



**OFFICIAL REPORT**  
AITHISG OIFIGEIL

# Health, Social Care and Sport Committee

**Tuesday 1 November 2022**

**Session 6**



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**HEALTH, SOCIAL CARE AND SPORT COMMITTEE**  
**30<sup>th</sup> Meeting 2022, Session 6**

**CONVENER**

\*Gillian Martin (Aberdeenshire East) (SNP)

**DEPUTY CONVENER**

\*Paul O’Kane (West Scotland) (Lab)

**COMMITTEE MEMBERS**

\*Stephanie Callaghan (Uddingston and Bellshill) (SNP)

\*Sandesh Gulhane (Glasgow) (Con)

\*Emma Harper (South Scotland) (SNP)

\*Gillian Mackay (Central Scotland) (Green)

\*Carol Mochan (South Scotland) (Lab)

\*David Torrance (Kirkcaldy) (SNP)

\*Evelyn Tweed (Stirling) (SNP)

\*Tess White (North East Scotland) (Con)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Jackie Buchanan (Society of Local Authority Lawyers and Administrators in Scotland)

Isla Davie KC (Faculty of Advocates)

Eddie Fraser (Society of Local Authority Chief Executives and Senior Managers)

Frank Jarvis (Scottish Human Rights Commission)

Councillor Paul Kelly (Convention of Scottish Local Authorities)

Jennifer Paton (Law Society of Scotland)

**CLERK TO THE COMMITTEE**

Alex Bruce

**LOCATION**

The Sir Alexander Fleming Room (CR3)



# Scottish Parliament

## Health, Social Care and Sport Committee

Tuesday 1 November 2022

*[The Convener opened the meeting at 09:50]*

### National Care Service (Scotland) Bill: Stage 1

**The Convener (Gillian Martin):** Welcome, everyone, to the 30th meeting in 2022 of the Health, Social Care and Sport Committee. I have received no apologies from any members. Stephanie Callaghan will be joining us online.

Under agenda item 1, we continue our consideration of the National Care Service (Scotland) Bill. We will have two evidence sessions this morning. The first session will focus on a human rights approach and legislative considerations.

I welcome to the committee our three witnesses. Jennifer Paton is a policy executive with the Law Society of Scotland; Isla Davie, King's Counsel, is from the Faculty of Advocates; and Frank Jarvis, is legal officer with the Scottish Human Rights Commission.

One of the principles that is set out in the bill—it is one of the first things in the bill—is that the services provided by the national care service

“are to be regarded as an investment in society that ... is essential to the realisation of human rights”.

Do you think that the provisions in this very high-level framework bill have the potential to address issues in the current system that have led to inconsistencies in relation to equity and the issues that we have heard about, particularly over the past couple of years, where there may not have been a consistent approach throughout the country to people's human rights? Can this framework bill be a springboard to addressing people's human rights when accessing care services?

**Jennifer Paton (Law Society of Scotland):** Good morning. The Law Society of Scotland considered the bill in line with our statutory objectives to represent the interests of the solicitors' profession, which includes our members working in local government and the social care sector, and with a view to the public interest.

The independent review of adult social care called for a paradigm shift in social care support to one that is underpinned by a human rights-based approach. Our view is that

“Any new legislation relating to social care must contain clear and attributable rights and duties, and effective mechanisms for redress including legal redress”,

and it must sit alongside work that is under way to integrate human rights conventions. Therefore, new legislation in this area must be based on and fully embed human rights principles. It must also promote real and effective access to justice for service users and their families, and it must be supported by transparent decision making and robust complaints processes to promote accountability.

In our written evidence, we also highlight a number of areas where we believe that there is a lack of clarity or detail and where the bill could be strengthened, including around rights and duties. Although the bill offers a timely opportunity to revisit Scotland's approach to health and social care, and human rights in that context, until further detail is available, the Law Society of Scotland is not able to take a view on whether the bill will meet the stated purposes that you have mentioned.

**The Convener:** Is that because so much of the detail will happen in secondary legislation as a result of the co-design process with stakeholders?

**Jennifer Paton:** Yes, that is correct. So much is left to secondary legislation and co-design that we do not feel that we have the detail at the moment to be able to comment on that point.

**Isla Davie KC (Faculty of Advocates):** Good morning, everyone. I am conscious that I will probably defer to Frank Jarvis, who is sitting on my right, on human rights issues.

Whenever legislation that will create a more centralised framework is introduced, there is always an opportunity for inconsistencies to be ironed out, which is to be welcomed.

