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Clare Haughey
Convener
Health, Social Care and Sport Committee
Scottish Parliament
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6th June 2024

Dear Ms Haughey,

Open letter - proposed amendments to National Care Service Bill

I attach a comprehensive set of proposed amendments to the NCS Bill which have been developed by Common Weal for consideration by the Health and Social Care Committee.

We appreciate the efforts that your committee, along with others in the Scottish Parliament, have made over the course of the last two years to get information from the Scottish Government about the draft NCS Bill, including the amendments it was proposing. Scottish Ministers excused their failure to publish their amendments as promised before the first reading of the NCS Bill in the Scottish Parliament on the grounds that they wanted to consult further and they had set up an “Expert Legislative Advisory Group (ELAG)” for this purpose.

The ELAG – Common Weal among a host of other organisations are “members” – has turned out to be a damp squib, for example:

- it has not considered any actual amendments to the NCS bill, only the policy intentions behind clauses which the Scottish Government is thinking of changing;
- there has been no opportunity for group members to suggest further or alternative amendments to the NCS bill;
- there has been no attempt to “co-design” the purpose of the amendments or to reach a (majority) decision on what changes might be required.

Common Weal would be happy to provide further information to the HSCS Committee on the deficient processes involved in the ELAG the experience has reinforced our view that no-one should have any faith in either Scottish Government’s commitment to develop a National Care Service or in the process by which the NCS Bill and any forthcoming amendments has been developed. Hence why we are now submitting our own proposals to your Committee.

While we hope that our proposals will prompt a wider public debate about what changes would be needed to the bill in order to create a National Care Service worthy of the name, our proposed amendments are primarily intended to assist MSPs. We hope that your Committee will be prepared to consider them both in their own right and as a benchmark against which any amendments forthcoming from the Scottish Government can be evaluated. At the appropriate time we would be very happy to attend your Committee to explain our proposals further.

We will circulating copies of this letter and our proposed amendments to the NCS Bill to all MSPs and will be asking the Scottish Government to circulate it to the ELAG.

Yours Sincerely,

Amanda Burgauer

Director

Common Weal

FIXING THE NATIONAL CARE SERVICE BILL

A SERIES OF PROPOSED AMENDMENTS FROM COMMON WEAL

INTRODUCTION

Common Weal set out a detailed vision for what a genuinely transformative National Care Service should look like in *Caring for All*. The Scottish Government's National Care Service Bill, not only falls a long way short of this but have introduced proposals which will damage our care system even further, including increased ministerial control over most aspects of the planning and delivery of services. Such was the degree of opposition that the Scottish Government was forced to pause the legislative process to reconsider its plans.

The lengthy 'pause' resulted in not a single change to draft legislation and Scottish Ministers then broke their promise that they would present their amendments to the Scottish Parliament before the Stage 1 Reading, announcing a new plan that their amendments would first be considered by a new Expert Legislative Advisory Group (ELAG). The ELAG consisting of a host of organisations, including Common Weal, has turned out to be yet another general stakeholder group which was asked to consider the policy intentions behind possible Scottish Government amendments rather than any actual amendments to the Bill and was given no opportunity to make its own suggestions as to what amendments might be required.

Common Weal does not believe this is sufficient, has no faith in the current process or that it is likely to lead to the creation of a National Care Service fit for purpose in Scotland. In this document therefore we set out detailed amendments which we believe are necessary to make this legislation fit for purpose and can provide a benchmark against which the Scottish Government's own amendments, when they are eventually published, can be judged.

Our proposed amendments which follow are to the text of the Bill as set out by the Scottish Government at Stage One. The text we believe should be deleted is marked in yellow highlighter and the text to be substituted or added is in red. Annex A starts with an explanation of why the Bill is not fit for the purpose, including its most significant omissions, and is then followed by a brief policy rationale for each of the changes proposed.

We would welcome feedback on our proposals (send to hello@common.scot) which are intended to promote thought on how the Bill could be made fit for the purpose and not as the last word

Note

Our proposed changes are to the sections and clauses of the Bill as currently numbered and have been drafted without specialist legal advice. Most of the numbering will need to be altered if either our amendments or those proposed by the Scottish Government are accepted. Any amendment that were accepted would need to be put into appropriate legislative format and legally proofed by the Scottish Government's lawyers.

PROPOSED AMENDMENTS TO THE NATIONAL CARE SERVICE (SCOTLAND) BILL

NATIONAL CARE SERVICE (SCOTLAND) BILL

[AS INTRODUCED]

An Act of the Scottish Parliament to establish the National Care Service; to make provision about the processing of health and social care information; to make provision about the delivery and regulation of social care; and for connected purposes.

PART 1

THE NATIONAL CARE SERVICE

CHAPTER 1

The Purpose, Principles and Institutions of the National Care Service

Purpose

The purpose of the National Care Service is to promote a caring society, support those who provide care informally through caring relationships and to provide care directly where this is needed from the cradle to the grave.

Principles

1 The National Care Service principles

The National Care Service principles are—

(a) the services provided by the National Care Service are to be regarded as an investment in society that—

(i) is essential to the realisation of human rights, including independent living as defined in the UN Convention on the Rights of People with Physical Disabilities

(ii) enables people to thrive and fulfil their potential, and

(iii) enables communities to flourish and prosper,

(b) for them to be such an investment the services provided by the National Care Service must be financially stable in order to give people long-term security,

(i) free at the point of use

(ii) be not for profit (and profit-making services phased out within a period of ten years)

(iii) based on the systematic collection of information about needs and outcomes

(iv) designed to benefit groups and communities as well as the needs and outcomes of the individual

(c) in order to help people and promote support services provided by the National Care Service are to be centred around early interventions that helps prevent or delay the development of care needs and reduce care needs that already exist, services provided by the National Care Service will be open to all and not provided on the basis of eligibility criteria. Over time Scottish Ministers will define specific enforceable entitlements (e.g. waiting times) through regulation.

(d) services provided by the National Care Service are to be designed collaboratively by social workers and commissioners working with the people to whom they are provided and their unpaid carers, frontline staff and other stakeholders

(e) **recognising that good care depends on good relationships**, opportunities are to be sought to continuously improve the services provided by the National Care Service in ways which—

(i) promote the dignity of the individual, and

(ii) advance equality, **and** non-discrimination, **and well-being**

(iii) **devolves decision-making powers wherever possible**

(f) the National Care Service, and those providing services on its behalf, are to communicate with people in an inclusive way, which means ensuring that individuals who have difficulty communicating (in relation to speech, language or otherwise) can receive information and express themselves in ways that best meet their individual needs,

(g) the National Care Service is to be an exemplar in its approach to fair work for the people who work for it and on its behalf, ensuring that they are recognised and valued for the critically important work that they do and will do this by—

(i) **establishing national terms and conditions for all staff**

(ii) **creating mechanisms that ensure and support national collective bargaining**

(iii) **ensuring that all staff are appropriately trained**

The Scottish Government

2 Responsibility for the National Care Service

(1) It is the duty of the Scottish Ministers to promote in Scotland a care service designed to secure improvement in the wellbeing of the people of Scotland.

(2) Everything that the Scottish Ministers do in discharging that duty is to be done in **the a way**

that **seems to them to that best reflects** the National Care Service principles.

(3) The principal responsibilities of Scottish Ministers with respect to the National Care Service are:

(a) to agree with the National Care Service Board annually what funding would be required to meet needs and outcomes then recommend a budget to the Scottish Parliament taking into account the requirements of other public services and how these impact on care needs and outcomes;

(b) to review the legislation affecting social work and social care to ensure it supports the principles and effective operation of the National Care Service and issue guidance about how this operates

(c) to draft further regulations to enable the NCS to deliver its purpose and principles as required in this bill

(ii) following discussions with the National Care Service Board and National Care Service stakeholders

(d) to ensure the National Care Service charter is fit for purpose

(e) to review with the National Care Service Board how services provided by the NCS are operating

3. Responsibility for improvement

It is the duty of the Scottish Ministers to put and keep in place arrangements for the purpose of monitoring and improving the quality of the services that the National Care Service provides.

Care boards

4 Establishment **and abolition** of local care boards

(1) The Scottish Ministers may by regulations—

(a) establish bodies to be known as care boards,

(b) abolish a care board.

(2) The power conferred by subsection (1) must be exercised so that—

(a) there are care boards with responsibility for particular geographical areas, and

(b) those boards' areas—

(i) together cover the whole of Scotland, and

(ii) do not coincide or overlap.

(3) A care board that is—

(a) established in fulfilment of the duty under subsection (2) is a local care board,

(b) not established in fulfilment of that duty is a special care board.

(4) Regulations establishing a care board must—

(a) in all cases—

(i) specify the name by which the board is to be known,

(ii) state whether it is a local or special care board,

(iii) specify the minimum and maximum number of ordinary members of the board,

(b) in the case of a local care board, identify the geographical area for which the board is responsible (which may be done by reference to another document).

(1) Each Local Authority in Scotland will set up a local care board which will function as a committee of that authority

(2) Each local care board will consist of locally elected councillors together with elected stakeholders representing the interests of service users and carers and the trade unions, including any health staff transferred to the NCS, and voluntary sector providers

(3) The care board may also include non-voting representatives from other public services

(4) The constitution of care boards is set out in Schedule 1. Scottish Ministers may, following further consultation with local authorities, service users etc issue further guidance about the factors that should be considered when determining their composition locally.

4A. Responsibilities of local care boards

Each local care board will be responsible for:

(a) Ensuring the delivery of care services within the local authority area they operate is in accordance with the National Care Service principles

(b) Ongoing systematic collection of information and data about service provision, unmet need and outcomes to inform the fair allocation of resources to and within their local area and nationally

(c) Ensuring that the design and management of care services in their area is devolved to allow service users, unpaid carers and staff to co-design and control the services that affect them

(d) Ensuring services in their area co-operate with other public services and the National Care Board

4B. Establishment of the National Care Board

(a) The local care boards will elect from among their members the National Care Board which will oversee the National Care Service nationally and advise Scottish Ministers

(b) Scottish Ministers will by regulation make provisions to ensure that the National Care

Board represents all interests included in the local care boards.

4C. Responsibilities of the National Care Board

The National Care Board will be responsible for:

- (a) Designing a national system to monitor and record unmet needs and outcomes on an ongoing basis to ensure that the NCS is properly resourced and resources fairly allocated across local care boards
- (b) Establishing national pay scales and terms and conditions and national collective bargaining
- (c) Establishing and maintaining a national training programme for care staff
- (d) Overseeing the National Social Work Agency
- (e) Agreeing with local care boards what other functions of the National Care Service are best delivered nationally
- (f) Overseeing services that it is agreed should be designed and delivered by the National Care Service nationally through a national commissioning function

4D. Special Care Boards

- (a) Scottish Ministers may after consultation with the National Care Service Board, through regulations create special care boards, including the National Social Work Agency, to deliver functions where specialist knowledge and skills are required
- (b) Special Care Boards will comprise nominees from stakeholders and the National Care Service Board
- (c) Special Care Boards will be accountable to the National Care Board

(4E) (5) Further provisions

Further provisions in connection with care boards is made by—

(a) schedule 1, which makes provision about their constitution and operation,

(b) schedule 2, which inserts references to them into other enactments which (amongst other things) impose duties on public bodies.

5 Financial assistance and budgeting for care boards the National Care Service

(1) The Scottish Ministers may will provide any financial assistance to care boards that they consider appropriate to the National Care Service as set out in the Scottish Government's budget and approved by the Scottish Parliament each year.

