

01/11/2024

Subject: Response to Question Taken on Notice – Health Social Care and Sport Committee Evidence – National Care Service (Scotland) Bill

Dear Members of the Health and Sport Committee,

Thank you for your question, taken on notice, during the Health, Social Care and Sport Committee's Evidence Session (8/10/2024) for the National Care Service (NCS)(Scotland) Bill:

"In general, are there any other changes to the bill that could help to facilitate more innovative and collaborative commissioning?"

Scottish Care is committed to the implementation of ethical commissioning, standing for much needed systemic change for the adult social care sector, and welcomes the opportunity to contribute further to the scrutiny of the NCS Bill in this regard. We reiterate our ongoing support to the Health, Social Care and Sport Committee as the Bill progresses through Parliament.

Social care is an agreement by all of society that places the autonomy and priority of those who use care at the forefront of decision-making. Ethical Commissioning is a collective commitment between Government, both local and national, commissioning authorities, and commissioned services to delivery high quality, rights-based and person-led social care. By focusing on people and communities, we can begin to understand the needs and aspirations for health, social care and wellbeing, and work together with people, communities, and partners to find the most appropriate ways to support these.


It is Scottish Care's position that there is scope for further changes to the NCS Bill, to sufficiently implement more collaborative and innovative commissioning. Given ongoing uncertainties surrounding both the content of, and stakeholder support for, the NCS Bill as it currently stands though, it is important to note the potential of implementing many aspects of ethical commissioning out with the NCS Bill. Scottish Care is committed to making progress on the principles of the National Care Service regardless of the outcome of the Bill.

In response to your question, please find attached two policy briefs in the appendix:

1. Changes to the Bill to facilitate more innovative and collaborative commissioning.
2. The removal of Section 41 of the NCS Bill: Reserving right to participate in procurement by type of organisation.

Thank you again for this opportunity to provide further evidence. As the Bill progresses through Stage 2, Scottish Care would welcome the opportunity to continue to work with members of the committee on potential amendments. Should this offer be favourable, or if you have any queries with any of the provided documents, please do not hesitate to get in contact with Becca Young becca.young@scottishcare.org.

With Regards,



Karen Hedge

Deputy CEO

Scottish Care

Purpose

The following policy brief has been developed in response to the question from Mr Paul Sweeney MSP, taken on notice during the Health, Social Care and Sport Committee's Evidence Session (8/10/2024) for the National Care Service (NCS)(Scotland) Bill:

"In general, are there any other changes to the bill that could help to facilitate more innovative and collaborative commissioning?"

Background

1. Scottish Care has been advocating to ensure the efficacy of the NCS Bill and the implementation of ethical commissioning through our dedicated [Ethical Commissioning and Procurement Project](#). Following extensive research into best practice cases of commissioning independent adult social care services across Scotland, a range of barriers to innovative and collaborative commissioning have been identified:
 - a. Insufficient independent sector provider involvement across the commissioning process.
 - i. Aggravated by the inconsistency of stakeholders at Health and Social Care Partnership level.
 - b. Insufficient transparency regarding budgetary decisions and their impact, and subsequent commissioning and procurement practice.
2. The following brief details Scottish Care's position on required changes to the NCS Bill to remove such barriers to collaborative and innovative commissioning.

Required Changes to the NCS Bill to Facilitate Innovative and Collaborative Commissioning

3. Removing Section 41: Reserving Right to Participate in Procurement by Type of Organisation.
 - a. Please see the dedicated policy brief (Appendix 2).
4. Mandating the inclusion of independent sector representation at both national and local care board level within the NCS Bill. This includes full voting rights, in line with the [Health and Social Care Integration Progress Review](#) and [Independent Review into Adult Social Care](#) recommendations.
 - a. Formalised collaboration is required to strengthen shared working, removing the current hierarchical nature of commissioning and procurement procedures (please see our [previous evidence](#) on the impact of the monopsonic market) and creating a shared responsibility on identifying and providing the most appropriate support. It also allows for a wider pool of intelligence and expertise in decision-making as independent providers have access to specialist knowledge and data:
 - b. Formalised collaboration has a proven track record:
 - i. [Research from Blake Stevenson](#) (Commissioned by Health Improvement Scotland) reported "HSCP/Provider relationships that are trust-based and honest" as a key enabler.
 - ii. E.G. The [Fife Care at Home Collaborative](#) has acted as a platform for independent providers to formalise their joint working, in collaboration with the Fife HSCP in delivering high quality, safe and effective care to services users across Fife.
 - iii. E.G. [The Dumfries & Galloway Care at Home Collaborative](#) formalises engagement with independent provider partners with key stakeholders across the HSCP: Community Waiting Times Team; Social Work; Home Teams; Digital transformation & AIT project leads; Strategic Planning & Commissioning; Communities Directorate; Performance & Intelligence team). Its 12-month test of change programme produced a 28% reduction in the number of people delayed in hospital and a 27% reduction of people awaiting a package of care and support at home.
 - iv. E.G. The Partners for Integration (PFI) programme provides a national network of development staff, formally embedded within their respective HSCP as key representation of independent sector agencies. The team recently held a networking event which brought together providers and

