



The Scottish Parliament
Pàrlamaid na h-Alba

Alison Irvine
Head of Cabinet, Parliament and
Governance Division
Scottish Government

Delegated Powers and Law Reform
Committee
DPLR.Committee@parliament.scot

7 November 2022

National Care Service (Scotland) Bill at Stage 1

Dear Alison,

The Delegated Powers and Law Reform Committee considered the above Bill at its meeting on 1 November 2022 and seeks an explanation of the following matters:

Firstly, in relation to some general observations on the Bill as a whole, the Committee would be grateful for further explanation of:

- 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.**
- 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 Committee would also appreciate an explanation of the more specific points set out below.

Section 4 – Establishment, and abolition, of care boards

Power conferred on: the Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument
Parliamentary procedure: affirmative

Section 4 provides the Scottish Ministers with a power to establish and abolish care boards by regulations. The power must be exercised so that there are care boards for distinct geographical areas which together cover the whole of Scotland, but do not coincide or overlap. In relation to this power, the Committee would like clarification on the following matters:

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?**
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?**

Section 15 – Dealing with complaints

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: affirmative

Section 15 provides that the Scottish Ministers may make regulations which make provision about the handling of relevant complaints, including the remedies that are to be available.

The Committee has received letters from the Presiding Officer on behalf of the SPCB and from the Scottish Public Services Ombudsman, regarding an aspect of this power (see Annex A).

The SPCB has concerns that the exercise of this power could have an impact on its budget, which may have already been set for the year in which such regulations could be made. The Presiding Officer suggests that the power in section 15 does not provide the same parliamentary scrutiny mechanisms that apply in the Public Services Reform (Scotland) Act 2010. Those mechanisms include an Order only being brought forward if the SPCB request it, a requirement for consultation, and an obligation for an explanatory document being laid before the Parliament. The Committee would therefore like to know:

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

The letter from the Scottish Public Services Ombudsman expressed concerns about the complexity of the proposed complaints process and the need for further review (set out in the submission accompanying her letter). The Ombudsman refers to existing powers available to her that are sufficient to address the issue of a complaints process.

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?**

Section 17 – Removal of care board members

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations made by Scottish Statutory Instrument

Parliamentary procedure: laid, no procedure

Section 17 provides that the Scottish Ministers may remove all of the members of a care board by regulations.

The Committee notes that a similar power to remove board members exists in the Further and Higher Education (Scotland) Act 1992. That power may be exercised by an Order, subject to the negative procedure.

- 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.**

Sections 27 to 29 – Powers to transfer functions

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by the Scottish Ministers

Parliamentary procedure: affirmative

Sections 27 to 29 provide that the Scottish Ministers may make regulations to transfer functions of local authorities and health boards to care boards and themselves.

If regulations are made that would transfer the function of providing a children's service or a justice service, the Scottish Ministers must first consult publicly on the proposal. They must thereafter lay a summary of the consultation process before the Parliament when laying such regulations. In relation to this power, the Committee would like the Scottish Government's view on the below.

- 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?**

Section 36 – Care records

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by the Scottish Ministers

Parliamentary procedure: affirmative

Section 36 provides the Scottish Ministers with a power to establish a scheme for sharing information to enhance the efficiency and effectiveness of services provided by and on behalf of the National Care Service and the National Health Service.

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?

I would be grateful if you could please email your response to the Delegated Powers and Law Reform Committee e-mail address above by 12 noon on Wednesday 16 November. I appreciate this is a very short turnaround but this is to allow the Committee to report in time for the Health, Social Care and Sport Committee's session with Humza Yousaf MSP, Cabinet Secretary for Health and Social Care.

Yours sincerely,

Lucy Scharbert

Clerk to the Delegated Powers and Law Reform Committee

Annex A



The Scottish Parliament
Pàrlamaid na h-Alba

The Presiding Officer

Gillian Martin MSP
Convener
Health, Social Care and Sport Committee

By email

30 August 2022

Dear Gillian,

NATIONAL CARE SERVICE (SCOTLAND) BILL

I am writing to you on behalf of the Scottish Parliamentary Corporate Body (SPCB) in response to your Committee's call for evidence about the National Care Service (Scotland) Bill. I understand your consultation closes on 2 September 2022.

It has only recently been drawn to our attention that the National Care Services (Scotland) Bill contains provisions that impact on the SPCB.

The Bill, as drafted, provides Scottish Ministers with regulation-making powers to confer, modify or remove functions from SPCB supported officeholders (albeit with the approval of the SPCB) (sections 15(4) and (5) of the Bill refer). In effect, should Ministers, by way of regulations, add functions to any officeholder (for example, the Scottish Public Services Ombudsman) then, as the funding body, this would have a financial impact for the SPCB which would be outside its control unless it did not give its agreement.