(2) For the purposes of subsection (1), "financial assistance" includes grants, loans, guarantees and indemnities.

(3) The Scottish Ministers may attach conditions (including conditions as to repayment and the payment of interest) in respect of any financial assistance provided under this section.

(4) The recommended budget will be negotiated between Scottish Ministers and the National Care Service Board each year on the basis of

- (a) the National Care Service principles
- (b) information on care needs and outcomes across Scotland
- (c) the cost of providing services, including those provided by special care boards

(5) The proportion of the budget allocated to local care boards will be distributed according to care needs and the costs of providing services in each area.

CHAPTER 2

STRATEGIC PLANNING

The Scottish Government National Care Service

6 Strategic planning by the Scottish Ministers National Care Board

(1) Subsection (2) applies if, by virtue of regulations under section 27, 28, or 29—

- (a) the Scottish Ministers National Care Board have the function of providing a service, or
- (b) the function of their providing a service is designated as a National Care Service function.

(2) The Scottish Ministers National Care Board must—

- (a) have a strategic plan, and
- (b) make their latest plan publicly available.

(3) The Scottish Ministers' National Care Board strategic plan is a document setting out, for the period of the plan, their—

- (a) arrangements for providing the all services referred to in subsection (1),
- (b) vision for the services,
- (c) objectives in relation to the services,
- (d) budget projections in relation to the services,
- (e) ethical commissioning strategy in relation to the services.

(4) The Scottish Ministers' National Care Board strategic plan may include any other information it considers appropriate.

(5) Before making a strategic plan the Scottish Ministers National Care Board must consult publicly on a draft of the plan.

(6) The Scottish Ministers National Care Board —

- (a) may make a new strategic plan at any time (having complied with subsection (5)),
- (b) must ensure that there is no gap between the period of one plan ending and that of its successor beginning.

(7) The period of a strategic plan—

- (a) must not exceed 3 years,
- (b) begins on the date that the plan states it begins,
- (c) ends on the earlier of—
 - (i) the date that the plan states it ends, or
 - (ii) the date that the period of the plan's successor begins.

Care boards

7 Strategic planning by local care boards

(1) A local care board must—

- (a) have a strategic plan, and
- (b) make its latest plan publicly available.

(2) A local care board's strategic plan is a document setting out, for the period of the plan (as defined in section 9(2)), the following for the board's area —

- (a) vision, current services
- (b) current and projected needs, unmet needs and outcomes
- (c) objectives,
- (c) structure,
- d) budget projections,
- (e) arrangements for providing services in exercise of the functions conferred on the board by virtue of regulations under section 27, 28, or 29,

(f) ethical commissioning strategy in relation to those services.

(3) A care board's strategic plan may include any other information the board considers appropriate.

8 Care boards' planning process

(1) Before making a strategic plan, a care board must—

(a) consult in accordance with subsection (3), and

(b) then have a draft of the plan approved by the Scottish Ministers

(2) The Scottish Ministers may decline to approve a care board's draft plan until any changes they consider appropriate have been made.

(3) A care board must consult on a strategic plan in the following way—

(a) the board must seek views on a draft of the plan from—

(i) **the people using services, their informal carers and staff working for the NCS**

(ii) its community planning partners, **including the voluntary sector**, and

(iii) in the case of a local care board, **the National Care Board** and any other local care board whose area of responsibility borders its own,

(b) then, having taken their views into account, the board must seek views on a draft of the plan from—

(i) in the case of a local care board, the residents of its area of responsibility,

(ii) in the case of a special care board, the public in Scotland.

(4) Nothing in this section precludes a care board from seeking views on a proposal for a strategic plan from any person at any time.

(5) In subsection (3)(a), the reference to a care board's community planning partners is to any person who is in a community planning partnership with the board for the purposes of Part 2 of the Community Empowerment (Scotland) Act 2015.

9 Frequency of planning by care boards

(1) A care board—

(a) may make a new strategic plan at any time (having complied with section 8(1)),

(b) must seek to ensure that there is no gap between the period of one plan ending and that of its successor beginning.

(2) The period of a care board's strategic plan—

(a) must not exceed 3 years,

(b) begins on the date that the plan states it begins,

(c) ends on the earlier of—

(i) the date that the plan states it ends, or

(ii) the date that the period of the plan's successor begins.

(3) A newly established care board must seek to make its strategic plan within 12 months of its establishment.

Interpretation

10 Meaning of ethical commissioning strategy

References in this Chapter to **a person the National Care Service's** ethical commissioning strategy in relation to a service **or services** is to the **person's National Care Service's** strategy for ensuring that the **person's** arrangements for providing the service best reflect the National Care Service principles.

CHAPTER 3

INFORMATION AND SUPPORT

The National Care Service charter

11 The National Care Service charter

- (1) The Scottish Ministers must—
- (a) prepare a charter (“the National Care Service charter”), and
 - (b) make it publicly available.
- (2) The charter is to contain—
- (a) a summary of the rights and responsibilities in relation to the National Care Service of—
 - (i) the **rights of the** individuals to whom the National Care Service provides services,
 - (ii) **the rights of** any individual who has a personal interest in the wellbeing of another individual to whom the National Care Service provides a service (for example a family member or a carer),
 - (iii) **the responsibilities of care boards**
 - (iv) **the rights and responsibilities of staff**
 - (v) **the responsibilities of Scottish Ministers**
 - (vi) **the rights and responsibilities** of any other category of person whose rights and responsibilities in relation to the National Care Service the Scottish Ministers consider it appropriate to summarise in the charter,
 - (b) a description of the processes available for upholding the rights in relation to the National Care Service of the persons whose rights and responsibilities the charter summarises.
- (3) The charter may include any other information the Scottish Ministers consider appropriate.

- (4) Nothing in the charter is to—
- (a) give rise to any new rights,
 - (b) impose any new responsibilities, or
 - (c) alter in any way an existing right or responsibility.

12 Further provision about the charter

- (1) In preparing and reviewing the National Care Service charter, the Scottish Ministers must—
- (a) consult any person they consider appropriate,
 - (b) have particular regard to the importance of eliciting the views of—
 - (i) the individuals to whom the National Care Service provides services, and
 - (ii) the persons who provide services on behalf of the National Care Service.
- (2) The Scottish Ministers must lay before the Scottish Parliament a copy of—
- (a) the first version of the charter, and
 - (b) any new version resulting from their making changes following a review.
- (3) The Scottish Ministers must—
- (a) first review the charter within 5 years of a copy of the first version being laid before the Scottish Parliament, and
 - (b) after that, review it within 5 years of the last review concluding.
- (4) Following a review of the charter, the Scottish Ministers may make any changes to it that they consider appropriate.
- (5) In the period before any regulations under a section in Chapter 6 have come into force, references in this section and section 11 to individuals to whom the National Care Service

provides services are to be read as references to the individuals to whom the Scottish Ministers expect the National Care Service will provide services within 12 months.

(6) For the purposes of subsection (1), it is immaterial that anything done by way of consultation was done before the Bill for this Act was passed or after that but before this section comes into force.

Advocacy

13 Independent advocacy

The Scottish Ministers may by regulations make provision about the provision of independent advocacy services in connection with the services that the National Care Service provides.

Complaints

14 Complaints service

(1) The Scottish Ministers Care boards must provide a complaints service for—

(a) receiving complaints about the services that the National Care Service provides, and

(b) passing those complaints on to the appropriate person.

(2) Nothing in subsection (1) precludes the complaints service from dealing with other kinds of complaint.

(3) The appropriate person in relation to a complaint is the person who, in the opinion of the provider of the complaints service, is best placed to address the complaint.

(4) The Scottish Ministers Care Boards—

(a) must fulfil their duty under subsection (1) as soon as practicable, and

(b) may do so by having the complaints service

assume responsibility for dealing with complaints about different services at different times.

15 Dealing with complaints

(1) The Scottish Ministers may will by regulations make provision about the handling of relevant complaints (including the remedies that are to be available).

(2) A relevant complaint is a complaint about—

(a) a service provided by the National Care Service,

(b) any other social service as defined by section 46 of the Public Services Reform (Scotland) Act 2010. a decision by the NCS not to provide a service in response to unmet need or poor outcomes

(4) Regulations under this section may in particular—

(a) impose requirements (for example to produce documentation on request),

(b) create sanctions (civil or criminal) for those who fail to comply with the regulations' requirements an appeals process to a sub-committee of the care board.

(c) set out what information about complaints and their handling will be published

(d) remove any duplication with existing complaints systems

(4) The Scottish Ministers may only lay draft regulations to which subsection (5) applies before the Scottish Parliament for approval with the consent of the Scottish Parliamentary Corporate Body.

(5) This subsection applies to draft regulations under this section that would—

(a) confer a function on a person listed in schedule 6 of the Public Services Reform (Scotland) Act 2010, or

- (b) modify or remove one of those persons' existing functions.

CHAPTER 4

SCOTTISH MINISTERS POWERS TO INTERVENE

Powers in relation to care boards

16 Directions to care boards

(1) A care board must comply with any direction issued to it by the Scottish Ministers.

(2) A direction under subsection (1)—

- (a) may be general or specific,
- (b) may modify or revoke an earlier direction under subsection (1).

17 Removal of care board members

(1) The Scottish Ministers may by regulations remove the members of a care board if the Ministers are satisfied that the board has failed to carry out any of its functions.

(2) The Scottish Ministers may only be satisfied that a care board has failed to carry out a function if an inquiry has been held to determine the facts relating to the alleged failure.

(3) An inquiry for the purpose of subsection (2) is to be held in whatever manner the Scottish Ministers consider appropriate.

(4) For the avoidance of doubt, a reference to a care board's functions includes its function of complying with any direction issued to it under section 16.

Stakeholders electing members to care boards may remove or replace those whom they decide no longer represent their interests

18 Transfer of care board's functions in an emergency

(1) The Scottish Ministers may direct that a function of a care board is to be performed by another person if the Ministers are of the opinion that—

- (a) an emergency exists, and
- (b) having a person other than the board perform the function is necessary in order to secure the function's effective performance.

(2) A direction under subsection (1) is to specify the person who is to perform the function (which may be the Scottish Ministers).

(3) A person directed under subsection (1) to perform a function must comply with the direction.

(4) The Scottish Ministers—

- (a) may revoke a direction under subsection (1) at any time, and

(b) must do so as soon as practicable after they form the opinion—

- (i) that the emergency in connection with which the direction was issued no longer exists, or
- (ii) that it never existed.

(5) A direction under subsection (1) is revoked when the Scottish Ministers have given notice to that effect to—

- (a) the care board whose function is concerned, and
- (b) if the person charged with performing the function by the direction is not the Scottish Ministers, that person too.

19 Transfer of care board's functions due to service failure

(1) The Scottish Ministers may direct that a function of a care board is to be performed by another person if the Ministers are of the opinion that the board has failed, is failing or is likely to fail—

(a) to perform the function, or

(b) to perform it to a standard which the Ministers regard as acceptable.

(2) A direction under subsection (1) is to specify the person who is to perform the function, but may only specify—

(a) another care board, or

(b) the Scottish Ministers.

(3) A person directed under subsection (1) to perform a function must comply with the direction.

(4) Where a care board's function is performed by another person in accordance with a direction under subsection (1)—

(a) the board is liable to the person for any expenses that the person reasonably incurs in performing the function, unless the direction states otherwise,

(b) anything done, or omitted, by the person in performing the function is to be regarded as having been done or omitted by the board,

(c) a third party who deals with the person in good faith and for value is entitled to assume that anything the person purports to do within the powers conferred by the direction is properly done within those powers.

