wales 'A place to call home?' raised several concerns relating to the enjoyment of human rights of older people in care homes in Wales including issues such as basic hygiene, access to appropriate healthcare and a lack of choice and control over day-to-day activities. The report also highlighted the need for commissioners to have a greater understanding of social care and the needs of older people.

25. A [national review by Care Inspectorate Wales](#) found that “limited accommodation options mean people who require care and support 24/7 may need to move many miles from their families to get the care they need.” This has clear implications in relation to Article 8 The right to family and private life. The report recommended “Leaders and senior managers should accept responsibility for commissioning services in areas of need and address longstanding deficits in domiciliary care and care homes.”
26. Our [policy briefing on the impact of the coronavirus in care homes in Wales](#) raised concerns that human rights standards may have been breached, with care homes introducing new restrictions on people’s freedom. Blanket restrictions on visiting in care homes are unlikely to have been compliant with human rights standards. Not seeing family and friends has potentially serious implications for mental and physical health, particularly over a prolonged period. For those with dementia (who account for at least 70 per cent of care home residents in the UK) it can result in cognitive and other skills deteriorating rapidly, including communication skills and the ability to recognise family members.
27. It is vital that the functions and operation of the new National Office for Care and Support is underpinned by human rights standards and that the Office demonstrates leadership and builds capacity in the sector on human rights.
28. The setting of human rights outcomes by the National Office would provide the opportunity for commissioners to develop services that meet people fundamental human rights, ensure people are treated with dignity and respect and realise people’s right to independent living. This should be supported by good guidance for commissioners on human rights obligations and standards.

29. The Commission has developed a useful tool, the [Human Rights Tracker](#) for public bodies, and civil society to monitor progress by the Welsh Government in implementing recommendations made to it by UN Committees. The Human Rights Tracker can be a useful tool for the National Office, public bodies, and commissioners in identifying key human rights challenges to address.

We recommend:

30. The National Office should set national human rights outcomes for people receiving care and support in the new framework. The national outcomes should correspond with obligations in the Human Rights Act and international human rights standards.

31. The National Office, public bodies, and commissioners should use relevant evidence such as UN Committee reports, the Commission's human rights tracker and the Equality and Human Right Monitor: Is Wales Fairer? to identify the most significant human rights issues to be addressed.

32. The National Office should seek to improve understanding of human rights obligations among commissioners.

33. The National Office for Care and Support should establish monitoring and evaluation mechanisms to measure progress to achieve the national equality and human rights outcomes.

Workforce

34. In 2022 we published our [inquiry report into racial inequality in health and social care workplaces](#).

35. Our inquiry found that the commissioning out of adult social care, and outsourcing of some roles in health, has resulted in more insecure work and poorer pay and terms and conditions than for those directly working for the public sector, disproportionately affecting lower-paid ethnic minority workers, that UK wide are more likely to be working in these indirectly employed roles in adult social care.

36. Key stakeholders with whom we engaged after our inquiry's publication told us that those responsible for commissioning decisions don't currently have the skills to take on board our recommendations to evaluate the impact of their commissioning decisions on groups of workers with protected characteristics; or to use commissioning to address some of the equalities issues impacting ethnic minority workers in the sector.
37. The National Office must play a key role in providing clear requirements for commissioners in relation to workforce equity, support them to set meaningful targets and ensure they have the skills to evaluate how commissioning decisions impact workforce.
38. **We recommend** that the Welsh Government (via the National Office for Care and Support) should provide leadership to public bodies commissioning care services and ensure that guidance relating to the commissioning of public services is in place to:
 - a. Set out clear expectations for commissioners on the contractual obligations about providing detailed and consistent workforce datasets for all contracts.
 - b. Ensure more evidence-based, improvement-focused, and transparent compliance with the PSED, and
 - c. Ensure that commissioning helps address the poorer outcomes faced by ethnic minority workers and there are checks in place for assessing compliance with such guidance.

4. Part 2 – Code of Practice – (General Functions)

Question 4.1: Do you have any comments on the detail of the revised draft Code, including any suggestions about what is missing, what could be omitted or where wording could be improved?

