

Lucy Scharbet  
Clerk  
Delegated Powers and Law Reform Committee

16 November 2022

Dear Lucy,

I am writing to you in relation to the National Care Service (Scotland) Bill and the Delegated Powers and Law Reform Committee's request for further explanation on certain sections of the Bill, sent to Alison Irvine, Head of Cabinet, Parliament and Governance Division, on 7 November.

The Scottish Government's responses to the Committee's questions are set out below.

**1. Why the Bill been introduced at a time when there is an ongoing consultation process, where many details are not yet known and significant delegated powers are required to implement the full policy after that consultation.**

It is essential that reforms to social care support, social work and community health services are developed with the people who access that support, including unpaid carers, and with those who provide it. The Scottish Government is committed to engaging with people with experience to co-design the detail of the new system, to finalise new structures and approaches to minimise the historic gap between legislative intent and delivery.

The Bill creates a framework for the National Care Service (NCS), but leaves space for the detail to be worked through during co-design with those who have lived experience of the social care system, and flexibility for the service to develop and evolve over time. It is important that we obtain Parliamentary agreement to the principle of creating the NCS, and transferring accountability to Scottish Ministers, to support those further discussions on the detailed arrangements for services. Creating a framework is not a novel approach to Bills where the Scottish Government feels it would be beneficial to provide for a range of delegated powers to provide for flexibility in implementation and to avoid the need to have to repeatedly bring forward primary legislation to make relatively minor changes to delivery mechanisms. Co-design does, however, represent a new approach to developing the detail of the changes we want to make to social care while importantly giving the Scottish Government the time to work through that detail together with people so that we get the delivery right.

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Some of the detail will be implemented through secondary legislation, whilst other elements will be for policy and practice. Where those decisions are implemented through secondary legislation (under this Bill or through pre-existing powers), financial and regulatory impact assessments will be provided. The Parliament will, therefore, have further opportunities to examine the implications of the Scottish Government's proposed reforms to the social care system.

**2. Whether applying a requirement to lay consultation documents or reports on any consultation carried out alongside regulations made under the significant powers in this Bill has been considered.**

The Scottish Government will consult appropriately on its proposals, as is normal practice for policy development. We have considered each of the delegated powers in the Bill and made what we consider to be appropriate procedural provision in each case.

We will engage with Parliament as policy proposals for regulations develop, and keep Parliament informed on consultation processes for the relevant regulations.

**Section 4 – Establishment, and abolition, of care boards**

**3. Is the intention of section 4(1), by reference to the wording “may by regulations”, that the Scottish Ministers will not be under a duty to create care boards?**

The Bill as drafted (section 4(1) and 4(2)) enables Scottish Ministers to create care boards but requires that in doing so they establish local care boards that together cover the whole of Scotland. This approach is in line with health legislation. As a result of the inclusion of these provisions Scottish Ministers are bound to establish local care boards.

**4. If it is not the intention that the power in section 4(1) be discretionary, how is it envisioned that this power will operate?**

The intention is to establish care boards with defined areas of responsibility and to ensure that every part of Scotland falls under the responsibility of at least one care board. Scottish Ministers may also establish special boards to deliver specific functions. Care boards are currently under consideration and will be developed through a process of co-design with people with lived experience and wider stakeholder engagement.

**Section 15 – Dealing with complaints**

**5. Whether the Scottish Government has considered, as suggested in the letter dated 30 August 2022 from the Presiding Officer, aligning the power in section 15 with the power in the Public Service Reform Act 2010 which requires SPCB to request functions to be conferred, and to be subject to consultation requirements and a more significant level of Parliamentary scrutiny?**

Section 15 of the Bill gives the Scottish Ministers power to make regulations about the handling of complaints about a service provided by the NCS or about any other social service, as defined in section 46 of the Public Services Reform (Scotland) Act 2010 (“the 2010 Act”). The development of regulations under section 15 for the complaints service will

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be driven by the outcomes of meaningful co-design with people with lived experience of a complaints and redress system as well as those who provide services. Depending on the outcome of that co-design process, section 15 may be required to reform complaints in a way that is not possible under existing powers.

The 2010 Act requires that any orders made under section 14 or 17(1) of that Act which relates to persons, bodies or office-holders listed in schedule 6, must have been requested in writing by the SPCB. Given sections 14 and 17(1) of the 2010 Act are focussed on efficiency and streamlining the exercise of public functions and removing burdens, it was felt by the Scottish Parliament at the time that it was appropriate that those currently operating those functions are able to draw attention to any inefficiencies or burdens that are affecting them and, through the SPCB, ask the Scottish Ministers to make an order to address this.

The power under section 15 of the Bill creates a new provision for the development of a complaints system for the NCS. The Scottish Government does not consider that it would be appropriate to have a requirement that regulations under section 15 of the Bill be initiated by a request from the Scottish Parliamentary Corporate Body (SPCB). The Scottish Government considers that the regulations are most appropriately initiated by the Scottish Ministers, following the co-design process, for consideration by the Scottish Parliament. We will continue to work with organisations such as the Care Inspectorate and the Scottish Public Sector Ombudsman (SPSO) to ensure their existing functions are taken into account when undertaking the co-design and implementation process, as well as to build on good practice already in place; while delivering on the outcomes of co-design.