commissioners to explore learning across Scotland which resulted from such relational working. The PFI Programme is funded locally by some HSCPs or lead agencies, with Scottish Government funding supporting its administration and the dissemination of good practice. Further information or meetings can be provided upon request.

5. Formalise the role of the National Care Board as the body to deliver market oversight.
 - a. The [Independent Review into Adult Social Care](#) projects that the real expenditure on adult social care will grow by 2.2%-3.5% per annum till 2035. Further research is required to understand the complexities of demand to enable commissioning bodies and independent providers to effectively meet growing service demand and innovate for the future.
 - i. [Fraser of Allender's Submission on Stage 2 of NCS Bill](#) details “an urgent necessity for timelier and better-quality estimates of the number of individuals utilising adult social care services, the associated workforce to facilitate this demand and the required expenditure to ensure quality of services are maintained and extended/improved.”.
 - b. Prevailing [myths surrounding the sustainability of the independent sector](#) continues to impact decision making from commissioning and procurement bodies. The role of market oversight is essential to ensuring the current monopsonic market not only remains stable but can innovate for the future. As best value continues to be a requirement of government, there needs to be recognition that this does not mean a commitment to minimum delivery cost and instead requires detailed evidence on impact to progress cultural change.
 - c. Market oversight within the NCS (through the National Care Board) is imperative to ensure independent provider contribution in such research, owing to their position as a formalised member of a Local Care Board operating under one system. Independent providers provide a significant economic contribution to the national and local economy. This is overlooked within a narrow commissioning and procurement process, where decision making is determined by assessed need and the allocation of available resource. Innovative commissioning can be supported through the role of market oversight, offering a macro-level analysis of the adult social care market and what services are best placed to meeting this rising demand.
 - i. E.G. An Independent Economic Impact Assessment of one Care Home Provider within Scottish Care’s membership detailed a £27.5 million a year contribution to the national economy in gross value added.
 - ii. E.G. [The Care Technologist Pilot Programme](#) typifies the benefits of commissioning innovative technological interventions across social care, with a return of £4.5 of Social Value for every £1 spent.
6. Introduce statutory obligations within the NCS Bill for Local Care Boards to be transparent with information and conditions relevant to the commissioning and procurement process. This will help to enable the collaboration of independent providers in the commissioning process, to be included within their Ethical Commissioning and Procurement Strategies (as per the current terms of the NCS Bill Stage 2 – Section 41a)
 - a. Symptomatic of the monopsonic market and the resultant power imbalance across the commissioning process, independent providers’ currently lack critical information to engage collaboratively with commissioning bodies (many of whom have private access to data that impacts decision-making). If providers have a thorough understanding of the care and support demands in their local area, they can contribute more effectively to meeting that demand. Transparency from commissioning bodies on how fees are set provides recourse for the commissioned service to challenge the current commitment to minimum delivery cost.
 - b. Scottish Care recommends the following evidenced additions:
 - i. The full economic cost of recovery for delivered care services from both public sector and independent services. This is critical to ensure independent providers are receiving a sustainable rate for delivering an equivalent service, enabling stability and equity of provision across Scotland.
 - ii. The existence of guidance for commissioned services to operate within their respective commissioning procedures and cost models (e.g. one Local Care Boards application of the National Care Home