(5) For the purposes of subsection (4)(a), a person's expenses in performing a function includes the cost of remunerating the person's staff for periods they spent performing the function.

(6) The Scottish Ministers may revoke a direction under subsection (1) at any time.

(7) A direction under subsection (1) is revoked when the Scottish Ministers have given notice to that effect to—

(a) the care board whose function is concerned, and

(b) if the person charged with performing the function by the direction is not the Scottish Ministers, that person too.

Powers to intervene with contractors

20. Emergency intervention order

(1) The court may, on an application by the Scottish Ministers a care board, make an emergency intervention order.

(2) An emergency intervention order is an order designed to ensure that goods or services that are to be provided by a person ("the provider") to, or on behalf of, the National Care Service under an agreement are, so far as possible, provided without undue delay and to an appropriate standard.

(3) An emergency intervention order may—

(a) authorise a person nominated by the Scottish Ministers care board to—

(i) enter and occupy premises identified in the order,

(ii) direct and control the provider's operations so far as they relate to the affected supply,

(iii) do anything that the person considers necessary to ensure that the affected supply is provided without undue delay and to an appropriate standard,

(b) require the provider to comply with any direction in relation to the affected supply given by the person nominated by the Scottish Ministers care board,

(c) confer any other powers, or impose

any other duties or prohibitions, that the court considers appropriate (for example, a prohibition on the provider disposing of assets).

(4) The court may make an emergency intervention order only if it is satisfied that it is reasonable for the **Scottish Ministers care board** to hold the opinion described by section 21(1) in relation to the affected supply.

(5) The court may make an emergency intervention order in the absence of the provider.

(6) If it makes an emergency intervention order, the court must specify in the order the period for which it has effect, which must not exceed 12 months (but see section 22(2)).

(7) In this section—

“the affected supply” means the goods or services that the emergency intervention order in question is designed to ensure are provided without undue delay and to an appropriate standard,

“court” means the Court of Session or the sheriff.

21 Application for emergency intervention order

(1) The **Scottish Ministers care board** may apply for an emergency intervention order only if it is their opinion that—

(a) there is a failure, or an imminent risk of failure, in the provision of goods or services that are to be provided to, or on behalf of, the National Care Service under an agreement,

(b) that failure has caused, or is likely to cause, significant harm to the material wellbeing or safety of persons to whom the National Care Service provides services,

(c) the agreement under which the goods or services are to be provided offers no remedy that could effectively mitigate that harm.

(2) In subsection (1), reference to a failure in the provision of goods or services is to—

(a) their not being provided in accordance with the terms of the agreement under which they are to be provided, or

(b) their provision in accordance with the terms of that agreement no longer being adequate to fulfil the purpose for which the National Care Service entered into the agreement to have the goods or services provided.

22 Variation and revocation of emergency intervention order

(1) The court may on the application of the **Scottish Ministers care board** or the provider—

(a) vary the terms of an emergency intervention order,

(b) revoke an emergency intervention order.

(2) The court may vary an emergency intervention order to extend the period for which it has effect, but—

(a) may only do so once, and

(b) may not extend the period originally specified by more than 6 months.

(3) In this section, “court” and “provider” are to be construed in accordance with section 20.

CHAPTER 5

FUNCTIONS CONNECTED TO THE PROVISION OF CARE

23 Research

(1) **The National Care Service and Scottish**

Ministers must agree a research programme into how to improve the collection of information on unmet need, how to improve outcomes and how to improve the working conditions of the workforce, including the health, safety and welfare of social care staff

(2) The Scottish Ministers, the **National Care Board** and care boards may do any of the following in relation to research relevant to the services that the National Care Service provides—

- (a) conduct it,
- (b) assist others in conducting it,
- (c) give financial assistance in relation to it.

(3) For the purposes of subsection (1)(c), “financial assistance” means grants and loans.

(4) A person giving financial assistance under this section may attach conditions to it (including conditions as to repayment and the payment of interest).

24 Training

(1) The **Scottish Ministers and care boards may** National Care Service will operate a free national training programme to---

- (a) **provide training courses for individuals** to equip them with knowledge and skills relevant to providing services on behalf of the National Care Service,
- (b) **give a person a grant towards expenses incurred by the person in providing training for the purpose mentioned in paragraph (a), support career development**
- (c) **give to an individual undertaking training for the purpose mentioned in paragraph (a) (whether or not by way of a course provided under that paragraph) a grant towards any or all of the following—** enable those carers who so wish to access training courses

(2) **The National Care Service Board will oversee the national training programme and may give**

a person a grant towards expenses incurred by the person in providing training for the purpose mentioned in paragraph (a) **or (b),**

(3) **Care Boards must** give to an individual undertaking **approved** training for the purpose mentioned in paragraph (a) (whether or not by way of a course provided under that paragraph) a grant towards any or all of the following—

- (i) fees for the training,
- (ii) expenses incurred in connection with the training,
- (iii) living costs that arise during the training period.

(4) A person giving a grant under this section may attach conditions to it (including conditions as to repayment and the payment of interest).

25 Support for other activities

(1) **The Scottish Ministers and c**Care boards may give financial assistance to any person who is engaged in an activity connected to the services provided to individuals **or communities** by the National Care Service.

(2) Financial assistance may be given under subsection (1) in order that the recipient of it can, in turn, give financial assistance to another person engaged in an activity connected to the services provided to individuals by the National Care Service.

(3) A person giving financial assistance under subsection (1) may attach conditions to it.

(4) Where financial assistance is given under subsection (1) for the purpose mentioned in subsection (2), the conditions attached to it may include requirements about the conditions that the recipient must attach when the recipient uses the financial assistance to give assistance to another person.

(5) References in this section to conditions include conditions as to repayment and the payment of interest.

(6) In this section, “financial assistance” means grants and loans.

26 Compulsory purchase

(1) The Scottish Ministers or a care board may compulsorily acquire land that they require for the purpose of exercising a relevant function.

(2) A compulsory acquisition by a care board under subsection (1) must be authorised by the Scottish Ministers.

(3) Land may not be compulsorily acquired by virtue of subsection (1) if it is held or used by a Minister of the Crown or a department of the Government of the United Kingdom.

(4) In this section—

(a) a relevant function—

(i) in the case of the National Care Board or a care board, is any of its functions,

(ii) in the case of the Scottish Ministers, is any function conferred on them by virtue of this Part,

(b) references to acquiring land includes acquiring—

(i) any right or interest in or over land,

(ii) a servitude or other right in or over land by the creation of a new right.

CHAPTER 6

ALLOCATION OF CARE FUNCTIONS ETC.

27 Power to transfer functions from local authorities

For the purpose of fulfilling their duty under section 2, the Scottish Ministers may by regulations, wholly or partly, transfer to themselves or a care board a function conferred on a local authority by an enactment mentioned in schedule 3

28 Power to bring transfer aspects of healthcare into out of the National Care Service and back to the NHS

For the purpose of fulfilling their duty under section 2, the Scottish Ministers may by regulations ----

(a) designate as a National Care Service function the function of their providing, or securing the provision of, a particular service under the National Health Service (Scotland) Act 1978,

(b) wholly or partly transfer to themselves, or a care board, a function conferred on a health board or a special health board, wholly or partly transfer health functions currently managed by Integration Authorities which transfer to the National Care Service back to the NHS

29 Power to re-organise the National Care Service

For the purpose of fulfilling their duty under section 2, the Scottish Ministers may by regulations wholly or partly transfer to—

(a) themselves a function conferred on a care board,

(b) a care board a function conferred on themselves by virtue of section 27, 28 or this section,

(c) a local care board a function conferred on a special care board,

(d) a special care board a function conferred on a local care board.

Duties in relation to transferring functions

30 Consultation before bringing children's and justice services into the National Care Service transferring services back to the NHS

(1) This section applies in relation to regulations under section 28 27 that would transfer the function of providing—

- (a) a children's service, or
- (b) a justice service.

(2) Before making regulations to which this section applies, the Scottish Ministers must consult publicly about the function transfer that the proposed regulations would effect.

(3) When laying a draft Scottish statutory instrument containing regulations to which this section applies before the Scottish Parliament for approval by resolution, the Scottish Ministers must also lay before the Parliament a summary of—

- (a) the process by which they consulted in relation to the function transfer that would be effected by the regulations contained in the draft instrument, and
- (b) the responses they received to that consultation.

(4) In this section, "a children's service" means a service that is provided to, or in relation to (either or both)—

- (a) persons under 18 years of age,
- (b) persons 18 years of age or over on account of a local authority having provided a service to, or in relation to, them when they were under 18 years of age.

(5) In this section, the reference to "a justice service" is to be construed as follows—

- (a) a justice service is a service that is provided only to, or in relation to, persons who are or have been—

(i) in police custody having been arrested in respect of an offence,

(ii) officially accused of committing an offence,

(iii) the accused in criminal proceedings,

(iv) found guilty in criminal proceedings,

(b) despite paragraph (a), no service provided in exercise of a function conferred by virtue of the Mental Health (Care and Treatment) (Scotland) Act 2003 is a justice service.

(6) In subsection (5), "officially accused" and "police custody" have the meanings given

in (respectively) sections 63 and 64 of the Criminal Justice (Scotland) Act 2016.

Further provision about function transfers

31 Transfers of staff

(1) In connection with the transfer of a function from one person the National Care Service ("the original function holder") to another the NHS ("the new function holder"), the Scottish Ministers may by regulations transfer individuals from the employment of the original function holder into the employment of the new function holder.

(2) But regulations under subsection (1) may not transfer a person from the employment of a health board or a special health board into the employment of another person.

(3) Regulations under subsection (1) may identify the staff to be transferred by name or description.

(4) A transfer effected by virtue of subsection (1) is a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (S.I. 2006/246).

(5) In this section, a reference to the transfer of a function is to a transfer by virtue of a section in this Chapter.

32 Transfers of property and liabilities etc.

(1) In connection with the transfer of a function from one person (“the original function holder”) to another (“the new function holder”), the Scottish Ministers may by regulations—

- (a) transfer to, and vest in, the new function holder any of the property (including rights) and liabilities of the original function holder,
- (b) provide that anything done by, or on behalf of, the original function holder is to be treated as having been done by, or on behalf of, the new function holder,
- (c) provide that any reference to the original function holder in a contract, deed or other document giving rise to a legal obligation, is to be read as a reference to the new function holder,
- (d) provide that any legal proceedings raised by, or against, the original function holder are to be continued by, or against the new function holder.

(2) In this section, the reference to the transfer of a function is to a transfer by virtue of a section in this Chapter.

33 Interpretation of expressions about functional transfers

(1) In this Chapter, a reference to—

- (a) transferring a function wholly is to transferring it so that it ceases to be exercisable for any purpose by the person on whom it was conferred before the transfer,
- (b) transferring a function partly is to transferring it so that for some purposes it is exercisable by the Scottish Ministers or a care board while for others it remains exercisable by the person on whom it was conferred before the transfer,
- (c) a function being conferred includes its being conferrable (for example by a court order),

(d) transferring a function from person A to person B includes making a function that is conferrable on person A conferrable on person B.

(2) In subsection (1)(a) and (b), a reference to a function’s being exercisable for a purpose includes its being conferrable for a purpose.

CHAPTER 7

FINAL PROVISIONS FOR PART 1

34 Consequential modifications

Schedule 4 makes modifications in consequence of this Part.

35 Interpretation of Part 1

(1) This section makes provision for the purposes of interpreting this Part.

