



Human Rights
Commission
Te Kāhui Tika Tangata

Submission on Productivity Commission Draft Report

More effective social services

24 June 2015

Submission of Human Rights Commission: Productivity Commission Draft Report: *More Effective Social Services*

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Introduction

1. Thank you for the opportunity to provide this submission on the contents of the Productivity Commission's draft report *More Effective Social Services* (the Draft Report).
2. In the words of the Draft Report, social services enable people to lead safe, healthy and fulfilling lives, and work to support and protect those who are most vulnerable. This is congruent with the fundamental purpose of human rights to protect the inherent dignity of all people¹, and enable the enjoyment of personal freedom through the creation of conditions that contribute to a safe, happy and fulfilling life².
3. The provision of social services accordingly has a direct bearing on the human dignity, development³ and freedom of individuals, families and communities of people. The accessibility and effectiveness of social services also provides an indicator of how well the Government meets its human rights obligations under international human rights treaties that it has ratified⁴. Major reform of the social services environment therefore brings with it important human rights implications.
4. Given the extensive nature of the Draft Report, our submission does not attempt to provide a line-by-line human rights assessment of each finding and recommendation. Instead we have taken a high-level approach that identifies ways in which the human rights framework applies to the design and operation of the following thematic concerns:
 - The nature of the institutional arrangements required for the effective provision of social services
 - The market arrangements required to deliver effective social services

Institutional arrangements

5. Institutional structures, roles and lines of accountability are critical aspects of any social services system. In New Zealand, institutional arrangements vary considerably across the broader social services environment. For example, in the health and education sectors government agencies, elected public entities that operate under delegated authority, private not-for-profit and for-profit entities deliver core social services. Other sectors, such as child

¹ Article 1, Universal Declaration of Human Rights, Preambles to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)

² Preamble, ICESCR

³ An example of a human rights based approach to human development within the social services sector is the Government's *Enabling Good Lives* programme. *Enabling Good Lives* is described as "a partnership between the disability sector and government agencies aimed at long term transformation of how disabled people and families are supported to live everyday lives. The primary focus is to enable disabled people and their families to have greater choice and control over the supports they receive and the lives they lead." <http://www.odi.govt.nz/what-we-do/improving-disability-supports/enabling-good-lives/>

⁴ Such as for example, the ICCPR and ICESCR (both ratified in 1978), UN Convention on the Rights of the Child (UNCRC) ratified in 1993, UN Convention on the Rights of Persons with Disabilities (UNCRPD) ratified in 2008.

protection and social security, deliver core social services directly through central government departments.

6. The recent policy drive towards a more integrated or co-ordinated approach by social service providers that is responsive to individuals and families with multiple, complex needs⁵ brings the current diversity of social sector arrangements further into focus.
7. With this in mind, the Draft Report is generally critical of “top-down” institutional governance structures, finding that they are not necessarily the best model for encouraging innovation or embedding new approaches⁶.
8. The Draft Report accordingly makes the case for more extensive devolution or delegation of the governance of services to semi-autonomous public entities across the social sector⁷, reflecting its view that devolved institutions that are closer to the front-line are better placed to enable integrated service delivery than “top-down” government departments. In such a model, central government’s primary role becomes that of a “*systems steward*” that enables (rather than delivers) social services through the implementation of the necessary funding, regulatory and institutional architecture.
9. When considering the human rights implications of such reform, it should be emphasised that the international human rights framework is neutral on the the ideological or technical approaches that the Government ought to take in funding, structuring and delivering social services⁸.
10. What is instead required is that the Government’s human rights obligations are “recognised and reflected” in the systems that are used⁹.
11. International human rights obligations require that devolved authorities have the necessary financial, human and other resources to effectively discharge the government’s responsibilities as regards human rights treaty implementation.¹⁰ Decentralisation of power, through devolution or delegation of executive authority, does not reduce the direct responsibility of the Government to fulfil its human rights obligations. For example, the Government’s human rights obligations concerning standards of education¹¹ apply equally to children enrolled in private schools as they do to children enrolled in state or state-integrated schools.
12. Decentralised systems have some advantages over centralised systems. Through closer proximity, localised entities may offer greater opportunities for the consumers of social services to have meaningful input into their design and delivery, may be more immediately responsive to the needs of the communities or regions under their remit, and may be able to be held more directly accountable for the quality of those services. From a human rights

⁵ The Children’s Action Plan and part 1AA of the Vulnerable Children’s Act 2014 being a significant recent example

⁶ p12 Summary Report; However, it is acknowledged that “top-down” models are the most appropriate for delivering services that are engaged through statutory intervention or coercion, such as child protection services.