However, it is hard to scrutinise something that is written at such a high level. The bill will put in place a framework, and it is clear that secondary legislation will be used to introduce a great deal of the substance of the legislation. At that point, it will be possible to see whether human rights are enshrined at a workable level.

As the committee has seen from the Faculty of Advocates' response, we are concerned that, although the principles are enunciated in the bill, they are not carried through in a practical way. There is a concern that there is an element of setting out ideals, but that the structure of how those ideals are translated throughout the bill does not work, practically, at a level that would mean that there was accountability for any of the principles. I am sure that those issues can be ironed out, but, as a starter for 10, we are concerned that, although there is a notion of embedding those rights, how that would be

translated in practical terms needs to be thought through carefully.

**The Convener:** In social care throughout the country, are there gaps, such as in the provision of complaints processes or with regard to people's ability to challenge the service that they have received on the basis of their human rights? Would the bill provide a springboard to address those gaps?

**Isla Davie:** Yes, absolutely, and the opportunity to plug those gaps must be welcomed. What is set out in the bill shows a bold ambition, so it is a case of taking care to ensure that the bill translates that in practical terms, once we have more substance and the secondary legislation.

**The Convener:** Do you agree with the principle of co-design with stakeholders, in order to inform that detail?

**Isla Davie:** The Faculty of Advocates is not in a position to talk about the policy behind that principle, but it is an innovative approach that is to be welcomed. It will be complicated and I suspect that it will take some time, but formulating legislation through co-design is a bold approach.

**Frank Jarvis (Scottish Human Rights Commission):** Good morning. The first thing to say is that there is a broad shared view between the Scottish Human Rights Commission and the other witnesses. On the convener's question whether the bill has the potential to deliver a human rights-based national care service, the answer is, yes, the potential is there. The questions for us are whether the bill requires a human rights-based service, or whether it even does enough to promote a human rights-based service, and the answers to those questions are more difficult.

Placing human rights at the heart of the new national care service is essential to fixing the generally recognised problems, and there is broad consensus on that. The key to that shift—I go back to Derek Feeley's report, "Independent Review of Adult Social Care in Scotland"—is that human rights must be embedded in a way that is "consistent, intentional and evident" as well as accountable in practice.

We must recognise that delivering a social care system that respects, protects and fulfils people's human rights will require radical change, and it cannot be assumed that the proposed structural reforms will inevitably deliver the improved outcomes that we all recognise to be necessary. It absolutely cannot be a rebranding exercise, and business as usual will not suffice. Therefore, although we acknowledge the relevance of human rights as a general principle, we want to see further specification of the objective human rights standards in the bill in order to make it a

meaningful vehicle for delivering improved quality and consistency.

It is framework legislation, and we understand that its main purpose is to provide ministers with the necessary powers to create operational and organisational structures, but we want to see more on how the powers would be exercised. There are opportunities to embed those concrete human rights standards throughout the bill. I hope that we will discuss those particulars this morning.

10:00

**Emma Harper (South Scotland) (SNP):** Good morning, everybody. On the back of the human rights questions and aspects, chapter 3 of the bill, which I have in front of me, talks about the creation of a national care service charter. I am interested to hear your thoughts about what the charter should contain. For example, should we link it to the principles in chapter 1, which talk about promoting dignity and advancing equality and non-discrimination? That question goes first to Isla Davie, because she is looking right at me.

**Isla Davie:** That is the danger of catching someone's eye.

One of the comments from the Faculty of Advocates was that we were slightly unclear about what the principles were meant to do. They are clear and well enunciated, but they sit in isolation from the rest of the bill. We were surprised by that; we had assumed that, once we got to the provisions on the charter, we would see the principles being adopted into the charter, because that seemed to be a seamless way to link them in. It seems to be slightly obvious that, if the principles are meant to be carried through into the service and are meant to be a measure by which the service will be held to account, the charter is an easy place to put them in order to achieve that.

**Emma Harper:** The bill talks about the charter being reviewed every five years. Is that enough time, or should the period be longer? Indeed, should it be shorter?

**Isla Davie:** I should not go into too much detail about that, because we are not necessarily the right people to talk about the practical effect. However, if a charter is put together with the right foundations, a review every five years should be adequate.

**Emma Harper:** I have a final quick wee question. You said that it is obvious that the charter should contain the principles that are laid out. I quite like seeing them laid out right there in the bill. It is almost like a seamless transition from saying, "Okay, we talk about the principles and here is what the national care service is going to do", to saying, "Now, here is what the charter will

incorporate.” Is it reasonable to have the charter laid out in this framework bill, as we have just discussed?

**Isla Davie:** If the principles are meant to be an overarching guide or subsequently form something for which the whole service can be accountable, yes, it makes a lot of sense.