1. We welcome the opportunity to comment on revisions to Part 2 of the Code of Practice (General Functions). We welcome the new chapter 5 which provides greater prominence for the need for co-production with social care service users and carers.
2. One aspect that the new draft code that has not been revised is the requirement for local authorities to have due regard to the UN Conventions on the Rights of the Child, the Rights of Persons with Disabilities and the Principles for Older Persons in the exercising functions under the Act.
3. Our recent inquiry into challenging adult social care decisions highlighted a lack of training for social care professionals on the UN Convention on the Rights of Persons with Disabilities, with just 55% of local authorities in Wales reporting that frontline social care decision makers. This along with evidence gathered during our social care inquiry suggest that awareness amongst social care professionals of their obligations to pay due regard to the UN Conventions is low.
4. In our inquiry report we recommended that:
‘Welsh Government should update and strengthen part 2 of the code of practice for local authorities on meeting their duties to demonstrate due regard to the UN Principles for Older Persons and the UN Convention on the Rights of Persons with Disabilities when exercising functions under the Social Services and Well-being (Wales) Act 2014’.

5. We therefore recommend that when revising the Part 2 code of practice the Welsh Government set out more clearly the expectations for local authorities and social care professionals in demonstrating due regard for the UN Conventions in the exercise of their functions. This could include additional content within the code itself or supporting guidance and, or toolkits that would support understanding of how social care professionals can apply the UN Conventions in the day-to-day exercise of their social care functions.

5. Part 9 - Statutory Guidance (Partnership Arrangements)

1. Regional Partnership Boards (RPBs) play an important role in the planning and delivering improvements in health and social care services.
2. The Commission has repeatedly recommended that to make Regional Partnership Boards most effective, the Welsh Government should:
 - Ensure Regional Partnership Boards are listed bodies under part 2 of Schedule 19 to the Equality Act 2010 and therefore subject to obligations under the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011.

3. The Public Sector Equality Duty could be a powerful tool for RPBs to use in planning and commissioning services that meet the needs of their populations. Currently RPBs are not listed under the PSED. Some public bodies in Wales that are not listed under the PSED have chosen to adopt the spirit of the PSED and the Wales specific duties to benefit from the use of regulations. We would recommend that while RPBs are not listed they adopt the spirit of the PSED and follow the Wales specific equality duties. In doing so RPBs should address the greatest and most persistent inequalities in social care using the most relevant and up to date evidence such as The Equality and Human Rights Monitor: Is Wales Fairer reports and the Commission's Measurement Framework, alongside other relevant data. The requirement to engage with people with protected characteristics would help RPBs understand barriers between health and social care for some groups and develop approaches to plan and commission services that address these.

4. The exercise of these duties would support Regional Partnership Boards to meet their core aims of producing population assessments, demonstrating citizen engagement and co-production and provide a focus on tackling inequalities that exist for the people receive care and support in their regions.

Question 5.2: Have you any comments on the proposed revisions to the Part 9 Statutory Guidance, including any suggestions about what is missing, what could be omitted or where wording could be improved?

5. Under the proposed governance arrangements RPBs will not be made a listed body under the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011. To ensure that the RPBs have a focus on addressing inequalities and developing and delivering services that meet the needs of people who receive care services and carers with protected characteristics we recommend that Regulation 10 include an objective for:

Partnership bodies to work effectively together to plan and commission services that address inequalities faced by people with protected characteristics in accessing care and support services.

6. We further recommend the following objective also be included as a new objective for regional partnership boards:
 - When considering Population Needs Assessments to inform workforce planning and when setting commissioning priorities and strategies, Regional Partnership Boards should use information relating to equality in the workforce and parity across sectors, in order to improve the outcomes for workers with groups of protected characteristics, particularly lower-paid ethnic minority workers.

We also recommend that the Welsh Government:

7. Provide leadership and oversight to Regional Partnership Boards to ensure they use the findings of the Commission's inquiry into racial inequality in the health and social care workforce, when using Population Needs Assessments to inform workforce planning and when commissioning strategies to improve the outcomes of lower-paid ethnic minority workers.
8. We recommend that RPBs be required to include organisations that represent the voice of groups with protected characteristics as members.