The Scottish Government recognises that the SPCB, as the sponsor of some public bodies, has an interest in legislation that would affect those bodies. Section 15(4) and (5) of the Bill therefore include an additional control in that such regulations brought forward by the Scottish Ministers would require the prior consent of the SPCB before they can be laid. If, after considering relevant issues, including financial considerations, the SPCB conclude that consent should not be given it would not be possible for the Scottish Ministers to lay draft regulations for consideration.

The power in section 15 is subject to the affirmative procedure. As noted, there is a power of veto by the SPCB in relation to any regulations which may affect the functions of a body sponsored by it. The Scottish Government is unclear what additional significant level of Parliamentary scrutiny the committee has in contemplation but will, of course, give careful consideration to any proposals the Committee may have. As set out in the response to Question 2 above, the Scottish Government will engage with Parliament as policy proposals for regulations develop, and keep Parliament informed on consultation processes for the relevant regulations.

## **6. Was any other mechanism considered to achieve the desired outcome of section 15?**

No. The power in Section 15 of the Bill is proposed so that it is possible to effect any legislative reforms that may be needed to establish the complaints system devised through the Scottish Government's co-design process. This process will of course engage with, and consider the position of, the SPSO in relation to complaints in the NCS context.

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**7. Does the Scottish Government agree with the submission from the Scottish Public Services Ombudsman that there are sufficient powers available to allow for the development of a complaint process for the National Care Service?**

No. The complaints system that is required to be delivered by the Scottish Ministers under section 14(1) will be driven by the outcomes of meaningful co-design with people with lived experience of a complaints and redress system. Depending on the outcome of that co-design process, section 15 may be required to reform complaints in a way that is not possible under existing powers. It is therefore not yet possible to say what legislative reform may be needed to establish the system that emerges from the co-design process.

**Section 17 – Removal of care board members**

**8. The Committee would appreciate an explanation of the Scottish Government’s position in relation to the removal of care board members with reference to the process set out in the Further and Higher Education (Scotland) Act 1992.**

Care boards will be responsible for delivering a national service on behalf of the Scottish Ministers and will operate under general directions from Ministers. Therefore, it is important that Ministers have the ability to ensure that the right people are on Boards. This is a different situation to education boards, which are not directly responsible to Ministers.

**Sections 27 to 29 – Powers to transfer functions**

**9. Would it be appropriate to apply the consultation requirement to all transfers of functions made under this power, given that it appears that engagement processes are still ongoing?**

The Bill allows Scottish Ministers to transfer functions from local authorities, health boards and special health boards to themselves or to care boards established under the Bill to form the NCS. Functions that can be transferred from local authorities include those related to adult social care and social work, children’s social care and social work, and justice social work.

The Bill requires Ministers to hold a further public consultation before any functions in relation to children’s services and justice social work are transferred. A summary of the process by which Ministers undertake consultation and of responses received to that consultation must be laid before Parliament alongside any regulations transferring the functions. A final decision on whether to pursue such a transfer in relation to those areas, and how that might be phased, will be subject to further detailed consideration and evidence gathering with key partners.

This approach is being taken because children’s and justice social work services were not considered as part of the Independent Review of Adult Social Care and it is important the potential implications for children and young people and people in the justice system are considered in depth before any decision on their inclusion is made. That in-depth consideration has already been carried out in relation to adult social care and does not need to be repeated.

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Programmes of research on children's and justice social work services have been commissioned to inform the decision on the potential inclusion of these services in the NCS. The findings of these programmes of research will inform the decision on children's and justice social work services alongside views gathered from engagement activity with children, young people, families, service users and key stakeholders. These programmes of research are planned to conclude in Autumn 2023. The consultation regarding the transfer of functions relating to children's and justice social work services will take place after the research concludes and a decision in principle is taken by Ministers.

We do not think it is appropriate to apply a statutory consultation requirement to the transfer of other functions made under sections 27 to 29 which are proposed to be in the NCS. However, as is normal practice for policy development, the Scottish Government will consult appropriately on its proposals as we believe it is important to consult with stakeholders as part of our co-design approach to the NCS more generally, and we will keep Parliament informed as we do this.

## **Section 36 – Care records**

### **10. Given the significance of such a scheme, has the Scottish Government considered establishing this scheme on the face of the Bill, in order that the Parliament properly debate and scrutinise the proposals for the creation of such a scheme?**

Under Section 36, Scottish Ministers will have a power to set up a statutory scheme to permit data sharing for the efficient and effective provision of services by, or on behalf of the NCS and NHS.

We heard via the Independent Review of Adult Social Care that people are having to repeatedly tell their stories – to multiple agencies, potentially multiple times – which can not only be frustrating but also traumatic. To that end, and facilitated by the regulations, we will create a nationally-consistent, integrated and accessible electronic social care and health record. We are committed to co-designing the integrated record as part of the NCS-wide co-design approach and this work will support the development of the Regulations alongside wider work to build our evidence base. For example we are currently undertaking work to map data flows across social care and health in granular detail in order to inform the design of the integrated record and the development of the Regulations and ensure robust impact assessments.

We consider that the scheme will likely have a level of detail that is more appropriate for subordinate legislation rather than primary legislation. Once the Regulations are prepared we welcome scrutiny via Committees and Parliament via the affirmative procedure.

I hope these responses are helpful for the Committee in its scrutiny of Stage 1 of the Bill.

Yours Sincerely,

**Anna Kynaston**

Deputy Director,

National Care Service Programme Design, Engagement and Legislation

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