**Emma Harper:** Thank you.

**The Convener:** Do the other witnesses want to come in on any aspects of the charter? I am interested to know whether you feel that something like a charter would have made a difference, particularly with regard to people exercising their rights in the pandemic. People’s experiences during the pandemic probably brought the need for a national care service to the fore. Do you think that that has been a gap? What is the point in having the legislation if it does not address issues and gaps?

**Frank Jarvis:** I think that there is an issue with accountability in relation to delivery of the charter. The bill does not indicate how delivery of the charter will be monitored or what the consequences will be for care providers if its requirements are not fulfilled. There is concern about section 11(4), which makes it plain that the charter neither creates nor alters existing rights and responsibilities. It is not clear how the charter will support accountability, which suggests that the charter is a presentational device of repackaging rights that care users already hold. Accountability would be strengthened if monitoring of delivery were carried out by an independent body responsible for scrutiny and perhaps also for providing redress where rights are not being realised.

At some stage, we might need to talk about what we mean when we talk about human rights, because the language of the principles and the charter in the bill is, from our perspective, unfortunately and unhelpfully vague. That is because it does not specifically reference well-established international treaty standards, such as article 19 of the Convention on the Rights of Persons with Disabilities—the right to independent living. At some point in the evidence session, and generally in the work on the bill, we need to engage with how these principles fit with those wider objective standards. We would like to see those built into the charter, so that people are clear about what they can expect.

**The Convener:** I was going to ask about that, because it is about making it clear to people what they can expect. Obviously, these rights exist—you have just referenced some of the legislation that outlines them—but is the gap really in people’s understanding of what their rights are? You say that it is presentational, but would a

charter that has been co-designed by those people be easily accessible so that people would know what their rights are with regard to the care that they might receive?

**Frank Jarvis:** It is clear that there is a need to frame the bill in such a way that it provides the co-design process with the flexibility to reach the best outcomes. However, our understanding, which I think is reflected in many of the other consultation submissions, is that many of the groups and individuals who will be involved in that co-design process will want to see, for instance, article 19 embedded, embodied and reflected in the legislation. Certainly, that was a key part of the work that Derek Feeley did, and the conclusions of that work were reached through a participative process.

We definitely agree that clarity and understanding are key aspects, and it is not clear that the language that is used in the bill is helpful. The bill refers to the principles enabling people

“to thrive and fulfil their potential”.

That relates to the right to independent living, but it feels unhelpfully vague and subjective, and it has not been scrutinised, examined and explained in the way that those well-established legal concepts in the CRPD treaty have been.

Similarly, section 1(e) of the bill states that one of the principles is that

“opportunities are to be sought to continuously improve the services”.

Again, that seems to relate to the idea of progressive realisation, which is a key concept for economic, social and cultural rights in the international human rights framework, but does it mean that or does it mean something different? Is it stronger or weaker? These new terms do not appear to assist with clarity and accountability.

**The Convener:** We now move to questions from Evelyn Tweed on a theme that is already establishing itself today, namely secondary legislation.

**Evelyn Tweed (Stirling) (SNP):** Good morning. I was interested in Isla Davie’s comments about the approach to the bill being innovative, different and possibly challenging, given the co-design aspect, which is quite new. Isla, what merits or risks do you think might be associated with the framework bill?

**Isla Davie:** In a very general sense, the concern is about there being a move to put the framework in place and then there being a process for putting in place the legislation’s substantive elements. It is clear that quite a lot of decision making still has to be done.

Clearly, quite a lot of work still has to be done on co-design. I realise that another committee will look at the costing of all that, but one concern that we have raised in our written submission is that the process could become difficult. There is a danger of our putting the structure in place at this point and then finding it difficult to keep the momentum going. The timetabling might be difficult or it might be hard to know exactly what will happen further down the line once the co-design has been gone through.

Although trying to embark on legislation in this way is to be encouraged, there is a theoretical difficulty with having the framework in place and not knowing what the substance will be. There is a danger that you get left with the structure and that what follows on does not quite fit with it. However, I am sure that the committee has already been considering those issues.

**The Convener:** There will be an opportunity to consider the content of the secondary legislation when it comes before us. You say that there is a danger of losing momentum, but given that secondary legislation will come out of the co-design process and come back to Parliament, where is the real danger? Every aspect of the secondary legislation will go through scrutiny and consultation processes.