We believe this is the first time that Ministers are proposing to use regulation-making powers which directly impact the statutory functions of the SPCB - in this instance, the funding of officeholders. This could be considered inappropriate, and we would wish to draw this matter to the attention of the Committee.

The Scotland Act 1998 establishes the Scottish Parliament (Part I) and the Scottish Government (Part II) as distinct and separate entities. While it is the function of the Parliament as the legislature to scrutinise the Scottish Government, the Scotland Act confers no direct functions or powers on the Scottish Ministers over the Parliament, its procedures, its officers or the SPCB and its officers, exercising its parliamentary and other functions conferred on it by section 21 of the Scotland Act.

By the annual Budget (Scotland) Acts, the Parliament approves the allocation of annual budgets to the Scottish Ministers, the SPCB and other public bodies. The Scottish Government has no locus to affect the SPCB's allocation or its expenditure. To interfere in the SPCB's budget, which is subject to parliamentary scrutiny, could be considered inappropriate.

We consider that any measures proposed by the Scottish Ministers which have the potential to affect the SPCB in any aspect of the exercise of its functions (including financial and governance support of office holders) should therefore follow a legislative route which affords proper scrutiny and ensures parliamentary approval, otherwise such a proposal could potentially be ultra vires the powers of the Scottish Ministers. The proposed conferral in the Bill of a delegated regulation-making power could fall into that category.

Normally, when additional functions are added to an SPCB supported body it is through primary legislation which is scrutinised by the Parliament, or Order-making powers within the primary legislation.

We are also of the view that there are already provisions available, under the Public Services Reform (Scotland) Act 2010, for modifying the functions of officeholders. Under this Act, the Scottish Ministers may not propose to make provision under section 14 or 17(1) of the Act which relates to any of the persons, bodies or officeholders listed in schedule 6 unless requested to do so in writing by the SPCB, and that the Scottish Ministers may not lay a draft order containing such provision before the Scottish Parliament in accordance with section 25(2)(b)(i) unless the SPCB consents. Further, the Scottish Ministers may not make an order under section 14 or 17(1) unless they have (a) consulted in accordance with section 26, (b) following that consultation, they have laid before the Scottish Parliament a draft order and an explanatory document prepared in accordance with section 27, and (c) the draft order has been approved by resolution of the Parliament.

The powers being proposed in the Bill are, therefore, not subject to the same parliamentary scrutiny mechanisms as apply to the exercise of regulation-making powers under the Public Services Reform (Scotland) 2010 Act.

As there are already mechanisms in place for the functions of officeholders to be modified with parliamentary scrutiny, we do not consider what is being proposed by way of conferring Ministerial regulation-making powers to be the appropriate approach to this matter.

I am sending a copy of this letter to the Convener of the Delegated Powers and Law Reform Committee, given that the comments we are making are about the delegated powers provisions in the Bill.

Yours sincerely



Rt Hon Alison Johnstone MSP
Presiding Officer

Gillian Martin MSP
Convener
Health, Social Care and Sport Committee

2 September 2022

By email

Dear Convener,

National Care Service (Scotland) Bill

My purpose in writing to you is to provide the SPSO's response to your Committee's call for evidence about the National Care Service (Scotland) Bill.

Attached with this letter is my formal submission. You will see that I have focussed solely on the complaints provisions. As the office holder appointed by Parliament with a remit for public service complaints, I have a number of significant concerns about the legislative approach proposed, particularly when a simpler route is available, using and reforming existing provisions resulting in a less complex landscape for service users.

The Bill also proposes to make regulations in a way which I am concerned impacts on the independence of my office (and that of other Parliamentary office holders). Given my concerns and that they relate to the core functions of SPSO, I intend to share a copy of this submission with the Local Government, Housing and Planning Committee and will also draw sections of this to the attention of the Delegated Powers and Law Reform Committee.

My commitment to improving the quality and focus of public service complaints handling remains and is a core tenet of my approach to the operation of SPSO; and I am supportive of the underlying aims of the Bill. In discussions my staff have had with government officials, there has been welcome and positive agreement about the outcomes that we wish to achieve; a person-centred, rights-based approach rooted in co-design. Unfortunately, the proposed approach, in creating a statutory underpinning for complaints about care, will in the long-term result in more complex systems, siloed by service. This potentially makes those outcomes more difficult to deliver.

Please contact me if you would like to discuss my submission.

Yours sincerely



Rosemary Agnew
Scottish Public Services Ombudsman