⁷ *ibid*; Given that this form of institutional arrangement already governs much of the health and education sectors, the implication posed here concerns whether devolved systems of governance should be used more widely for social services which have traditionally been directly delivered by central government agencies.

⁸ UN Committee on Economic Cultural and Social Rights, General Comment 3, *The nature of State Parties obligations* (Fifth session, 1990), E/1991/23, para 8

⁹ *ibid*

¹⁰ *ibid* para 41

¹¹ Articles 28, 29 UNCRC

perspective, however, the potential benefits of decentralisation will be influenced by the degree to which the institutional, regulatory and commissioning instruments in place work to uphold and progress the government's human rights obligations and promote human rights outcomes. This issue is looked at in more detail in paragraphs 27-37 below.

Funding

13. However, regardless of the institutional arrangements in place and commensurate with its international human rights obligations, central Government will continue to have the primary role in funding the delivery of social services.
14. The Draft Report is strongly in favour of the Government adopting an "Investment Approach" to funding social services and is of the view that the use of investment and insurance tools to prioritise and select clients, services and interventions offers a "significant improvement" on traditional funding approaches. The Draft Report goes on to suggest that a social insurance approach is also "worthy of consideration", noting that "the interests of social insurers, such as the ACC, can align better with the long term well-being of individual New Zealanders than traditionally structured social service agencies".
15. The Draft Report also notes that the traditional Government contracting approach, which mixes overly prescriptive contracts with "bare-bones" funding (or under-funding as the case may be), stifles innovation and investment amongst non-government service providers.
16. As noted in paragraph 9 above, the human rights framework does not specify a preference for any particular mode of funding that the Government ought to use in providing for social services. What is important is that funding allocations are sufficient to enable the progressive realisation of the full range of human rights including the core economic, cultural and social rights, such as the right to health, the right to education and the right to an adequate standard of living.
17. International human rights treaties to which New Zealand is a State party set a high benchmark in this regard, requiring that the Government commit to the allocation of the "maximum extent of available resources" to enable the realisation of economic, social and cultural rights¹². Even where resources are demonstrably inadequate, the UN has held that States Parties must strive to ensure the widest possible enjoyment of those rights, and pay special attention to the most disadvantaged groups.¹³
18. It will therefore be important that any new social service funding system, such as the Investment Approach and related social insurance models, is designed or calibrated in such a way as to meet the wide range of needs that exist throughout the community. A focus on investing to minimise future welfare liability through targeted allocations may well have the potential to deliver a greater long-term social dividend than current funding approach. However, with this approach comes a corresponding risk that marginalised groups with needs that are not recognised as having "investment value" may miss out.
19. It should be also noted that evaluating the effectiveness of Government funding in meeting its human rights obligations is challenging. For example, the UN Committee on the Rights of the Child has found that, despite the New Zealand Government's increased expenditure on

¹² Article 4 of UNCRC and Article 2 of ICESCR

¹³ UN Committee on Rights of the Child, General Comment 5, *General Measures of Implementation of the Rights of the Child*, CRC/GC/2003/5, para 8

children in recent years, those increases appear to have been insufficient to reduce child poverty and related inequalities¹⁴. The UN Committee accordingly recommended that the Government implement a budgeting mechanism that enables it to specify strategic allocations aimed at advancing children's rights, track those allocations, monitor their results and evaluate their impact¹⁵.

20. Designing and incorporating such a mechanism within the current budgetary process would be a complex process and may encounter considerable resistance. However, the implementation of new funding approaches for specific initiatives, such as the social impact bond model due to be trialled in the mental health sector, offers an opportunity to apply human rights impact mechanisms to the funding and evaluation structures of small scale projects. If found to be effective, this type of mechanism could then be adapted to apply broadly across the social sector.