**Isla Davie:** Perhaps “danger” is an emotive way of putting it. Obviously, though, if you put the framework in place at this stage without knowing what is coming further down the line, you might end up having to come back to revise parts of it. That would be necessary if decisions made further down the line changed aspects of the framework in a fundamental way. From our perspective, everything that we say with regard to this framework bill is caveated with the comment, “Well, it looks okay so far.” When I say “danger”, I suppose that I am saying that it is difficult to be precise in any scrutiny at this stage.

**The Convener:** Is the nervousness not just because the process is a new way of doing things that actually includes the public more?

**Isla Davie:** Perhaps. With any innovation or anything new, everybody waits with bated breath to see how it will pan out. As lawyers, we are on the more risk-averse side and say, “I hope that it all works fine.” At this stage, we are really just flagging up the issue.

**The Convener:** One issue that comes before politicians is that things are done to people. The bill does things differently, with people telling us what they want at every stage. Is that not to be welcomed?

**Isla Davie:** Yes, that is definitely to be welcomed. From a legal perspective, though, we need to ensure that we do not end up with ideas at

this stage that do not translate later on. You might go through the co-design process and then discover that what is in the framework does not fit with the substantive part that emerges later. In essence, it is almost as if we are formulating the legislation in two parts. At the moment, we are looking at very high-level provisions, and there is only so far that you can go with that. The real meat will come later.

**Paul O’Kane (West Scotland) (Lab):** I have a couple of questions for Isla Davie that follow on from that point. First, just for clarification, do you have concerns about the powers that are transferred to ministers as outlined in schedule 4, in terms of what ministers will be able to do under secondary legislation? Secondly, is there also an issue with the delay in getting to the secondary legislation, which might mean that we do not achieve the stated aims?

**Isla Davie:** On the first part of your question, I will have to be careful, because policy decisions have been made, and the faculty does not comment on those. I am sure that the committee will have heard many comments and concerns about centralisation, but it is not for the lawyers to comment on that aspect.

We do not have concerns about the way in which the secondary legislation provisions are formulated in the bill. We have flagged up some details of the drafting where we think improvements can be made or where certain aspects should be considered further. For example, there are certain nuances where there might be some overlap with the current Care Inspectorate legislation; there is an issue about how that will dovetail with the powers that the Scottish ministers will have under this bill. Certain details such as that could be looked at again and considered more carefully. However, the faculty does not have a difficulty with how secondary legislation is incorporated into the bill and the scrutiny that will be afforded to it.

Does that answer the second part of the question?

10:15

**Paul O’Kane:** The second part of the question was on the faculty’s submission. There were concerns about the delay in getting to secondary legislation in order to make the change that is required in social care at the moment, and there are issues with staffing and improving outcomes. Do you have a comment on that?

**Isla Davie:** There will be some practical difficulties, and there are some big decisions to make. For a start, there is not a great deal in the bill about transition. That might be for obvious reasons—because the decisions have not been



made—but it means that there will be a state of flux for a period, which will cause obvious difficulties for people working in the sector. Some of them will remain exactly the same, but they will be in different structures. I know that you are taking evidence from witnesses from the Convention of Scottish Local Authorities later, so I am sure that there will be a great deal more debate about that.

The faculty is concerned about this. We can already see difficulties arising if the co-design process takes time, given the huge state of flux before decisions are made and given that people will have to continue working in the sector. There are clear needs that must be met—and it is hoped that they will be met further down the line—but the longer that takes, the longer those needs will be left unanswered. Those are practical difficulties.

**Paul O’Kane:** My next question is for Jennifer Paton, who is here on behalf of the Law Society. In your response to our call for views, you say:

“It is not clear what evidence base suggests that a national service will improve quality and consistency of services. This lack of an evidence base also makes us question whether the centralisation of what are currently locally-delivered services can be justified in terms of the European Charter of Local Self-Government.”

The Government hopes to incorporate that policy into law. Can you please expand on the impact that you think the bill will have on local democracy and accountability?

**Jennifer Paton:** We have not considered that, beyond what you have quoted from our response. As Isla Davie has already indicated, we, like the Faculty of Advocates, must be neutral on the policy considerations at play. If you want me to expand on that, I am happy to take that back to the working group that has been considering the bill and can write to the committee.

**Paul O’Kane:** That would be helpful. Is it fair to say that, as your submission suggests, you question whether the centralisation agenda can be justified?

**Jennifer Paton:** I think that we have highlighted the need for a strong and robust evidence base for any change. These are huge changes that will have a huge impact; there must be an evidence base for any change on that scale, and we have some concerns about the evidence base at the moment. I am not in a position to say much more today about the points that you have made about centralisation and local democracy, but I am happy to write to the committee.

