Minister for Social Care, Mental Wellbeing and Sport
Maree Todd MSP

Scottish Government
Riaghaltas na h-Alba

T: 0300 244 4000
E: MinisterforSCMWS@gov.scot

Stuart McMillan MSP
Convener
Delegated Powers and Legal Reform Committee
The Scottish Parliament

dplr.committee@parliament.scot

2 May 2025

Dear Stuart,

I am writing in response to your letter of 22 April 2025 regarding the Committee's scrutiny of the delegated powers in the Care Reform (Scotland) Bill. Firstly, I would like to thank the Committee for their scrutiny of the Bill. I have considered each of your points in turn and my responses are set out below.

Section 36(1): Power to provide for an information sharing scheme for public health and social care services

I thank the Committee for the background information they have provided. The Scottish Government recognise and agree that Section 36 in part relates to sensitive personal information, and I agree that it is important that information sharing is addressed appropriately within the legislation.

The Committee asked the following questions:

If the Scottish Government has any explanation or further comment to provide in relation to the amendments made to this delegated power during the course of Stage 2 of the Bill?

As the Committee has recognised, this provision was amended during Stage 2 to reflect the change in the definition of services. Instead, subsection (3) will provide that the scheme may apply to any service which is provided under a list of prescribed functions.

This amendment was made due to the removal of Part 1 of the Bill at Stage 2. With the removal of the proposed structures of a National Care Service from the legislation, it became necessary to redefine the means of achieving the intended scope of the power. This meant appropriately identifying what health or social care services would be encompassed within the regulation-making powers contained within Section 36. The intent of the amendment is to match the initial

scope set in the Bill as introduced, rather than to introduce any new scope, as such no additional information was included in the supplementary Delegated Powers Memorandum.

If the Scottish Government considered establishing this scheme on the face of the Bill, particularly given the removal of the National Care Service element, in order that the Parliament may properly debate and scrutinise the proposals for the creation of such a scheme?

I have carefully considered this possibility, and recognise that there are merits of being able to scrutinise proposals in primary legislation. However, it is important to recognise that Scotland's health and social care landscape will evolve and change significantly within the next decade as digital solutions become more prevalent. It is therefore imperative that such a scheme remains flexible to address these challenges, as and when they arise, and I believe that secondary legislation provides the best mechanism by which to create and address these in detail.

I am however keen to address the concerns that the Parliament will not be afforded the opportunity to appropriately scrutinise the proposals relating to such a scheme. As you will be aware, regulations relating to Section 36 will be subject to the affirmative procedure. Therefore the DPLR Committee will have opportunity to scrutinise any secondary legislation alongside the lead committee, and a vote will take place in the Chamber. I believe this offers an appropriate opportunity for scrutiny.

To ask the Scottish Government whether the regulations resulting from this power will include a requirement that the individual to which the information relates consents to the sharing of such information? And if so, does it anticipate this will be an opt in/opt out procedure?

As the Committee will be aware, the principal policy driver behind Section 36, as set out in the Policy Memorandum was "the desire to create a scheme that allows for the direction of what information should be shared for what purpose, removing the uncertainty that persists within some organisations as to whether they were allowed to share certain information or not. Part of the intention behind this was to reduce the friction experienced by people accessing services, who often have to repeat their story over and over again due to professionals not having access to previously captured information."[1]

It is already the case that a broad range of information is communicated on a daily basis between public bodies without requiring the consent of the individual to take place. In most cases, the sharing of health and care information relies on lawful basis other than consent, primarily the vital interests or public task basis. These lawful basis are explained on the Information Commissioners Office Website: https://ico.org.uk/for-the-public/does-an-organisation-need-my-consent/.

I recognise that on a case by case basis, there are areas of information sharing where it has been thought appropriate to rely on consent for. For example, this may include certain types of sharing for research purposes. Handling of personal health information and the typical basis relied on is explained on NHS Inform: https://www.nhsinform.scot/care-support-and-rights/health-rights/confidentiality-and-data-protection/how-the-nhs-handles-your-personal-health-information/. Any scheme established will follow the principles set out in the above links

[1] NCS Stage 2 Memorandum
Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

and will operate within devolved competence and be compatible with the Data Protection Act 2018 and UK GDPR.

If the Scottish Government could give examples of any similar information sharing protocols?

As the Committee may be aware, the Social Security Information-sharing (Scotland) Regulations 2021 - https://www.legislation.gov.uk/ssi/2021/178 - (as amended by the Social Security Information-sharing (Scotland) Amendment Regulations 2024 - https://www.legislation.gov.uk/ssi/2024/8/regulation/2/made) made allows Social Security Scotland to share information with other parties, including local authorities and the Office of the Public Guardian (OPG). Although these regulations may have a smaller scope, I believe that the premise of sharing information in order to ensure that individuals at risk of harm are identified and supported is broadly similar in essence to our existing proposal.

I also note that there is a consistent trend across Europe in legislating for the sharing of health information as a result of the recently passed European Health Data Space Regulations - European Health Data Space Regulation (EHDS) - European Commission. These regulations establish a common framework for the use and exchange of electronic health data across the EU. European nations are now establishing domestic legislation to appropriately interact with these regulations, and the committee may find the Health Information Bill 2024 being taken through the Oireachtas a useful example. Please see the explanatory memorandum for that bill for more information: brief-overview-health-information-bill-2024.pdf.

Section 37C(2): Power to provide civil sanctions for breach of compliance with information standards

The Committee asked the following questions in relation to this section:

Why the Scottish Government did not consider appropriate to set out the civil sanctions on the face of the Bill?

I understand the concerns of the Committee in relation to these civil sanctions. However, it is important, given the potential impact of such sanctions, to undertake the appropriate diligence to ensure that these sanctions are appropriate, proportionate and targeted. In order to provide the committee with some assurance, I wish to draw your attention to the framework of sanctions set out in Part 5 of the Network and Information Systems Regulations: https://www.legislation.gov.uk/uksi/2018/506.

I believe that the framework set out would provide a suitable starting point for assumptions on how any sanctions scheme associated with Section 37 could operate. They offer an example of a compliance pathway that supports compliance with financial penalties as a last resort.

As the Committee will understand, given penalties may specify sums (and their limits) for failure to comply, it is necessary that these are changeable over time to account for inflation. As such, I believe that the flexibility offered by regulations is appropriate and allows for setting out the detail that is required. As with Section 36, these regulations will be subject to the affirmative procedure meaning the DPLR Committee will have opportunity to scrutinise any secondary legislation alongside the lead committee and a vote will take place in the Chamber. I believe this offers an appropriate opportunity for scrutiny.

While the list of who might be covered by the sanctions is broad, it is already determined by section 37B(1). If it would be possible to set this out ahead of Stage 3 (perhaps even with a power to modify this list, as required by developments in technology or to the list of persons subject to the duty)?

The Committee are correct in their understanding that Section 37B (1) creates the scope to whom any civil sanctions will apply. The list defined in Section 37B (1) can be modified using the power set out at 37B (2) – I have copied below for your convenience.

"(2) The Scottish Ministers may by regulations modify this section so as to change, or clarify, the list of persons to whom an information standard may be made to apply."

I hope the Committee finds this information helpful.

MAREE TODD MSP

Scottish Ministers, special advisers and the Permanent Secretary are covered by the terms of the Lobbying (Scotland) Act 2016. See www.lobbying.scot

St Andrew's House, Regent Road, Edinburgh EH1 3DG
www.gov.scot