- Contract). This should be routinely updated through co-design between commissioning bodies and commissioned services, evidencing required procedural changes following service provider feedback.
- iii. The average remuneration levels of both in-house and commissioned workforces, to support commissioning bodies achievement of fair working practices for *both* workforces.
 - iv. Published mechanisms for collaboration as part of strategic plans which are developed with the independent care sector.
 - v. Commitment to the [New Deal for Business](#), meeting the requirement to undertake Business Resilience Impact Assessments for commissioning decisions.
 - vi. Commitment to support research and innovation, and new models of care which enhance people’s experience of social care and support, as well as offering savings to the system. Evidencing cross-sectoral working is critical to achieve this best practice (such as the [Care Technologist Pilot](#)) and support systemic oversight and shared learning.
- c. Such inclusions would reflect the ongoing development of best practice for the determination of adult social care funding and subsequent transparency of commissioning decisions. The recent result of [His Majesty’s Treasury v The Information Commissioner & Anor](#) [October 2024] emphasised the necessity of “motivating organisations to collaborate to drive culture change on the frontline of social care and to share data ... to achieve systems change at all levels of social care decision”.
- d. Symptomatic again of the monopsonic market and the resultant power imbalance, Scottish Care notes the burden of data collection efforts on the independent sector workforce, in order to satisfy various requirements at HSCP level. Responsibility to obtain the above data for commissioning strategies must be shared as part of a collaborative process between new Local Care Boards and commissioned services. Please see Scottish Care’s report, '[Seeing the Diamond in Social Care Data: A Human Rights-Based Perspective on Creating Value in Social Care Data](#)', for a best practice, co-designed approach to data collection that ensures fit-for-purpose data, fosters trust, and supports relational working.

Purpose

The following policy brief has been developed by Scottish Care for the consideration of members of the Health, Social Care and Sport Committee (the Committee) of the Scottish Parliament, regarding the continued inclusion of measures to reserve the right to participate in procurement by type of organisation (Section 41 of the National Care Service (NCS) Bill Stage 2).

Background

1. Scottish Care has been advocating to ensure the efficacy of the NCS Bill and the implementation of ethical commissioning through our dedicated [Ethical Commissioning and Procurement Project](#).
2. In this capacity, Scottish Care has been advocating to ensure the efficacy of the NCS Bill and proper implementation of ethical commissioning, through the removal of Section 41 of the NCS Bill (Stage 2), reserving right to participate in procurement by type of organisation.
3. The Scottish Government intends that reserving the right to participate in procurement by type of organisation will “stimulate a diverse range of care and support services to ensure people’s needs are met and that the market as a whole remains vibrant and stable” ([Business and Regulatory Impact Assessment](#) - May 2024) (BRIA).
4. Whilst the Government has noted the expansion of the reserved process will not require all contracts to be awarded only to third sector bodies, and use of the reserved procurement process is a choice which will not prevent profit-making providers bidding for contracts through other procurement processes, there are grave unintended consequences of any legislation that serves to limit contracts to certain businesses or suppliers, and the subsequent choice of social care provision.
5. Scottish Care notes and welcomes the Committee’s previous concerns regarding legislative efforts to reserve right to participate in procurement by type of organisation, found within the Committee’s [NCS Bill Stage 1 Recommendation Report](#):
 - a. Paragraph 89 – “there is an inherent contradiction between reserving the right to participate in procurement by type of organisation, and the principles of ethical commissioning ... competitive tendering, as reflected in the call for competition set out in the Bill by reserving rights to participate in procurement, is not compatible with ethical commissioning and that it promotes transactional procurement related to cost that, to date, has led to time and task approaches and unfair work practices in the provision of social care, irrespective of whatever guidance is in place”.
 - b. Paragraph 91 – “concerns over how this provision (reserving right to participate in procurement by type of organisation) would work in practice if enacted”.
 - c. Paragraph 92 – “reserving the right to participate in procurement by type of organisation implies a judgement on the types of organisations that provide quality care ... such a provision could unintentionally have a negative impact on outcomes for individuals, particularly in relation to already established and valued local provision and future sustainability of services”.
6. On 25 June 2024, Scottish Care wrote to Neil Gray - Cabinet Secretary for Health and Social Care of Scotland (CC’d to Maree Todd - Minister for Social Care, Mental Wellbeing and Sport) to outline Scottish Care’s objections to the extension of reserved procurement as part of the NCS (Section 41).
7. To further our efforts to see the removal of Section 41 from future iterations of the NCS Bill, Scottish Care provides this brief to outline key issues for the Committee’s further consideration.

Issues – Section 41 (Reserved Procurement)

8. Adherence to the Social Care (Self-directed Support) (Scotland) Act 2013 means that every person who requires social care and support has the right to choose a provider for their care. The Scottish Government’s BRIA states that reserved procurement would support the “involvement and empowerment of users in contract award decisions”, however,

statutory provisions that give precedence to commissioners' choice of procured service over the expressly desired service of the individual, would be a denial of this legal right.