(2) The National Care Service is comprised by—

(a) local care boards, special care boards and the National Care Board which together are known as care boards

(b) the Scottish Ministers insofar as they are exercising a function that is—

(i) conferred on them by virtue of this Part, or

(ii) designated as a National Care Service function by virtue of regulations under section 28.

(3) References (however expressed) to a service provided by the National Care Service are to a service that a person comprising the National Care Service provides in exercise of a function that is—

(a) conferred by virtue of regulations under section 27, 28, or 29, or

(b) designated as a National Care Service function by virtue of regulations under section 28.

(4) References (however expressed) to providing a service include securing its provision.

PART 2

HEALTH AND SOCIAL CARE INFORMATION RELATING TO CARE AND HEALTH

36 Care records

(1) The Scottish Ministers may by regulations provide for a scheme that allows information and data to be shared based on the creation of personal data stores with citizens, carers and families in order that services can be provided efficiently and effectively by and on behalf of—

- (a) the National Care Service,
- (b) the National Health Service,

(c) local authorities

(d) social security Scotland (information relating to entitlement to disability and carers benefits)

(e) registered social landlords

(2) Such a scheme will be based on the creation of a national system of personal data stores, where the individual decides which services have access to what information

(3) Regulations under subsection (1) may in particular—

(a) require one person contracted services to supply information to another person the public services listed in 36 (1),

(b) create sanctions (civil or criminal) for

contracted service providers who fail to comply with the regulations' requirements.

(c) require the public services listed in 36 (1) to share information with contracted services

(3) In this section—

“National Care Service” means—

(a) a care board,

(b) the Scottish Ministers exercising a function conferred on them by virtue of—

(i) Part 1,

(ii) section 58 of the Regulation of Care (Scotland) Act 2001,

“National Health Service” means—

(a) a health board,

(b) a special health board,

(c) the Common Services Agency for the Scottish Health Service,

(d) Healthcare Improvement Scotland,

(e) the Scottish Ministers exercising a function conferred on them by virtue of the National Health Service (Scotland) Act 1978.

“Local authority” means (specify what local authority services included, eg education, housing)

36A Information technology in the National Care Service

(1) The National Care Board will, within its first year, produce a 10-plan to harmonise and improve digital information systems across the National Care Service based on the creation of personal data stores nationally

(2) The National Service IT systems will be designed to

(a) support the collection of meaningful data on unmet need and outcomes nationally

(b) enable the production of reports at all levels of the National Care Service

(c) facilitate research

(d) to enable efficient transfer of information on services and complaints to the regulator

(3) Any local or special care board planning to upgrade their IT systems after year 1 must do so in a way that supports that National Care Service plan

37 Information standard

(1) An information standard is a document, produced by the Scottish Ministers, setting out how certain information is to be processed.

(2) The Scottish Ministers must make any information standard they produce publicly available.

(3) A person to whom subsection (4) applies must—

(a) comply with any information standard, and

(b) include in any agreement for the provision of a service on the person's behalf a requirement that the other party comply with any information standard.

(4) This subsection applies to—

(a) a care board,

(b) a health board,

(c) a special health board,

(d) the Common Services Agency for the Scottish Health Service,

(e) Healthcare Improvement Scotland,

(f) the Scottish Ministers, but only insofar as they are exercising a function conferred on them by virtue of—

(i) Part 1,

(ii) section 58 of the Regulation of Care (Scotland) Act 2001,

(iii) the National Health Service (Scotland) Act 1978.

(5) The references to an information standard in subsections (2) and (3) do not include an information standard that the Scottish Ministers have withdrawn.

(6) In this section, “processed” includes doing any of the things referred to in paragraphs (a) to (f) of section 3(4) of the Data Protection Act 2018.PART 3

Reforms connected to delivery and regulation of care

Carers

38 Rights to breaks for carers

(1) The Carers (Scotland) Act 2016 is modified by subsections (2) to (10).

(2) After section 8(2) (adult carers: identification of outcomes and needs for support) insert—

“(1) A responsible local authority **or care board** must identify, as a personal outcome that is relevant to an adult carer, the outcome that the adult carer is able to take sufficient breaks from providing care for the cared-for person.

(2) Where an adult carer is not able to take sufficient breaks from providing care for the cared-for person, a responsible local authority must identify the need for support to **that would** enable the adult carer to take sufficient breaks from providing that care.”.

(3) In section 9(1) (content of adult carer support plan)—

(a) after paragraph (h) insert— “(ha) if the adult carer’s identified needs include the need

for support to enable the adult carer to take sufficient breaks from providing care by virtue of section 8(4), information about the support which the responsible local authority provides or intends to **provide offer** to the adult carer to meet that need,”

(b) in paragraph (i) delete “if the adult carer’s identified needs meet the local eligibility criteria”

(c) in paragraph (j), after “criteria” insert **“(except in the case of an identified need as mentioned in paragraph (ha))”**, **delete “if the adult carer’s identified needs meet the local eligibility criteria”**

(d) paragraph (k) is repealed.

(4) After section 14(2) (young carers: identification of outcomes and needs for support) insert—

“(3) A responsible authority must identify, as a personal outcome that is relevant to a young carer, the outcome that the young carer is able to take sufficient breaks from providing care for the cared-for person.

(4) Where a young carer is not able to take sufficient breaks from providing care for the cared-for person, a responsible authority must identify **the need for and provide** the support **to that would** enable the young carer to take sufficient breaks from providing that care.”.

(5) In section 15(1) (content of young carer statement)—

(a) after paragraph (i) insert—

“(ia) if the young carer’s identified needs include the need for support to enable the young carer to take sufficient breaks from providing care by virtue of section 14(4), information about the support which the responsible local authority provides or intends to **provide offer** to the young carer to meet that need,”

(b) in paragraph (k), after “criteria” insert **“(except in the case of an identified need as**

mentioned in paragraph (ia))”; (j) **delete “if the young carer’s identified needs meet the local eligibility criteria”**

(c) paragraph (k) is repealed

(d) paragraph (l) is repealed.

(6) **Delete section 21 (duty to set local eligibility criteria)—**

(a) in subsection (2), for “identified” substitute **“relevant”**,

(b) after subsection (4) insert—

“(5) In subsection (2), “relevant needs” means identified needs other than any need for support to enable carers to take sufficient breaks from providing care that is identified by virtue of section 8(4) or 14(4).”

(6A) Delete section 22 Publication and review of criteria

(7) Delete in section 23 (national eligibility criteria)—

(a) in subsection (2), for “identified” substitute **“relevant”**,

(b) in subsection (3)(c), for “24(3)” substitute **“24(2) and (4)”**,

(c) after subsection (4) insert—

“(5) In subsection (2), “relevant needs” means identified needs other than any need for support to enable carers to take sufficient breaks from providing care that is identified by virtue of section 8(4) or 14(4).”

(8) In section 24 (duty to provide support) **delete all after (1) “This section applies where a carer has identified needs which cannot be met by services or assistance” and replace by**

(b) The local authority has a duty to provide ongoing advice and emotional support in such circumstances

(a) in subsection (1)(a), for the words from **“section” to “caring”** substitute **“this section**

in order to enable the carer to take a break from providing care for the cared-for person”,

(b) in subsection (2), for “eligible needs” substitute “relevant needs that meet the local eligibility criteria”,

(c) subsection (3) is repealed,

(d) in subsection (4)—

(i) in paragraph (a), for “the carer’s eligible needs” substitute “any relevant needs of the carer that meet the local eligibility criteria”,

(ii) in paragraph (b), for “the carer’s other identified needs” substitute “any relevant needs of the carer that do not meet the local eligibility criteria”,

(e) after subsection (4) insert—

“(4A) The responsible local authority must also provide support to the carer to meet any need for support to enable the carer to take sufficient breaks from providing care for the cared-for person that is identified by virtue of section 8(4) or 14(4).”

(f) in subsection (5)—

(i) in the opening words, for “Subsection (4) (a) applies” substitute “Subsections (4)(a) and (4A) apply”,

(ii) in paragraph (a), for “eligible needs” substitute “identified needs in question”,

(iii) in paragraph (b), for “eligible needs” substitute “identified needs in”,

(g) in subsection (6), for the words from “the”, in the first place where it occurs, to the end substitute ““relevant needs”, in relation to a carer, means the carer’s identified needs other than any need for support to enable the carer to take sufficient breaks from providing care that is identified by virtue of section 8(4) or 14(4).”

(9) Delete all In section 25 (provision of support to carers: breaks from caring)—

(a) subsection (1) is repealed,

(b) for subsection (2) substitute—

“(2) The Scottish Ministers may by regulations make further provision in connection with the support to be provided to a carer under section 24(4A).

(3) Regulations under subsection (2) may in particular make provision about—

(a) the meaning of any reference to sufficient breaks in this Act,

(b) standards or criteria in relation to the sufficiency of such breaks (including the nature, frequency or duration of breaks),

(c) forms of support that may enable a carer to take such breaks,

(d) where the support is the provision of care for the cared-for person, the role of the cared-for person in relation to how the care is provided.”

(c) in subsection (3), for “by virtue of subsection (1)” substitute “under section 24(4A)”,

(d) in subsection (4)—

(i) for “by virtue of subsection (1)” substitute “under section 24(4A)”,

(ii) for “caring” substitute “providing care”,

(e) in subsection (5), for “as a break from caring” substitute “to enable a carer to take a break from providing care for the cared-for person”.

(10) In section 31 (duty to prepare local carer strategy)—

(a) after subsection (2)(h) insert—

“(ha) plans to promote a variety of providers of services to support to relevant carers and to promote the variety of support provided,”

(b) after subsection (2) insert—

“(2A) In subsection (2), references to support to relevant carers include references to support to enable carers to take a break from providing care for cared-for persons.”

(11) The Social Care (Self-directed Support) (Scotland) Act 2013 is modified by subsection (12).

(12) In section 7(1) (choice of options: adult carers and young carers), after “24(4)” insert “or (4A)”.

(13) The Social Work (Scotland) Act 1968 is modified by subsection (14).

(14) In Delete section 87 (charges that may be made for services and accommodation)—

2

(a) in subsection (1), after “24(4)” insert “or (4A)”,

(b) in subsection (1A)(a), after “24(4)” insert “or (4A)”.

39. Enactments relating to carers: minor modifications

(1) The Carers (Scotland) Act 2016 is modified by subsection (2).

(2) Sections 6(6) and 12(8) are repealed.

(3) The Social Care (Self-directed Support) (Scotland) Act 2013 is modified by subsection (4).

(4) In section 7(1), the words “an adult” in the first place where they occur are repealed.

Care homes

40. Visits to or by care home residents

(1) Residents of care homes and other forms of supported accommodation have a right to be visited and visit others unless otherwise restricted by law

(2) Where the provider of the care home or supported accommodation denies the right of a resident to visit or be visited without legal justification the local care board will issue a visiting direction within 24 hours.

5 The Public Services Reform (Scotland) Act 2010 is modified as follows.

1 (4) In section 78 (regulations: care services), after subsection (2) insert—

“(2A) The Scottish Ministers must exercise the power under subsection (2) to require providers of care home services to comply with any direction (“visiting direction”) issued by the Ministers about either or both of—

(a) visits to residents of accommodation provided by a care home service,

(b) visits by residents of accommodation provided by a care home service.