**Paul O’Kane:** Thank you.

**The Convener:** Tess White has some questions.

**Tess White (North East Scotland) (Con):** I have two questions, one for Jennifer Paton and the other for Isla Davie.

The picture that I have in my head is of being asked to comment on or scrutinise an aeroplane that is being built as it is flying through the air, which is obviously very difficult. In its written submission, the Law Society of Scotland has been very critical of the lack of detail in the draft legislation and the fact that it makes it really hard to scrutinise the bill. Therefore, I wonder, Jennifer, if you can expand on the view in the Law Society’s submission that

“It is not clear what safeguards are in place to ensure that co-design is meaningful, effective and timely and that Scottish Ministers are appropriately held to account by Parliament for the design and implementation of the National Care Service.”

**Jennifer Paton:** I can certainly try.

We welcome the co-design element of the process. As others have already said, the involvement of people who have lived experience or are involved in delivering social care is extremely valuable, and we welcome it.

However, we are concerned that the bill as introduced does not appear to contain a statutory basis for the co-design process and therefore there is no statutory guarantee of meaningful engagement with the full range of stakeholders. We say that while noting that co-design is mentioned in the principles. Our concern about the principles is that they are drawn very broadly and, at the moment, it is not clear to whom they are addressed or how they will be supported by attributable duties and mechanisms for accountability. Although we recognise that co-design is supported by the principles, we have some concerns about those principles. That is the basis for our comments around co-design.

As you have highlighted, this is a framework bill. That makes the secondary legislation process even more important, because that is where the detail will come. An area that we have highlighted for consideration is the strengthening of consultation duties at various points in the bill to offer a safeguard alongside the co-design process and to ensure meaningful engagement. We have highlighted several areas where we think that the consultation duties could be strengthened, such as around strategic planning, the charter—which we have already discussed this morning—and the transfer of services.

That is what is at the root of the comments that we have made and which you have highlighted around co-design. Aspects of the bill could be strengthened to mitigate that issue to some extent.

**Tess White:** Huge parts of the bill will be implemented through secondary legislation, which

will mean much less parliamentary scrutiny. Can you comment on the appropriateness of that use of secondary legislation?

**Isla Davie:** Secondary legislation will be used, but the authority that is given in the bill is for the affirmative process to be used in the vast majority of cases. The bill is careful about that, and it means, actually, that quite a lot of scrutiny could take place.

We are talking about secondary legislation, but we should be careful to identify the scrutiny that happens there. There is quite a lot of it, and it is not as if it will all go through some sort of quiet route. There are a couple of occasions in the bill where the provisions specify the negative rather than the affirmative procedure, but the vast majority of secondary legislation will go through the affirmative route, which will mean that it will be placed before Parliament and that there will be time for scrutiny.

The Faculty of Advocates did not have any particular concern about what was being proposed to be done by secondary legislation; the concern was more about how long it might take to get to the point of introducing that legislation and what might happen during the transition process. There is not a lot of detail about that in the bill. However, we make no criticism of the secondary legislation mechanism being used as a matter of principle, because it will still allow for scrutiny.

**Tess White:** If you do not have a product, how can you scrutinise it?

**Isla Davie:** We cannot scrutinise it at this stage. However, the use of that mechanism further down the line is perfectly adequately covered in the bill. At this stage, our concern is that what we are looking at is clearly a framework bill, and we are waiting with bated breath to see what comes further down the line. The process cannot be criticised for not affording the ability for scrutiny further down the line, but it is clear that there will be a transition process and a delay and that there will be demands on services in the meantime. There will be a sense of flux until we get to that point.

**Tess White:** That is great. I note your comment that you are waiting with bated breath to see what is coming.

**Frank Jarvis:** I was hoping to make a general point about this before we moved on. It seems that we are discussing the appropriate point to embed human rights standards in the process, and whether it be in primary or secondary legislation. The commission's answer is that we would want the foundations to be in primary legislation. We see the value of co-design, and we want to give the process the flexibility that it needs, but are we really arguing for flexibility to produce a care

service that does not meet international human rights standards? That does not seem to be a particularly useful form of flexibility. For that reason, including the standards in primary legislation does not hedge in co-design in any problematic way.

It is also important to recognise that, for Scottish public authorities, dealing with human rights is no longer simply something that it is nice to do. The CRPD treaty that I mentioned earlier will soon be incorporated into Scotland's own human rights bill, so the establishment of the national care service must anticipate and prepare for the new rights or risk having to retrofit them. There is therefore a question about ensuring consistency across the entire legislative programme.

**The Convener:** Is the fact that human rights will be incorporated into other Government and Parliament procedures the reason for their not being referenced in the bill? The incorporation of such rights will be an overarching process—it will go across every piece of legislation that we have before us. Should they be referenced in the bill?