Use of data

21. The Draft Report supports a more flexible and systematic approach to data sharing between social service agencies. This includes government agencies sharing data with third party providers in order to "support innovative services to solve social problems" and the sharing of identifiable personal information between agencies, subject to individual client consent.
22. Recent developments in information technology and data collection enable the effectiveness of social services to be measured in ways that were not possible in the past. The use of data and indicators will accordingly play an increasingly central role in informing social sector policy and service design and for evaluating the impact of social services on the people they are delivered to. It will therefore be crucial that data collection and utilisation methodologies have sufficient scope and sophistication to provide an accurate picture of the social service environment; and are consistent with international benchmarks¹⁶.
23. It is important to note that there is significant work underway in New Zealand and around the world on both human rights indicators and sustainable development indicators. The development of the United Nations Sustainable Development Goals¹⁷ and its related indicators that are being developed by the UN with the assistance of national statistics commissions, including Statistics New Zealand, will provide an international benchmark for measuring of the effectiveness of social service provision, disaggregated across potentially vulnerable or marginalised population groups. Developed countries like New Zealand will be expected to report on their sustainable development indicators¹⁸.

Market arrangements

24. The Draft Report examines in detail the types of market arrangements and service models used to facilitate the procurement and delivery of services to clients. These include the following models:

¹⁴ UN Committee on the Rights of the Child, Concluding Observations on New Zealand, February 2011, CRC/C/NZL/3-4 para 16

¹⁵ *ibid* para 17

¹⁶ For example, there are currently gaps in New Zealand data collection systems regarding children, disabled people and GLBTI people. Inadequate disaggregation of data has been commented on recently by the UN Committee on the Rights of Persons with Disabilities (Concluding Observations on New Zealand, 2014, para 69)

¹⁷ <https://sustainabledevelopment.un.org/content/documents/1579SDGs%20Proposal.pdf>

¹⁸ https://sustainabledevelopment.un.org/content/documents/1684SF_-_SDG_Universality_Report_-_May_2015.pdf

- “*In house*” - deemed to be best suited for statutory interventions or exercise of statutory powers
- “*Contracting out*” - considered useful where specialised skills are needed, particularly in respect of hard-to-reach clients
- “*Managed markets*” - where multiple providers compete for market share; this is seen as promoting innovation and investment
- “*Client-directed budgets*” – this model is seen to work well when clients (or their representatives) are well placed to make service consumption decisions.
- “*Voucher*” systems - this works by clients choosing services among providers offering a bundle of services. Funding flows to providers depending on those choices.

25. The Draft Report generally appears to favour service models that encourage market competition and consumer choice within the social sector, such as the “*managed markets*” and “*client-directed budgets*” services models. These models are likely to involve the government strengthening its current commissioning focus towards the procurement, monitoring and evaluation of non-government, private service providers.

Application of the Ruggie Principles

26. The UN Guiding Principles on Business and Human Rights (The Ruggie Principles¹⁹) are of considerable relevance when considering how best to ensure that human rights obligations are not lost, diluted or minimised in the complex chain of transactions that links central government policy and funding allocations to the actions of a private service provider, via a devolved or independent commissioning agent.

27. The Ruggie Principles were endorsed by the UN Human Rights Council in 2011²⁰ with the objective of enhancing business and human rights standards and practices and achieving tangible results for individuals and communities²¹. As regards the role of the State, the Ruggie Principles reinforce the current obligations States have under international human rights treaties. As regards business, they establish non-binding human rights responsibilities.

28. The Ruggie Principles are organised into three inter-related “Pillars”:

- Pillar I concerns the *duty* of the State to protect human rights
- Pillar II concerns the corporate *responsibility* to respect human rights
- Pillar 3 concerns the duty of the State and the responsibility of business to provide access to non judicial and judicial remedies for human rights violations by business enterprises

29. The Ruggie Principles apply to all States and business enterprises, regardless of size, ownership, location and structure. For example, in respect of the provision of rental accommodation, if the provider is a state owned enterprise it must manage its business in accordance with the government’s human rights duties and obligations pursuant to the

¹⁹ In reference to Professor John Ruggie, the Special Representative of the UN Secretary-General on the issue of human rights, transnational corporations and other business enterprises, who developed the Guidelines and annexed them to his final report to the UN Human Rights Council (A/HRC/17/31).

²⁰ Resolution 17/4 16 June 2011

²¹ *The Guiding Principles on Business and Human Rights, General Principles*, UN Office of the High Commissioner on Human Rights, p 1 accessed http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

provisions set out under Pillar 1. If the provider is a private organisation or individual, the non-binding human rights responsibilities under Pillar 2 apply.