9. RPBs currently contain members who represent interests of care providers; we recommend that they should also have a member representing care workforce, including representation for commissioned out care workers. Our inquiry into experiences of lower paid, ethnic minority workers in health and adult social care found that ethnic minority and migrant workers in these fields found that workers felt they had no effective means to raise concerns, with some of the primary barriers to effective employee voice being the fragmented nature of the social care sector, lack of unionisation in the sector and fear of victimisation. Our inquiry made recommendations to the Welsh Government to work with relevant stakeholders to address this issue.

10. We appreciate the proposed revisions require RPBs to report on how they consider social value and to include an account of how the RBP has engaged with citizens. We recommend that in that reporting, RBPs must show how they considered the impact of commissioning decisions on the workforce and, how they considered equality data/information/issues relating to the workforce. We also recommend that the proposed revisions require RPBs to report how they have engaged with representatives of the social care workforce in their citizen engagement, including commissioned out care workers.

7. Integrated Impact Assessment

Question 7.1: We would like to know your views on Sections 1 and 8 of the Integrated Impact Assessment. Are there any specific areas where you feel further detail is required, or any specific issues you wish to highlight which may have an impact on a specific group?

1. As a listed body in schedule 19 of the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 regulation 8, the

Welsh Government is required to conduct and publish an assessment of the impact of its policies or proposed policies on people with protected characteristics. We note the publication of the integrated impact assessment (IIA), but to date no equality impact assessment (EIA) has been published. It is critical that a robust EIA is conducted and published. We appreciate that work is ongoing on the six items included in this consultation, but conducting an EIA during formative stage of the Rebalancing Care and Support Programme is essential to ensure that the programme promotes equality and addresses any potential negative impacts of it.

2. Section 149 of the Equality Act 2010 requires the Welsh Government to show due regard to the three aims of the general duty:
 - Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
 - Advance equality of opportunity between people who share a protected characteristic and those who do not.
 - Foster good relations between people who share a protected characteristic and those who do not.
3. A robust EIA should be a live document that evolves throughout the decision-making process. As set out in the Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 the EIA should consider all three aims of the general duty (as referenced above), not just the need to eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act. As part of the EIA process listed bodies are also required to have due regard to the relevant information held and have meaningful engagement with relevant groups.
4. The Integrated Impact Assessment (IIA) includes references to engagement with stakeholders but there is no reference to engagement with people or representatives of people with

protected characteristics. The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011, Regulation 5 requires the Welsh Government to involve such persons as it considers:

- Represent the interests of persons who share one or more of the protected characteristics; and
 - Have an interest in the way that the authority carries out its functions.
5. It is currently unclear what, if any, engagement with people with, or representatives of people with protected characteristics has taken place.
 6. We note the reference within the IIA to “trade unions have represented the worker voice through the development of the product alongside Hugh Irwin associates who conducted early engagement activity with workers across the sector”. However, as you are aware the social care sector in Wales is highly fragmented and has low levels of unionisation. Therefore, engaging with trade unions is unlikely to be an effective engagement strategy for this sector’s workforce, and particularly those with protected characteristics.

We recommend:

7. We recommend the Welsh Government work with relevant stakeholders to ensure that the voices of non-unionised workers are heard.

Appendix 1: Equality and human rights legal obligations

We set out below some of the key equality and human rights legal obligations relevant to adult social care.

Equality

The Equality Act 2010 (the Act) protects people from unlawful discrimination, harassment, and victimisation on the basis of nine protected characteristics. The Act places duties on employers, service providers and those carrying out public functions (and others). It prohibits direct discrimination, indirect discrimination, and unfavourable treatment because of something arising as consequence of a person's disability. There is also an anticipatory duty to provide reasonable adjustments where disabled people would be placed at a substantial disadvantage were they not provided. This includes providing information in accessible formats³³.

The Act also places a positive duty on public bodies (and those carrying out public functions such as delivering services on behalf of public bodies) to proactively give appropriate consideration (due regard) to the need to:

- Eliminate unlawful discrimination;
- Advance equality of opportunity between people who share protected characteristics and those who do not; and

³³ See more details at: EHRC (2018), [Your rights to equality from healthcare and social care services](#). The nine protected characteristics under the Equality Act 2010 are: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

- Foster good relations between people who share protected characteristics and those who do not³⁴.