**Frank Jarvis:** It would be valuable to do so. It is a question of consistency and clarity. If section 19 or whatever of the new human rights bill were to give a right to independent living and then the national care service bill were to contain clearly analogous rights, principles and provisions, that would simply present us with a headache as we tried to understand how the two related. We would end up having to carry out an interpretative exercise that would involve looking at the care service legislation in light of the new human rights bill, whereas we could ensure consistency simply by adopting the consistent language of human rights standards across the whole programme.

**The Convener:** I call Sandesh Gulhane, and then I will bring in Emma Harper.

**Sandesh Gulhane (Glasgow) (Con):** I have a question on the back of Tess White's point. I had a meeting with groups that provide care for disabled people. They said that once things move into secondary legislation they will not have the resource to enable them to scrutinise it. What are your thoughts on that?

**Isla Davie:** I am not sure that I really have any thoughts on that, other than the sense that it is obviously a good thing if all invested bodies can scrutinise. I am not quite sure what they mean by "resource". If it means that they would not be able to scrutinise legislation or have someone who could formulate a material response, my response is that we would all like to see, as a general approach, appropriate scrutiny at all levels by all interested bodies. I am not sure that doing things by way of secondary legislation alters bodies' ability to scrutinise. If they do not have the

resource to do it, that would, I presume, be the case regardless of the form in which the legislation was introduced—although perhaps I am missing something that they told you about that.

**Sandesh Gulhane:** The question was literally about what you said about their not being able to go through it all and put together a coherent argument.

I want to move away from that aspect and turn to accountability. Earlier, we heard about the Scottish ministers having meetings with the care boards. Where do you foresee accountability lying?

**Isla Davie:** Certainly, from how the bill is framed it seems that the intention is to make the Scottish ministers accountable. In our response, the Faculty of Advocates flagged up areas where that perhaps needs to be tightened, or where it needs to be made clearer exactly how such accountability will translate.

I will go back to the issue of the principles. They are enunciated at the start of the bill as a kind of bold statement—“These are our principles”—but when you translate them through the practicalities of the bill they do not actually amount to anything. They are not really used as a level or as a measure of accountability.

10:30

There are aspects such as that on which, I think, decisions have to be made. If you want to make those the principles that will run through to being the means by which the Scottish ministers will be held accountable, that needs to be made clear in the bill. If they are simply to be something by which people who use the services can reference their rights, they could be enshrined in a charter.

There are elements of the bill in which it is unclear how certain ideas are meant to translate. That is why, in our submission, we have flagged up a couple of areas that we think need tightening or where, at least, a slightly more thought-through process is needed that asks what we are doing with the principles. For example, if we really think that they are the measures, why not enshrine them in the charter, for example, or have them in plans that are going through?

Decisions still need to be made about exactly what the level and measures of accountability will be. I think that you can see from the bill that the intention is that the Scottish ministers will be accountable. The practicalities of exactly how that will be translated in the bill are important.

**The Convener:** One of the issues would be sanctions for services that fall short of what is in the charter. Is that something that any of you

would like to comment on? What sanctions should there be, if the charter is not complied with?

**Frank Jarvis:** It is perhaps worth remembering that the gaps in accountability that have been experienced by rights holders—service users—were a key strand of the Feeley review and, I think, of many other reports and reviews of the current arrangements. Our consultation response highlighted a number of areas in which there could be greater accountability. Section 15, which is on complaints, says very little about remedies and sanctions. For us, those are the key vehicles, alongside monitoring, for accountability against the human rights standards. It is important not to leave that to regulations.

From what little we can glean about the complaints process from section 15, it seems to be a sort of point of access—a means of handling complaints and then passing them to appropriate persons. However, the question is who the appropriate persons are and whether we are actually relying on the overburdened and underresourced complaints resolution processes and mechanisms that we already have—civil court claims and the like. The barriers to accessing justice for breaches of human rights are already well understood, but it is not clear how section 15 is addressing them.

**The Convener:** Thank you. I barged in there a bit, Emma—over to you.

**Emma Harper:** Thanks. I think that my question has already been answered.

Secondary legislation comes through committees all the time. I have been an MSP for six years. We approve affirmative legislation: we scrutinise it when it comes to committee, so I do not for one minute think that there will not be appropriate scrutiny of what is coming down the line. I know that this is a big piece of work and that the framework bill sets out where we are to go, but I take on board what Sandesh Gulhane said about organisations that provide care to disabled people and their perception that there will not be the ability to scrutinise the legislation. I suppose that my question is about how we can make sure that the Law Society of Scotland, the Faculty of Advocates and the Scottish Human Rights Commission are still involved in the process as we take all the legislation forward.