(2B) The Scottish Ministers **may make** regulations —

(a) **must, before issuing a visiting direction, empowering care boards to restrict the right to visits, after consultation with Public Health Scotland, care home relatives and any other person the Scottish Ministers consider appropriate in order to protect the health of residents for an emergency period of up to two weeks**

(i) **In such circumstances, except where the NHS replaces staff in the home, every resident will retain the right to visits from their main carer from outside the care home;**

(ii) **Care Boards will treat a resident's main carer like paid staff at the home and provide personal protective equipment and training where appropriate to enable visits to continue.**

(b) may vary or revoke a visiting direction.”
 requiring care boards to consult residents,
 relatives and staff before such restrictions
 can be extended beyond two weeks

(c) requiring providers of care homes to
 provide facilities and other infrastructure that
 would reduce the likelihood of any visiting
 restrictions being required.

Procurement

41. Reserving right to participate in procurement by type of organisation

(1) The Public Contracts (Scotland) Regulations
 2015 (S.S.I. 2015/446) are modified as follows.

(2) After regulation 76 insert—

“76A “Reserved contracts for certain services

(1) Contracting Care boards and local
 authorities may will reserve to qualifying
 organisations the right to participate in
 procedures for the award of reservable
 contracts.

(2) Where a the contracting authority
 exercises the power of reservation conferred
 by paragraph (1), the call for competition must
 make reference to this regulation.

(3) The power of reservation conferred by
 paragraph (1) is without prejudice to the power
 conferred by regulation 21.

(4) A reservable contract is a contract that—

(a) is to be awarded in accordance with this
 Section,

(b) has a maximum duration of 5 years or less,

(c) is for the provision of a service, or more
 than one service, to or on behalf of the
 National Care Service (as defined by section
 35 of the National Care Service (Scotland) Act
 2023), and

(d) is exclusively for a service, or more than
 one service, covered by one of the following
 CPV codes: 75200000-8, 75231200-6,
 75231240-8, 79611000-0, 79622000-0,
 79624000-4, 79625000-1, a code in the
 range beginning with 85000000-9 and ending
 with 85323000-9, 98133100-5, 98133000-4,
 98200000-5, 98500000-8 and a code in the
 range beginning with 98513000-2 and ending
 with 98514000-9.

(5) An organisation is a qualifying organisation
 if—

(a) its objective is the pursuit of a public
 service mission linked to the delivery of
 services referred to in paragraph (4)(d),

(j) all profits are reinvested with a view
 to achieving the organisation’s objective,
 and any distribution of profits is based on
 participatory considerations, supporting
 the purpose of the National Care Service,

(k) the structures of management or
 ownership of the organisation are (or will
 be if and when it performs the contract in
 question)—

(i) based on employee ownership or
 participatory principles, or

(ii) such that they require the active
 participation of employees, users or
 stakeholders, and

(d) the organisation has not been awarded,
 pursuant to this regulation, a contract for
 the services concerned by the contracting
 authority concerned within the past 3 years.

(6) The Scottish Ministers may by regulations
 change—

(a) the CPV codes specified in paragraph (4)
 (d),

(b) the definition of qualifying organisation.

(7) The power conferred by paragraph (6) may be
 exercised to make different provision for different
 purposes.”

Regulation of social services

42 Social Work and Care Inspectorate

(1) The following functions will be transferred from Social Care and Social Work Improvement Scotland (“the Care Inspectorate”) to the National Care Service

(a) The general duty of furthering improvement in the quality of social services

(2) The following functions will be transferred from the Scottish Social Services Council (“the SSSC”) to the National Care Service

(a) Workforce planning

(b) The general duty of promoting high standards—

(i) of conduct and practice among social service workers; and

(ii) in their education and training.

(3) The remaining functions of the Care Inspectorate and the SSSC will be amalgamated into a single regulatory body known as the Social Work and Care Inspectorate whose primary purpose will be to act as the independent regulator of the National Care Service

(4) The main functions of the Social Work and Care Inspectorate are:

(a) Registration of the Social Work and Social Care workforce

(b) To provide independent reports on the levels of training of that workforce

(c) To determine cases where there are serious concerns about a workers’ fitness to practice

(d) To provide independent inspection of services under the National Care Service

(e) To act as an appeals authority where people or organisations are dissatisfied with the way the National Care Service has handled a complaint about the provision of care or failure to provide care

(f) To take regulatory action where required

(g) To work closely with other regulatory bodies, in particular,

(i) the Health and Safety Executive on the health, safety and welfare of staff

(ii) Healthcare Improvement Scotland regarding the health of staff and users of services, including inspections as set out in clause 43.

42B Registration and Cancellation of care services **registration**

(1) The Public Services Reform (Scotland) Act 2010 is modified as follows.

(2) In section 64 (cancellation of registration)—

(a) in subsection (1), the words “, at any time after the expiry of the period specified in an improvement notice given in respect of a care service,” are repealed,

(b) after subsection (1) insert—

“(1A) The power in subsection (1) may be exercised—

(a) at any time after the expiry of the period specified in an improvement notice given in respect of the care service, or

(b) at any time in circumstances which may be prescribed.”.

43 Assistance in inspections from Healthcare Improvement Scotland

(1) The Public Services Reform (Scotland) Act 2010 is modified as follows.

(2) After section 57 insert—

“57A Assistance in inspections from Healthcare Improvement Scotland

(1) Healthcare Improvement Scotland may assist

SCSWIS Social Work and Care Inspectorate in carrying out an inspection under this Part.

(2) Healthcare Improvement Scotland may charge a reasonable fee determined by it for any assistance provided by virtue of subsection (1)."

PART 4

FINAL PROVISIONS

44 Interpretation

In this Act—

"health board" means a board constituted under section 2(1)(a) of the National Health Service (Scotland) Act 1978,

"special health board" means a board constituted under section 2(1)(b) of that Act.

45 Transitional Arrangements

(1) Scottish Ministers, in consultation with the National Care Board, will within a year produce plans which will be presented to the Scottish Parliament for approval for

- (a) the phasing out of for profit services
- (b) the creation of a system for national collective bargaining
- (c) the creation of national pay scales, terms and conditions
- (d) the creation of any special care boards
- (e) the rationalisation of existing legislation on social work and social care so that it supports the purpose and principles of the National Care Service

(2) The National Care Board, in consultation with

local care boards and Scottish Minister will within one year produce plans for:

- (a) how information on unmet need will be collected and improved
- (b) harmonising Information technology across the National Care Service as set out in Part 2
- (c) the creation of a national training programme encompassing all staff
- (d) draft Strategic plans for national services

(3) Local care boards will within one year produce:

- (a) Strategic Plans (as set out in Clause7)
- (b) A training needs assessment for all staff working in social work and care services in their area to inform the development of the national training programme
- (c) Plans to support the democratisation of the National Care Service from service level to representation on the care board

45A Ancillary provisions

The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, or in connection with, or for giving full effect to this Act or any provision made under it.

46 Regulation-making powers

(1) A power to make regulations conferred by this Act includes the power to make different provision for different purposes and areas.

(2) Regulations under—

- (a) the following provisions may modify any enactment other than this Act—

- (i) section 13,
- (ii) section 15,
- (iii) any section in Chapter 6 of Part 1,

(b) section 45 may modify any enactment including this Act.

(3) Regulations under any of the following provisions are subject to the affirmative procedure: sections 4, 13, 15, 27, 28, 29 and 36.

(4) Regulations under any of the following provisions are subject to the negative procedure—

- (a) sections 31 and 32,
- (b) paragraph 15 of schedule 1.

(5) Regulations under section 45—

- (a) are subject to the affirmative procedure if they add to, replace or omit any part of the text of an Act, but
- (b) otherwise, are subject to the negative procedure.

(6) Regulations under paragraph 11 of schedule 1—

- (a) are subject to the affirmative procedure if no regulations have previously been made in exercise of the power, but
- (b) otherwise, are subject to the negative procedure.

47 Commencement

(1) This Part comes into force on the day after Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

48 Short title

The short title of this Act is the National Care Service (Scotland) Act 2023

SCHEDULE 1

(introduced by section 4(5)(a))

Care Boards: Constitution and Operation

(Revised version will be required once structure care boards agreed)

SCHEDULE 2

Delete all

(introduced by section 4(5)(b))

Care Boards: Application of Public Authorities Legislation

SCHEDULE 3

Delete all

(introduced by section 27)

Enactments Giving Rise to Transferable Local Authority Functions

ANNEX A

POLICY RATIONALE FOR PROPOSED AMENDMENTS

INTRODUCTION

The Care Reform Group first started developing a set of amendments to the National Care Service (Scotland) Bill (“the Bill”) 18 months ago but halted the process after the bill was paused to enable more co-design work on the National Care Service (NCS). This and the Verity House agreement with Cosla in June 2023, in which the Scottish Government agreed care should remain a responsibility of local authorities, implied that there would be some fundamental changes to the Bill. The Scottish Government, however, refused to reveal what those changes would be – despite requests from several Committees of the Scottish Parliament – and then managed to persuade the Scottish Parliament to approve the unamended Bill at its First Reading on the basis that it would publish its amendments to the Bill before the end of March. However, on 29th March the Scottish Government announced that it had set up an Expert Legislative Advisory Group (which includes Common Weal) of over 60 organisations to consider its proposed amendments and delayed the publication date until 30th June.

In the light of this history Common Weal has decided to publish our proposed amendments now in order to assist discussion at the expert legislative group and promote wider debate. We believe the time for secrecy is over and we hope our amendments will help prompt the Scottish Government to publish theirs as promised.

Our “Amendments to the National Care Service (Scotland) Bill from Common Weal” are to the Bill as published. We have taken a “conservative” approach and tried to retain as much of the

structure and wording of Bill as possible rather than redrafting it from the start. This means that some of our proposed amendments are clumsier than they might have been. Generally, we have tried to address key gaps in the Bill by amending clauses, rather than writing new ones, and unless we believe a clause is incompatible with the vision for a NCS we set out in Caring for All, we have retained it even where we do not think it is appropriate for a framework bill. We believe this is in accordance with Scottish Parliament precedent and procedures including the fact that after the First Reading, the general principles underlying legislation are said to have been established.

This paper sets out the policy rationale and general explanation for our proposed amendments to the Bill. It does not attempt to provide a detailed justification for each amendment. The amendments are generally written in ordinary, not legal language, and would need to be refined to become legally competent. As importantly they have been written with a view to prompting further thought and debate rather than as the definitive way to improve this Bill.

While wide-ranging our proposed amendments are not comprehensive. For example, we have not attempted to re-write Schedule 1, Constitution of Care Boards, because more fundamental issues need to be addressed first, while if our proposals to amalgamate the Care Inspectorate and the Scottish Social Services were accepted the clauses we have suggested

would need to be expanded and developed. Nor have we checked through every legal reference in the existing legislation, just the ones that to us appeared most important.

Purpose

The proposed amendments are designed:

- To create a single National Care Service from womb to tomb, separate from central government and with its own constitution like the NHS
- To set out the main functions of the National Care Service
- To enable care services to be designed and controlled from the bottom up
- To decentralise control over the National Care Service and make it democratically accountable
- To create a transparent mechanism for the funding of care based on need and creating positive outcomes for people and their carers
- To create a national pay structure and terms of service, like the NHS, subject to national collective bargaining
- To establish that all services operating under the National Care Service should be not for profit and free at the point of need
- To initiate a different approach to information sharing encompassing all public services based on the creation of personal data stores
- To set out transitional arrangements
- To initiate a process to rationalise and consolidate legislation which applies to social work and social care services

Common Weal set out our vision for a National Care Service in *Caring for All* (see www.commonweal.scot) and produced a detailed critique of the National Care Service (Scotland) Bill based on our understanding of what care is and how it underpins the well-being of society as a whole. In developing these proposals to amend the Bill, we have taken account of suggestions, contributions and comments made by others to the policy papers we have developed and to the draft legislation.