30. Furthermore, the *Ruggie Principles* provide guidance when contemplating and designing systems that link the role and obligation of the State to protect and advance human rights with the actions and responsibilities of private enterprises.
31. Under Pillar 1, Principle 5, States should exercise “adequate oversight” in order to meet their international human rights obligations when contracting with, or legislate for, business enterprises to provide services on behalf of central government. The commentary to Principle 5 points to the provision of independent monitoring and accountability mechanisms for this purpose²².
32. Principle 6 further provides that “States should promote respect for human rights by business enterprises with which they conduct commercial transactions”. Commentary indicates that this includes the terms of contracts, which should have “due regard to the States’ relevant [human rights] obligations under national and international law.”²³
33. Conversely, private enterprises engaging in social service delivery should be required to demonstrate full compliance with their corporate responsibilities under Pillar II of the *Ruggie Principles*, responsibilities that include:
 - Human rights due diligence processes, including human rights impact assessments, to a scale appropriate to the size of the business/entity²⁴
 - Statements of human rights policy that are reflected in operational policies and procedures²⁵
 - Consultation with external stakeholders as to the size, content and nature of the operation.²⁶
34. The *Ruggie Principles* accordingly provide a strong basis for including human rights compliance and monitoring mechanisms within the terms of instruments, contracts or policies that act to delegate authority from central government to an external commissioning or service delivery agent.
35. This concern was recently examined by the Northern Ireland Human Rights Commission (NIHRC) in its 2014 report *Public Procurement and Human Rights in Northern Ireland*.²⁷ In its report, the NIHRC made a number of recommendations concerning human right compliance measures and mechanisms, including the following²⁸:
 - Requirements for public authorities and businesses to respect human rights should be fully integrated into general guidance materials on public procurement.
 - A Guidance Note on Public Procurement and Human Rights should be developed to inform each step of the procurement process.

²² *The Guiding Principles on Business and Human Rights*, UN Office of the High Commissioner on Human Rights, p 8 accessed http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

²³ Ibid p 8

²⁴ Ibid Principle 17

²⁵ Ibid Principle 16(e)

²⁶ Ibid Principle 18(b)

²⁷ http://www.nihrc.org/uploads/publications/NIHRC_Public_Procurement_and_Human_Rights.pdf

²⁸ Ibid pp 38 and 39

- Services and products purchased by public authorities should be disaggregated into purchase categories according to the nature of the human rights engaged and the corresponding levels of associated risk.
- Public officials responsible for procurement policy and operation and private tenderers should receive training, information and advice on human rights in a business context.
- Government departments should evaluate the human rights risks of all public services delivered by private entities within their respective policy areas and implement measures to mitigate such risks, in line with the provisions of the *Ruggie Principles*.
- The Government should ensure that dedicated guidance is provided for district councils on integrating human rights procedures into procurement policies.

36. The *Ruggie Principles* are of course not only relevant to prospective reform of the social sector, but also to the current operation of many social sectors where a combination of central government agencies, not-for-profit services organisations and for-profit private enterprises interact. Such sectors include the Canterbury Recovery, involving the Earthquake Commission, the Canterbury Earthquake Recovery Authority and private insurance companies; the housing sector where Housing New Zealand is simultaneously a provider, manager and contractor of social housing; and the primary health care sector in which core public services are primarily delivered by private General Practices.

Conclusion/recommendations

37. In conclusion, the Human Rights Commission acknowledges the breadth and detail of the analysis, findings and recommendations contained in the Draft Report and the significant role the finalised version is likely to play in future social sector reform. In our view, it is therefore important that the final version of the report includes consideration of the human rights implications that arise from such reform.

38. Accordingly, the Human Rights Commission recommends that the Productivity Commission amend the Draft Report to include the following elements:

- Acknowledgment of the implications that reform of social services has for both the public's enjoyment and realisation of their human rights and the Government's international human rights obligations.
- Reference to the *Ruggie Principles* and endorsement of their application in social services commissioning models, instruments and market arrangements.
- Incorporation of human rights compliance and monitoring requirements within the report's suite of recommendations.

39. The Human Rights Commission would welcome the opportunity to discuss these recommendations further with the Productivity Commission.

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