**Isla Davie:** The faculty is asked to comment on various forms of legislation that come to us, and we have a process by which committees are formed. Obviously, that is the process by which I have come to give evidence today; I was asked to chair one of the committees for the bill. In effect, anything that is referred to the faculty for scrutiny is scrutinised at that level.

Obviously, we do not make policy points; we look at things purely from the legal perspective. However, there could be a process by which the secondary legislation was also passed by us for comment. Often, there is no comment—if there is nothing to say, no response will be put in. None of the mechanisms is foolproof, but at least they are something.

**Frank Jarvis:** I have had the benefit of a minute or two to reflect. It is important not to take engagement for granted. Engagement by individuals and organisations always comes at a cost—a cost in time to people with lived experience and a cost in resources to organisations. Organisations that have engaged up to this stage have clear asks and recommendations for how the primary legislation should be amended, whether that is for human-rights or other reasons. Risks are associated with leaving things that have not been tackled at the primary legislation stage to get fixed in secondary legislation, through expecting the same people to invest the same resource in order to make the same points.

**The Convener:** We move on to the rights to breaks for carers.

**Gillian Mackay (Central Scotland) (Green):** Good morning. What are your views on how we can ensure that carers are consulted on whether the breaks that they receive are sufficient, and should a mechanism to support that be included in the bill?

**Frank Jarvis:** We have not done a detailed analysis of how rights to breaks should be assessed. I have not formed a view on the question—which stalks all discussions—of whether that sits in primary or secondary legislation.

We certainly want an approach that focuses on personalised support to meet carers' specific needs. The approach should also require adequate support services for family carers, including respite, childcare, support for parenting practices, social support and counselling services. However, as I have said, we have not developed a detailed analysis of how exactly that should be realised, and at what stage in the process it should happen.

**Gillian Mackay:** In its written submission, the Faculty of Advocates raises concerns about use of the word “sufficient” in relation to carers' breaks. How can that wording be strengthened? Does the faculty have a view on what mechanism would be most appropriate to determine what qualifies as “sufficient”?

**Isla Davie:** We deliberately did not propose a mechanism; it is not for us to say what would be

best. We just flagged up the absence of a mechanism.

Clearly, use of a word such as “sufficient” will raise issues and disputes about what it means and what would be appropriate in every circumstance. Given that already, at this stage, we see it giving rise to disputes, a mechanism has to be put in place. That could be something as simple as having an expert view for determination, or putting in place some sort of board. Some means to determine that is going to be necessary.

**The Convener:** If there are no other questions on that theme, I will move on to Anne's law and questions from Carol Mochan.

**Carol Mochan (South Scotland) (Lab):** I would like a bit of information about Anne's law, which is about rights for care home residents. We are interested to understand whether the inclusion of Anne's law in the bill will make circumstances easier for care home residents to be visited or to visit places during a public health threat. Will the bill provide that balance to ensure safety for residents, carers and staff?

**Frank Jarvis:** I am happy to go first. How you framed the question is interesting, and it is important that you picked up on the idea of balance, because it is a matter of balancing rights. We responded to the consultation last year on Anne's law, and we argued that any new guidance or legislation concerning visiting must respect, protect and fulfil the human rights that relate to that situation. That includes the human rights of residents, families and care home staff. To do that, the domestic provisions need to set out and reflect the human rights considerations.

Something that is perhaps missing from the discussion is recognition that the people who live in adult care homes, and all the people in such settings, already have rights. People who live in care homes have the right to see and to spend time with people who are important to them, because that is an aspect of article 8 of the European convention on human rights—the right to private and family life.

We called for individualised risk assessments in order to determine whether a particular restriction would be proportionate in the circumstances; for example, when it seems that public health needs—as was the case during the course of the pandemic—require a restriction on visiting. They would be individualised because we need to look at the facts-sensitive context of the situation and consider other means of infection risk prevention and so on.

We do not know the exact content of the visiting directions that will be enabled by the bill, but it seems to be the case that we risk replacing the blanket bans that we unfortunately had during the

pandemic with blanket permissions—or, at least, something akin to a presumption that visits will take place. If we really understand that individual decisions are, as I said, facts-sensitive exercises in balancing competing rights, loading the scales one way or the other on a legislative basis will not necessarily produce better outcomes, and will not support care home managers to make the necessary human rights-based decisions in pandemics or other crises.