There are strong arguments in favour of a framework Bill since the creation of a National Care Service (NCS) will take time and require an ongoing programme of reform. However, to enable that to happen several things must be put in place:

- First, the foundations of the NCS as set out in the Bill need to be absolutely solid. Instead of that we have a bill in which the purpose of the NCS is not described and which is not even clear about what services will be included, with children's and justice services possibly being added at a later date. If that were to happen, it would affect multiple clauses, from the principles to information sharing. A framework bill therefore needs to be all encompassing from the start.
- Second, the Bill needs to provide democratic mechanisms to enable the stakeholders in Scotland's care system to have real power when it comes to deciding how the NCS develops. As worded at present the Bill does the opposite, handing unprecedented powers to Scottish Ministers to determine everything. The Covid crisis showed the dangers of that with top-down decision-making, for example, resulting in the discharge of people infected with Covid to care homes unprepared to cope. But in truth this attempted power grab is likely to come back to bite Scottish Ministers in the future: where someone is responsible for everything, they will be blamed for everything when care should be a collective responsibility.
- Third, the key argument for a National

Care Service is the need to resource care properly. The only way to do that fairly is through central government funding, like the NHS. But, for this to work and make a difference, there need to be mechanisms for ensuring that resources follow need and deliver better outcomes for people, like in the constitution of the NHS. The draft Bill leaves funding entirely at the discretion of Scottish Ministers without any checks and balances. That is not good enough. While in the NHS funding mechanisms are less than transparent, up until now the court of public opinion along with information about unmet need and outcomes in the form of waiting lists has helped drive investment.

- Fourth, while the Bill does include some consequential amendments of existing social care legislation (mainly the Carers (Scotland) Act 2016), it contains no mechanism to ensure the multiple other pieces of social work and care legislation that will impact on the operation of the NCS are reviewed and reformed to ensure they are compatible with its objectives and principles.
- Fifth, the Bill lacks provisions for transitional arrangements and is generally silent about where further regulations might be required, instead leaving this to the discretion of Scottish Ministers. What is required are clear legally binding arrangements that will give people the confidence that the aspirations set out in the Bill will be implemented over time and that Scottish Ministers are not simply diverted to the next political priority. We believe that is far more likely to happen if responsibility for that is devolved to the people using, requiring and working in the NCS rather than being left with Scottish Ministers.
- Sixth, health and social care information should not be viewed in isolation but as part of a suite of public services that includes social security, other council services, registered social landlords etc. What is needed is a Scotland-wide programme of data and information system reforms which would enable people who

so wish to share their information across a suite of public services and not just those included in the NCS. We believe that is bigger and separate to the NCS but have proposed changes to Part 2 of the Bill which would support such a programme.

MAIN PROPOSED CHANGES TO THE BILL

Purpose

Nowhere does the Bill say what the purpose of the NCS is, a major omission. There should be a new clause –one of few occasions we are proposing this – setting out the purpose of the NCS at the very start. Our proposed wording is based on the aims of the NCS we set out in Caring for All, recognising that care for each other is the glue that holds together society and makes much of life worth living. The purpose flows from that, to promote a caring society, to support informal care and to provide care services to people whose care needs would be otherwise unmet.

The proposed purpose encompasses all care services, making no distinction between care for children and care for adults for example (the two are intertwined through families) and sets the scope for the NCS, which like the NHS should be cradle to grave or womb to tomb.

Principles

The Bill is rightly structured so that the principles feed in to everything the NCS does and in places this is explicit, for example ethical commissioning is defined as being about how the principles are applied to the design and financing of services. It is therefore of crucial importance that the Bill gets the principles right.

Perhaps the most important principle of all is that need should precede resource, as is set out

in the constitution of the NHS. While it might be tempting to try and create one overarching enforceable right, “a right to care for all who need it”, we believe that although the aspiration is laudable it is not workable even if considerable additional resources were always available. This is first because needs are constantly changing (as is happening in health) and there will always be a gap therefore between what is needed and what is provided. Second, without full financial powers or support for such an aspiration from Westminster, there are limits to what the Scottish Government or Scottish Parliament can do to reduce that resource gap to the smallest possible.

Instead, however, of disguising how funding is determined and allocated, which is what happens at present, we believe there needs to be a firm commitment to transparency about how far resources are meeting needs. Hence our proposal that a fundamental principle of the NCS is that at all levels it should collect and collate information and data on unmet needs as happened in Strathclyde Regional Council before it was abolished. Without such information there can be no public accountability and no rational discussions about how the NCS should develop.

Needs, however, also require to be explicitly related to equitable outcomes. In other words, needs should not be defined in terms of the presence or absence of a service but should reflect holistic and equitable wellbeing with consistent methods of measuring/identifying this. As a consequence, we refer to needs and outcomes.

We are also proposing some additional principles that have been omitted from the Bill but are widely supported:

- That care should be not for profit. Money-making should have no place in care. This would have the additional benefit that if we stopped money leaching out of the system there would be more money to pay staff and invest in services. This clearly cannot happen overnight, which is why it is important that the Bill sets out transitional arrangements describing how the NCS will become not for profit over a period of years.

- That care should be free at the point of use. The Independent Review of Adult Social Care (IRASC) recommended this and the Scottish Government has committed to implementing those recommendations so there appear to be no political reasons for not including this in the principles.
- That care provision should include community infrastructure and collective provision as well as services targeted at individuals – this is key to the preventive agenda and making independent living a reality.

In addition, several of the existing principles should be amended to strengthen them and give them real force:

- **Rights (sub-clause (a) i).** In our view a rights-based approach is meaningless unless the rights referred to are explicitly stated. There is little in any of the international conventions (ECHR/ UN Declaration) that is specific enough other than an inherent right to life and a general prohibition of discrimination. The UN Convention on Rights of Persons with Disabilities goes into a bit more detail, which is why we have added a reference to it, but is still quite high level. The UK Equalities and Human Rights Commission sets out a number of themes which are consistent with both the amendments we have proposed and also with the general principles of ‘Caring for All’, but again does not go into much detail. Rights need to be translated under specific entitlements e.g. access to assessment, waiting times, immediacy of provision of services, provision of services that minimise the risk of deterioration
- **Prevention (sub-clause c).** As this reads, it presents prevention as a miraculous intervention that will reduce the level of care needs people have and whose primary purpose is to save money. This is very different to what we believe is needed, that help is available to people when they feel they need it. This requires the removal of eligibility criteria, which prevent people from accessing help,

and over time the translation of “rights” into specific entitlements such as those referred to above. The amendment is proposed with that intention.

- **Co-design of services (sub-clause d).** Our amendment would make local commissioners – not government ministers (who are too remote and have other things to do) – responsible for working with a range of stakeholders to design services according to the NCS principles. The amendment extends the list of people who need to be involved in this process to include not just service users (problematic in services where people lack mental capacity) and carers but staff and other stakeholders (e.g. voluntary sector providers, advocacy groups, local community organisations). We believe that will strengthen, not undermine, the involvement of people with “lived experience”.
- **Relationships (sub-clause e).** There is nothing in the principles to recognise that care is fundamentally about relationships or that this has implications for rights. This insight was key to the Independent Care Review for Children but is totally missing from the Bill. We considered trying to draft a clause about relationship-based work but believe it simpler to add a reference to this clause “recognising that good care depends on good relationships”. This should have fundamental implications for how care services are organised, for example the NCS needs to move from task-based care (driven by a health perspective) to one that also allows time for staff to build the necessary relationships.
- **Staffing (Sub-clause g).** We have strengthened this by adding to the recognition of Fair Work Principles some more specific principles that are necessary to make this happen: national pay scales for all staff, the creation of mechanisms to enable national collective bargaining and training for all staff. This happens in the NHS and the Scottish Government has accepted in principle it should happen in care but not been prepared to say how.

The amendment would bind the Scottish Government to that commitment. The exact wording of this clause should be negotiated and agreed with the Trade Unions.

Structure and control

Much of the content of the Bill is about the structure of the NCS and the creation of a service directly managed by Scottish Ministers. We recognise this will change as a result of the Verity House Agreement and understand a new tripartite structure is planned involving the Scottish Government, NHS and Local Authorities.

Under the Bill as drafted the national elements of the service would become part of the civil service and other services will be managed by care boards which are wholly under the control of Scottish Ministers. The powers the Bill awards to Scottish Ministers are extraordinary: the power to decide the number, function and geographical extent of care boards; the power to determine who sits on care boards; the power to direct what care boards do and as if that is not sufficient to then intervene. It is not clear how much this will change as a result of the Verity House agreement but this undermines local democracy, rather than strengthening it, while the model of care boards as commissioning bodies still creates a real risk that all care services and some in the NHS too will be outsourced undermining pay and conditions in the sector. The centralised model is also incompatible with the principle (see above) that services should be co-designed with the people who need them, their carers and staff. This can only happen at the local level.

The rationale for our proposed amendments to the rest of Chapter 1, which sets out the structure of the NCS, is to deliver a radically different model that delivers the purpose and principles of the Bill by being designed and controlled from the bottom up. The main elements of this are:

Local care boards

We propose there should be one for each council area and they would function rather like a committee of the local authority with elected councillors but would also include elected

representatives from the main stakeholder groups in the NCS, the people who use it, the informal carers who provide the vast majority of care in Scotland and staff. The balance of membership between different interest groups needs further debate but we would propose that at least half of the (voting) members of the Care Boards are people other than local councillors. It is important to emphasise that councillors are very important because they represent the wider interests of communities (including the people who don't need care at particular times but are likely to need this in future) and because local authorities are responsible for so much of infrastructure that is necessary to make care work (from designing accessible streets and public places to housing). There also need to be transitional arrangements that support the creation of structures that enable the various interests to elect representatives, building on what happens in the Trade Unions and parts of the voluntary sector.

The local care boards would then be responsible for distributing resources in their area according to need (information about which would be submitted to the National Care Board). They would also importantly be under a duty to devolve control of those resources over time to enable services to be designed and controlled by stakeholders. If a local care board decided that because of its geography or population it wanted to create subsidiary care boards it would be able to do so but this would be a local decision and the statutory local care board would retain overall responsibility for care provision in their area.

Under our proposed amendments to minimise disruption and costs the Health and Social Care Partnerships, as currently constituted would remain BUT the Integration Authorities would be replaced by democratic Care Boards with the NHS having rights to be represented but not to vote. This would move adult care back into the orbit of local authorities and enable adult services to be re-integrated with children's and justice services. As this happened it might well make sense for health staff to transfer back to the NHS and we make provision for that in Chapter 6 of the Bill. This would also help end the distortions to the care system that have resulted from top-down management focussed on trying to solve the problems of the NHS (such

as so-called 'bed-blocking') rather than the needs of society as a whole.

The National Care Board

This should be an independent body with a constitution like the NHS and which is separate from the civil service and Scottish Ministers. But instead of being appointed and under the control of Scottish Ministers we propose this should be appointed by local care boards with mechanisms put in place to ensure that all interests represented on local care boards are also represented on the National Care Board. At the heart of its functions would be the promotion of a caring society, the collation of information about care needs in Scotland to inform what resources the NCS needed and ensuring those working in care services were properly paid and trained. The National Care Board would also assume some of the powers and duties given to Scottish Ministers under the draft bill (e.g. with respect to strategic plans for National Services). This is a very different model to the functions that the Scottish Government has been proposing through the Expert Legislative Advisory Group.