9. Given an already imbalanced and monopsonic social care market, extension to public bodies' ability to purchase services from suppliers of limited criteria impedes a mixed-market model and exacerbates market failure:
 - a. Scottish Care's briefing report ([Myth-Busting: The First Steps of The Care Revolution – May 2024](#)), details the ongoing sustainability crisis facing the independent sector. Legislative efforts to further limit procurement opportunities and subsequent funding will worsen provider sustainability and their ability to deliver person-led, human rights-based care, whilst disincentivising much needed investment in the independent sector's existing provision
 - b. Such market failure will be prevalent in rural communities without access to an economy of scale. The [New Deal for Business](#) aims to support business to thrive, with fairness at its heart, yet arbitrary classifications of independent care providers results in an inherent unfairness for these vital community organisations.
10. Section 41 conflicts with the Scottish Government's own Procurement of [Care and Support Services: Best Practice Guidance \(June 2021\)](#). Page 34, paragraph 8.21, states that *"evaluating existing arrangements for delivering the service against best value principles will require a public body to consider: whether the service is effective and of good quality, what it costs and whether it is cost-efficient, whether it promotes equal opportunities, [and] whether it contributes to sustainable development"*. Section 41 will serve to bypass such necessary checks to procurement procedures by providing the ability to discount eligible providers based on arbitrary categorisation of their business model.
11. The Scottish Government is yet to evidence support of reserved procurement across public consultation:
 - a. Section 280 of the Scottish Government's [Policy Memorandum \(June 2024\)](#) for the NCS Bill Stage 2 notes that *"the Scottish Government sought stakeholder views on reserving contracts for mutual organisations when consulting on the transposition of the 2014 European procurement Directives in 2015. The largest number of responses to the consultation were undecided, 28 [of 140] respondents saw advantages in implementing this proposal"*. This represents only 20% of respondents.
 - b. There was no question in relation to reserved procurement within the first round of public consultation on the NCS ([NCS Consultation: Analysis of responses](#) - February 2022). This issue must be subject to further consultation and co-design alongside independent providers prior to the inclusion of reserved procurement within the NCS Bill.
12. There remain significant shortcomings to the Scottish Government's [BRIA](#) for the NCS Bill:
 - a. Page 13 - *"The Bill enables Scottish Ministers to make regulations to change the definition of qualifying organisations and the category of service contracts this provision applies to in order to give effect to this change. There will be further engagement, consultation and impact assessments about any regulations to that effect"*. A further impact assessment of Section 41, as indicated within the BRIA, has not been conducted. Such assessment, including proper engagement with the independent sector must be conducted prior to the Bill's progression through Parliament. This is to ensure that such criteria remains inclusive of community-embedded services across the independent sector, no matter their business model.
 - b. Page 23 - *"The procurement provisions in the Bill will allow the NCS and local care boards to have the option to consider targeting mutual organisations when seeking invitations to bid for contracts. While the impacts on competition between firms could be significant, they are likely to be outweighed by the benefits to people who access care and support and the wider economy and society"*. Scottish Care has significant concerns over the Scottish Government's assumption that any impact to competition is *"likely to be outweighed by the benefits to people who access care and support and the wider economy and society to people who access care and support and the wider economy and society"*. Particularly, as the Committee notes in its [report on the NCS Bill Stage 1](#), that competition between sectors through reserved procurement opposes the implementation of ethical

commissioning. If the independent sector is not a mutual organisation within commissioning and procurement procedures, this conflicts with the collaborative aims of ethical commissioning and procurement under the NCS.

Recommendation

13. That the Health, Social Care and Sport Committee continue to contest the inclusion of Section 41 (reserving right to participate in procurement by type of organisation) within the NCS Bill.
14. That if Section 41's removal is not possible, the Committee impress upon the Scottish Government the necessity of:
 - a. Robust eligibility criteria to ensure the continued involvement of community organisations in the delivery of rights-based, person-led care, no matter their business model.
 - b. Robust data collection procedures on the part of Local Care Board's, transparently evidencing the use of reserved procurement within their ethical commissioning and procurement strategies (NCS Bill – Section 41a).
 - c. A BRIA to be undertaken on reserved procurement by type of organisation prior to formalising Section 41.