This is known as the Public Sector Equality Duty (PSED) and is a key tool to ensure public bodies (and those carrying out public functions) drive progress on equality. The PSED is designed to help make sure that those bodies subject to the duty³⁵ show ‘due regard’ to the real human impact of their policies and practices and that they do this when they are developing, implementing, and reviewing them.

The Equality Act 2010 also introduced a ‘socio-economic duty’ (SED) commenced by the Welsh Government in March 2021. The duty states that certain public bodies, when making strategic decisions on, for example, priorities or objectives, must consider how their decisions might help to reduce the inequalities associated with socio-economic disadvantage.

‘An authority [...] must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.’ (The Equality Act, 2010, part 1)

Human Rights

Human Rights Act 1998

³⁴ Further details of the duties under the PSED are set out in EHRC, [Public Sector Equality Duty](#).

³⁵ The PSED applies to almost all public bodies and to those carrying out public functions on their behalf which could include delivering public services. For more information please see: EHRC, [Public Sector Equality Duty](#).

Adult social care engages a range of human rights under the Human Rights Act 1998 (which enshrines the rights protected by the European Convention on Human Rights). We have set out a detailed analysis of the relevant obligations under the Human Rights Act applicable to adult social care provision at paragraphs 28-44 of our briefing: EHRC (Oct 2020), [Equality and human rights in residential care in England during Coronavirus](#). These include: Article 2 (Right to life); Article 3 (Prohibition of torture and inhuman or degrading treatment); Article 5 (Right to liberty and security); and Article 8 (Right to respect for private and family life).

International human rights obligations

The UK government has ratified a number of international human rights treaties which are binding under international law. These treaties are not directly enforceable in the UK courts, but by ratifying them the government has agreed that their requirements will be reflected in laws, policy and guidance. They can also be used to interpret the rights protected under the Human Rights Act.

UN Convention on the Rights of Persons with Disabilities (UNCRPD)

[Article 19 UNCRPD sets out that disabled people have the right to live independently as part of the community](#)³⁶. The Commission has set out in detail how the right to independent living can be strengthened in the UK in our paper [Strengthening the Right to Independent Living](#)³⁷.

³⁶ UN Committee on the Rights of Persons with Disabilities (2017), [General comment No. 5 \(2017\) on living independently and being included in the community](#).

³⁷ EHRC (2021), [Strengthening the right to independent living](#).

Appendix 2: Equality and human rights guiding principles.

Guiding Principles

Adult social care should embed the requirements of the Equality Act 2010, the Human Rights Act 1998 and the UNCRPD. We recommend that the following principles drawn from these legal instruments are used to guide the future of adult social care.

An effective adult social care system should

Be:

- **Available.** Everyone with care needs should be able to access the support they need. The system should be sufficiently and sustainably funded to achieve that.
- **Accessible.** Social care should be easy to navigate and empower people to make informed choices. Services must anticipate the needs of disabled people and the adjustments they might need, including independent advocacy.
- **Person-centred.** Care should be personalised and tailored to individuals' needs, including needs arising from their protected characteristics. Health, care and wider community services should be joined up around people. Offer those with care needs:
- **Choice and control.** Individuals should have maximum choice and control over what care they receive and how it is provided. The voices of those with care needs should be at the centre of decisions that affect them, in line with the principles of participation and coproduction.
- **Community and connection.** People should be supported to live in and access care close to their own homes, communities and support networks.

□ **Effective redress.** Routes to challenge decisions and raise complaints should be effective and accessible.

Have in place:

□ **Robust regulation.** Regulators should work to promote equality and human rights and ensure accountability and continuous improvement.

□ **Support for unpaid carers.** Services should recognise the vital role of unpaid carers and work in partnership with them. Carers should be able to access the support they need, including financial help.

□ **A valued workforce.** Caring should be a valued profession with fair recruitment, pay and treatment, and opportunities for training, development and progression. This should be recognised as key to driving higher standards of care and upholding people's rights.