The National Care Board would also be responsible for any special care board. Further debate is needed about how far some specialist national functions relating to the NCS, e.g. the proposed National Social Work Agency, should be part of the NCB or whether they would be better managed as a semi-stand-alone body (which would require a new clause in the Bill). In order to fulfil its proposed function to promote a more caring society, we can see a role for a special care board, Public Care Scotland, akin to Public Health Scotland.

Role of Scottish Ministers

While our proposals would reverse the proposed centralisation of power in the hands of Scottish Ministers, the NCS could not function effectively without close involvement from the Scottish Government. We see the main responsibilities associated with this relating to funding, ensuring that the legislation affecting care is compatible and supports the delivery of the NCS principles and to take a critical view of how the NCS is doing, including reporting to the Scottish Parliament. None of these responsibilities is simple.

For example, in determining what resources may be required to meet unmet care needs the Minister will need to take account of how investment in other services may affect the level of care needs along with how investment in care will affect investment in health. It could mean, for example, it might be as effective to increase benefit levels for families in poverty as to invest in support services. These are complex decisions and a public care service able to conduct research etc would ensure these decisions about where to put resources are as well informed as possible.

Any review of social work and social care legislation is also a complex task and likely to take several years. To give one example, if social workers are to be freed up to help people, the law and guidance which determines what they do currently will need to be fundamentally revised. This will mean ministers accepting that the focus on eliminating risks (which infuses child and adult protection) will need to shift. While that creates some new risks, we believe it will be outweighed by the benefits. Working out how much of the existing social work resource should be used on protection, how much on help and how much bureaucracy is necessary will take some time

Health and Social Care Information

There is no doubt that information held about individuals could be shared better and that the systems for collecting data about care are extremely poor. We need to improve the way information is shared about individual not just to stop people needing services from having to answer the same questions endlessly, as pointed out in the IRASC, but to improve service delivery to the individual (e.g. respond to indicators of risk) and free up staff from endless form filling. However, much as there is a need to address these issues within the NHS and care services, the sharing of information needs to be considered and addressed from a wider perspective, with doctors for example having to fill in forms for people to qualify for benefits or housing transfers, while housing should form a key part of every social work assessment.

The answer to improving the sharing of information about individuals while adhering to

data protection requirements is not, however, to try and force different systems and staff together but rather to create personal data stores, built using open-source software rather than proprietary information systems, which will underpin all public services and be controlled by the individual as happens in other countries such as Denmark. What we need to do is initiate and implement an inclusive, person centred approach to data and information sharing in health and care that encompasses citizens, carers and organisations; such an approach means citizens can be active, be at the centre of services, have personal data stores and the citizen in Scotland is then the point of integration for public and third sector services.

The Bill may not be the best place to introduce this but our proposed amendments are written on the basis it makes no sense to try and address information sharing by looking at health and care in isolation.

Transitional arrangements

If a broad framework bill which sets out the overarching purpose, principles and structure of a National Care Service is to work, this will take time. One of the major failings of the draft bill is it hands all decisions about transitional arrangements and implementation to Scottish Ministers. We have therefore introduced a section under Part 4 of the Bill which sets out broad requirements for transitional arrangements and who is responsible for what. It needs further development.

EXPLANATION OF PROPOSED AMENDMENTS

Our proposed amendments to the Bill are presented as insertions (red text), deletions (yellow highlights) or amendments to the NCS Bill BUT we are not lawyers and they have not been drafted with any intention of being legally competent. Rather the intention is to

show how the Bill might be amended to deliver a National Care Service worthy of the name and which might meet the aspirations of those who have responded to the draft bill and been disappointed.

Following the section with our proposed amendments to the Bill there is a section providing a brief explanation of the rationale for each amendment, following the order that clauses are set out in the amended Bill, and how it supports the wider rationale we have described above. The most important amendments are at the start and have to do with the purpose, principles and structure of the NCS and from these many of the other amendments follow.

Part 1 – Principles and Institutions of the National Care Service

Clause by clause explanation of proposed amendments

Chapter 1

New Clause – Purpose

To set out the three fundamental reasons we need a NCS and express these as its purpose

Clause 1 – Principles

- The addition of “independent living” is designed to set out more clearly what human rights should be central to care provision
- We have retained the wording about care being an investment in society but spelled out what we think is necessary for that to be achieved, i.e. care being not for profit, free at the point of use, care provision being designed to address unmet need and that investment in care should be in social infrastructure as well as individual services
- Preventative services should not just be viewed as about saving money and our rewording is an attempt to describe the wider benefits of prevention.

- The change clarifies who in the NCS is responsible for designing services, “commissioners” and who they will work with collaboratively to achieve this, i.e. not just service users and carers
- Unlike in the Independent Care Review for Children nowhere in the bill is there a recognition that care is relationship based and this has implications for rights. Giving rights to one party in a relationship affects the rights of the other party so in improving services needs to take account of the dignity of both staff and people receiving services, both people in need of care and their informal carers.
- While this clause on inclusive communication appears to specific – a more general clause on inclusion might be more appropriate to the principles section – we have it as is.
- Amendments intended to give really meaning and force to the Fair Work clause

Existing clauses 2 and 3– Responsibility for the NCS and improvement

We propose amalgamating these clauses and amending current clause (2) so that it is not a matter of opinion on the part of Scottish Ministers whether the NCS is being delivered according to the principles in Clause 1 but a matter of law. Delete clause (3) which gives Scottish Ministers responsibility for improvement as this responsibility should in our view lie with care boards and staff (so we have moved this requirement there). Replace this with new subclause (3) setting out five responsibilities of Scottish Ministers: funding, regulations, review of other legislation, the NCS Charter (beefed up) and general oversight. The clause on the need to rationalise existing social work and social care legislation is new but the need for this should be obvious.

Existing clause 4 – Local Care Boards

The title and content of the existing clause is amended, removing the ministerial power to establish and abolish care boards at will, and replacing this with a local care board for each

local authority area set up by the local authority concerned but with elected representatives. A new clause (5) sets out the statutory responsibilities of local care boards to deliver services according to the NCS principles, collect information about needs and to facilitate the co-design of services in their area.

National Care Board

Mirroring the clauses for local care boards, two new clauses create a National Care Board, with statutory status, elected by local care boards, and then set out its main statutory responsibilities.

Special Care Boards

The Bill contained provisions for Scottish Ministers to create special care boards, mirroring how the NHS works, without setting out clearly what was envisaged. We believe there is an argument for this, particularly in relation to the public care and training functions of the NCS but also for social work as the National Social Work Agency as proposed has no statutory basis and it is unclear at present what it is about that is different from a Special Care Board (apart from it being more directly controlled by government which we view as undesirable).

Financial assistance

This clause, currently (5) is retained as it is essential the NCS is financed by central government. However, the content is amended to ensure that Ministerial funding decisions are transparent and based on need, the costs of providing services (e.g. according to national wages and terms and conditions, transport in rural areas – which would be the same for services whether operated publicly or by the voluntary sector) and the NCS principles

It is important to appreciate the NCS budget cannot just be decided in isolation on the basis of projected care needs and improving outcomes since those care needs and outcomes are also determined by matters such as housing, income etc which fall into other budget lines. Just as increasing spend on care might reduce pressure on the NHS, so spending money on housing might reduce pressure on the NCS.

Chapter 2 Strategic Planning

Existing clause 6

The amendment replaces the duties of Ministers to plan for national services by duties for the National Care Board to do the same. Apart from that the clause is unchanged. The amendments are consequential to the creation of a NCS independent of central government. It is worth noting we believe it is appropriate there are separate strategic plans for different types of services that may be provided nationally because these are likely to be specialist services meeting distinctive needs (e.g. specialist residential provision for older people with sensory impairments, secure care for children, residential addiction services).

Rather than an overall National Care Service plan, which would hand power back to Scottish Ministers, we believe that national planning should be conducted through the budgetary process, i.e. the National Care Board collates all the information on needs and outcomes, relates these to the costs of providing services and then negotiates with the Scottish Government on what further resources are needed.

Existing clauses 7 – 10. Strategic planning by care boards

We propose amending the scope of the clause (7) so it just applies to local care boards (what special care boards would need to plan for is different). We have proposed amendments to the content of strategic plans so they focus on how current services relate to needs and what the care board plans to change in the period of the plan through the co-design process.

Under the original wording Ministers were to provide strategic plan for each service they provided. This makes no sense, services could be tiny, and is different to care boards whose plan covers all services

Under clause 8 on the planning process the proposed amendments greatly reduce the powers that Scottish Ministers have over local care boards' Strategic Plans. If plans are developed from the bottom up and determined by democratically elected boards there is no

need for such powers. We have made it explicit that people using services, informal carers and staff must be consulted about draft strategic plans. We have also provided that the National Care Board must be consulted to enable join up between nationally provided and local services (e.g. if there are specialist services such as for the deaf-blind provided nationally, local planning needs to feed into future demand for such services).

Existing clauses 9 and 10 are basically unaltered except for the legalese involved in defining ethical commissioning strategy – there must be a better way to put this! While triennial planning is very labour intensive, given the need to reconfigure current services according to ethical commissioning principles it is reasonable to expect a short timescale

Chapter 3 Information and Support

Existing Clause 11 – 12; the NCS charter

While there is a strong case for creating new enforceable rights, we think there is also an argument for creating an NCS Charter for information purposes, setting out rights and responsibilities as they are at any one time, as long as this is simple so everyone can understand it. The summary of rights and responsibilities in the existing clause contains no responsibilities! We have therefore added some plus a reference to the rights of staff!

While we have left the detailed process specified in Clause 12 unamended, it is a good example of the Bill specifying in great detail what is relatively unimportant while the really important matters are handed over to the absolute discretion of Scottish Ministers!

Existing Clause 13 – Independent Advocacy

Unamended, however, it is worth noting that if staff were empowered to do what was right, as we propose, there would be far less need for independent advocacy. However, if advocacy is to be really independent there is a case this should be funded by Scottish Ministers separately to the NCS, perhaps through Justice rather than health and care.

Existing Clauses 14 – 15 complaints

The amendments move responsibility for complaints from Scottish Ministers to care boards but establishes a right of appeal to be heard by elected board members (like councillors hearing certain complaints in local authorities). It also creates a right to complain about a decision not to provide services. With our model NCS covering all care services, the clause extending the complaints system to other care services is redundant.

If services and power is devolved, there should be less need to make formal complaints as most complaints should be possible to resolve at the frontline level. The current system, however, is impossibly complex with it being possible to complain about the same event to the SSSC, Care Inspectorate, Provider and Council/ HSCP. A single post box would help but should not preclude right to complain to independent regulators.

It is important for accountability (Clause 15) that the NCS is not responsible for designing its own complaints system and that they are subject to regulations. However, the proposal to create civil and criminal sanctions for staff that might not comply with them is draconian and has been deleted.

Chapter 4 Powers to Intervene

Existing clauses 16-19

We propose amending this chapter from “Scottish Ministers powers to intervene” to “Powers to Intervene” and deleting clauses 16-19 in their entirety. Clauses 17-19 give Scottish Ministers unwarranted new powers. Clause 16 transfers the existing powers Scottish Ministers have to issue Directions to Integrated Joint Boards to Care Boards. Given our proposals to democratise care boards overriding the ability to take local decisions would be fundamentally undemocratic. If Scottish Ministers believe they need some fall-back power to deal with elected care boards that have gone astray, consideration might be given to empowering ministers to require fresh elections but they would then need to accept the result.

As the crisis in care has developed, the use of Ministerial Directions to HSCPs has become more common without any evidence that it has worked. The removal of the Ministerial power to issue directions is therefore part of our proposals to devolve power but does not affect their right to issue guidance to care boards.

Existing clauses 20 – 22 Emergency intervention order

This power should lie with care boards, not Scottish Ministers, but would provide a welcome means for commissioners to intervene in contracted services that are failing. The problems are most common in the private sector, which we believe should be phased out, but the clause would also allow care boards to intervene in services provided by the voluntary sector, workers co-operatives etc. Care Boards do not need such powers to intervene in the services they manage and because all Board Members are democratically accountable and represent a range of interests that should help ensure they take rapid action to address issues in any services where the care board employs the staff.

Chapter 5 – Functions connected to the provision of Care

Existing Clause 23 Research.

We have proposed strengthening the clause and broadening it from a power of Scottish Ministers to conduct research to a duty on Scottish Ministers to agree with the National Care Board a research programme to improve information on unmet need and the welfare of the workforce. The permissive powers remain but belong both to Ministers and the National Care Board. We believe Scottish Ministers need to retain some responsibility for research as they fund universities. Specific care research establishments like IRISS and CELCIS would be better having a direct relationship with the NCS Board.

Existing Clause 24 – Training

Our amendments would transfer responsibility for training from Scottish Ministers to the National Care Service and create a duty for this to operate

a national training programme for both staff and unpaid carers with specific objectives. Further discussion is needed on whether a Special Care Board might be the best way for the NCS to deliver the training objectives.

Existing Clause 25 – Support for other activities.

The proposed addition that empowers care boards to provide financial support to communities as well as individuals enables care boards to invest in care infrastructure and preventive services.

Existing Clause 26 – Compulsory Purchase

This is a consequential amendment that transfers the proposed power for Scottish Ministers to the democratised care boards

Chapter 6 – Allocation of Care functions etc

Existing Clauses 27 – 28

These give Scottish Ministers powers to transfer care functions from local authorities and certain healthcare functions from the NHS to the care boards. We propose deleting clause 27 entirely as if care boards become a special committee of the local authority there is no need for it. Given our proposal that in order to minimise disruption HSCPs should transfer in their entirety to Care Boards initially, we have proposed a new power for Ministers to transfer some functions and staff back to the NHS in future

Existing clause 29 – power of Ministers to reorganise the NCS

This is undemocratic, any power to re-organise the NCS should lie with the Scottish Parliament, and we propose deleting it entirely.

Existing clauses 30 – 33

These are technical clauses that allow staff and property to be transferred. While intended to allow the transfer of functions to standalone care boards under Ministerial control, they probably need to be retained if it is decided after consultation that health functions/property

currently held by HSCPs return to the NHS at a future date.

Chapter 7 – Final Provisions of Part 1

Existing Clause 34 – 35 Consequential modifications and Interpretation

Whatever amendments were accepted would have consequential implications for existing legislation. Schedule 4 is a matter for the Scottish Government lawyers.

We have amended clause 35 so that instead of the National Care Service comprising Scottish Ministers it comprises the three types of care board, local, special and national.

Part 2 Health and Social Care Information

Existing clause 36 Care Records and Clause 37 Information Standard

The proposed amendments are intended to widen the scope of information sharing to all the main public services that are provided under the welfare state and to base this on the creation of personal data stores which are controlled by the individual. To put it simply, all the information that may be recorded by public services will be automatically fed into the individual's personal data store but each service will only be able to access the information it has inputted unless the individual consents otherwise. This puts the individual in charge of how information is routinely shared when they access or need different services. Current arrangement for sharing information between agencies for specific purposes which do not require the consent of the individual, for example child and adult protection, would continue. Our understanding is that the current clause on creating an Information Standard (37) could provide the means to describe how this should work

As it reads the clause contains draconian sanctions against staff who fail to share

information without recognising the very real practical barriers that prevent it happening. The main barrier to information sharing is less cultures than poor systems and we believe the presumption should be that it is in the interests of those working in public services to share information as it makes their jobs so much easier. We recognise, however, that sometimes it is not in the financial interests of for-profit organisations to share information – because, for example, every successful rehabilitation represents a potential loss of income – and so believe that it is justifiable to retain sanctions to ensure the private sector share information until such time as it is phased out.

34) New clause 36A – Information technology in the National Care Service

This clause, another new one which we believe is consistent with the intention behind the Bill to improve information sharing, introduces a requirement to harmonise IT systems that will be used within the National Care Service within a period of 10 years and for this to be based on the creation of personal data stores nationally. It also identifies the very broad outcomes and policy objectives that this process needs to deliver while on practical level requires that any IT upgrades that are in the pipeline at a local level support the harmonisation plan.

Part 3 Reforms connected to the delivery and regulation of care

35) Existing clause 38 Rights to breaks to carers

The NCS bill hands the duty to provide breaks to carers to local authorities, not care boards, without any explanation of why in the policy memorandum. As the Bill is drafted this implies that provision for carers will lie outwith the National Care Service. Our proposed amendment is intended to make it clear that duties to support carers should lie within the NCS but allow for local authorities in their current form to start implementing the new right before any care boards are created.

The other main amendments are designed to

remove all eligibility criteria in respect of carers rights to a break. The right to a break should be based on need and if a carer feels they need a break that should be enough for the National Care Service to respond. However, provision of services to the person the carer helps care for also requires that person's consent (unless they lack the mental capacity to make such decisions), a fact that has been disregarded in the framing of this clause. Our other amendments are designed to recognise that while it should absolutely be a duty for the National Care Service to offer appropriate services to support unpaid carers and that these should be made as attractive as possible, the National Care Service cannot compel people who are supported by carers to receive services except in specific circumstances.

36) Existing clause 40 visits to or from care home residents

The way this clause is worded risks embedding all the bureaucracy that so lamentably failed to address the problems that resulted in restrictions on visits to care homes, including by carers heavily involved in caring for residents, during the Covid pandemic and which had such tragic consequences. Our proposal is that the starting point for addressing this issue is to create a right to visits and along with that a mechanism to enforce that right locally rather than starting with the problem and then trying to create a centralised mechanism to deal with this.

To protect care home residents from disease in an emergency, we have suggested that care boards should be able to impose restrictions on visits for a period of two weeks but that each resident should have a "main carer" who is able to access the care home like staff (a proposal emanating from the Care Home Relatives Group). Any restriction affecting other visitors for longer than two weeks should require consultation with residents, relatives and staff. The intention is to remove the power of care home providers to restrict visits and that any restrictions imposed by care boards would quickly be subject to public scrutiny by the main stakeholders. However, it would be even better to prevent such situations ever recurring and the way to do that is for Scottish Ministers to introduce regulations to introduce facilities and infrastructure that

would enable safe visiting in most conceivable circumstances.

We know that the Care Home Relatives Group has significant concerns about creating any new powers for public health, given what happened during Covid, and believe the wording should be agreed with them. The issue is how to balance the need for clear, easily enforceable rights to visit with the powers of public health authorities.

37) Existing clause 41 Reserving right to participate in procurement by type of organisation

If the National Care Service becomes not for profit, as we are proposing, and is based on a new model of commissioning in which services are co-designed locally according to agreed costs for staff etc, there should not be much need for this clause in the future. However, there may be circumstances where services are completely lacking, there is no local capacity to meet needs and where procurement might still be required. Our amendment therefore is intended to enable ethical procurement to take place where this is required and to strengthen the requirements in respect to such tenders being limited to not-for profit organisations (including supported businesses, i.e. those that employ people with disabilities).

We see no need for this to be changed in future and have removed Scottish Ministers power to change the basis of ethical procurement at a future point through regulation.

An alternative way of doing this would be to adopt that taken in para 16 of the foster care regulations:

"(1) Local authorities may individually or jointly enter into arrangements with one or more voluntary organisations in relation to children looked after by the local authorities under Parts II and III of these Regulations for the voluntary organisations to discharge on their behalf their duties in relation to fostering under those Parts of these Regulations.

(2) Local authorities shall not make arrangements under this regulation unless—

(a) they are satisfied–

(i) as to the capacity of the voluntary organisations to discharge duties on their behalf; and

(ii) that those arrangements are the most suitable way for those duties to be discharged; and

(b) they enter into a written agreement with the voluntary organisations about the arrangements, providing for consultation and for exchange of information and reports between the authority and the voluntary organisations.

(3) A voluntary organisation may not place a child outside the British Islands(1).

(4) Local authorities shall review any arrangements made under paragraph (1), and any agreement under paragraph (2)(b), at intervals of not more than 12 months.”

38) Existing clauses 42 to 44 Regulation

The amendments proposed in these clauses are designed to tackle issues that have not so far been considered by the Scottish Government, i.e. how the new National Care Service should be regulated and what the role of the regulator/s should be, and were ignored by the Independent Review of Regulation, Scrutiny and Inspection. The proposal to create a National Social Work Agency clouds the issues further.

In the absence of a National Care Service, the existing regulators have been handed responsibilities for workforce planning and workforce and service improvement which would now be much better carried out by the NCS and should form part of the responsibilities of care boards (it is important that the proposed legal responsibilities of care boards in Chapter 1 reflect this). That would enable the regulators to focus on regulation. Those working for the SSSC and Care Inspectorate in these areas should be transferred to the National Care Service enabling it to build on the expertise that has been developed

amendments to create a not-for-profit care service, based on co-design and local control of services and a far better trained and appropriately rewarded workforce are accepted, the need for regulation in its current form would reduce significantly. We have therefore proposed that the SSSC and Care Inspectorate should be amalgamated. Many inspection staff have most of the skills needed to help co-design services and there is the potential for some to transfer to commissioning teams in care boards.

Our argument here is not that regulation is unimportant. It is in our view essential that there is an independent regulator for the National Care Service which is there to ensure serious complaints and failings are addressed and ensures that staff working for the National Care Service are subject to external challenge when required. Our proposed amendments listing the main functions of the new regulator are therefore intended to provoke debate and attention to what really matters.

The proposals in the Bill to make improvement notices more effective and enable the Regulator to cancel services more easily are welcome and will assist the transition to higher quality and not for profit services.

The amended clause 42B is crucial for the creation of a not-for-profit national care service. It would enable the Public Services Reform (Scotland) Act 2010 to be amended so that ALL new care services must be not for profit and not just adoption and fostering services as at present. With no new private sector services, the NCS can then focus on applying ethical commissioning to create new services where these are required and how to transition existing for-profit services into not-for-profit services.

Further consideration needs to be given as to whether the new Regulator should have powers not just over services but providers, whether this is to limit the money being leached out of the private sector or address failings that affect a number of services.

39) New Clause 45 Transitional Arrangement

As explained earlier, if people are to trust the framework bill and it is to deliver what it promises, there have to be clear transitional arrangements. We believe this would be best expressed as duties for Scottish Ministers, the National Care Board and Local Care Boards.

Schedule 1 Constitution

In our view the constitution of care boards, particularly in terms of their composition and how members will be elected needs far more debate. However, we believe that those decisions need to be driven from the bottom up and not be left to Scottish Ministers to decide and there needs to be some legal framework to enable this to happen. This should include a requirement for all members to be elected and to represent interests, including the local area as a whole through local authorities, and set some parameters about the size and composition of care boards.

This will take time to work, particularly as the existence of organisations representing the views of people who need services is very patchy. The medium-term aim of the NCS, however, should be to support strong and independent organisations representing service user and carers and to extend Trade Union representation to the whole of the workforce. These democratic structures then need to be embedded in the National Care Service from the service level to the National Care Board.