There is, perhaps, insufficient understanding of what caused the problems in the first place. What if the problem is not lack of rights, but that the rights that people already hold have not been respected and protected? That goes back to my perennial refrain about accountability. Placing visiting rights on an explicit statutory footing will bring benefits in visibility and, perhaps, public awareness, but on its own it will not improve the adequacy and accessibility of mechanisms for review or for challenging the decisions of what one does when one is prevented from seeing an elderly relative. How would passing Anne's law change that? I suspect that we would still face the same problem with enforcement of rights, so we need to see something that addresses accountability, for instance, in the complaints process.

**Carol Mochan:** On your last statement, do you think that we need additional legislation around the issue, or more accountability in how we proceed?

**Frank Jarvis:** That is very much about accountability; it is about mechanisms and looking at things from the point of view of the rights holder. What does the rights holder do when confronted with that situation?

The production of legislation, in and of itself, will not necessarily change the situation in which some of the prohibitions on visiting were already breaches of human rights. We need to understand how those breaches were permitted, and why they were neither challenged nor addressed. It is not clear that legislation, in and of itself, can address that problem. It is about mechanisms.

10:45

**Carol Mochan:** Okay. I suppose that Anne's law has highlighted to us the need to ensure that such things are explored.

**Frank Jarvis:** Absolutely. There is widely shared recognition that the problem needs to be addressed, so this is more about the means of addressing it.

I should say that monitoring is valuable for accountability as well, so it could be included in the bill in relation to complaints.

**Carol Mochan:** Thank you.

**The Convener:** I have a follow-up to Carol Mochan's questions about consistency. Was it not a geographical inconsistency that led to the calls for Anne's law? In some areas, care homes were very good at realising people's human rights—and, at this point, I must declare an interest, in that my grandmother's care home allowed visiting throughout the pandemic, although in a very safe way. However, we have heard complaints from other parts of the country, where people were effectively kept away from vulnerable adults, and that is what has led to the calls for Anne's law. Is not the whole point of ministerial accountability to address that differentiation and lack of a consistent application of human rights across the country by having the ability to centrally monitor whether those rights are being adhered to consistently throughout Scotland?

**Frank Jarvis:** Clearly, consistency is an aim. When we talk about balancing the competing rights of different individuals holding different rights with the interests of the population as a whole with regard to the management of infection risk, we can have consistency only where there are similar situations.

The problem is that, across the care sector, vastly differing situations and circumstances exist, such that it is possible for a prohibition on visiting to be, in specific circumstances, a permissible interference in that human right, because it is a justifiable and proportionate measure when factoring in the staff's right to life and the interests of the wider public. It is about recognising that the blanket approach to such a situation—either a blanket prohibition or blanket visits—is probably not a sufficiently sophisticated and nuanced tool for realising everyone's human rights when they are all in the balance.

**The Convener:** I come back to the idea of people's awareness of their rights and of which body they go to if they have a complaint. Is that not really the issue here? Is it not, as Frank Jarvis has said, all about the mechanism?

**Isla Davie:** I do not disagree with anything that Frank Jarvis has said. As lawyers, we sit there and say, "The rights are there anyway—why wouldn't they be enforced in a certain way?"

With Anne's law, it was about swinging the pendulum. It swung one way with the pandemic and concerns about public health, and Anne's law was a way of swinging it back and saying that, actually, there are other rights to take into account now. As Frank Jarvis has said, those rights were already there, so the question was whether having the pendulum swing back addressed anything.

The point is that it is sometimes important to give those rights a more public voice and to make it clear that the pendulum has to swing back.

Anne's law does that very effectively, and the fact that it was raised from guidance to legislation simply emphasises the point. It has kept the issue high on the agenda, and it means that people can identify it more readily as a right, which counters the pandemic's sweeping away of some human rights. From a legal perspective, Frank Jarvis is entirely right; it does not really assist with arguments when we get down to the nitty-gritty of what the law says. However, it serves a purpose in showing the public that the various rights at play have to be balanced to some extent.

**The Convener:** We move to our next theme, which is ethical commissioning, and Emma Harper will lead the questioning.

**Emma Harper:** Issues have been raised about the national care service and employment. As we have seen—and, indeed, as I have seen from my own work—social care workers are paid differently in different parts of Scotland. If they are doing the same job, why are they not being paid the same wages? Carers do a vital job and need to be compensated appropriately.

I am interested in hearing whether you think that the bill has enough detail in it to ensure that fair work principles will be realised in the national care service. That issue has come up in various places, and it certainly forms part of the work in which I have been engaging locally in Dumfries and Galloway.

Jennifer Paton might want to go first on that.

**Jennifer Paton:** I would just highlight my earlier comments on the principles. I think that the principles of the bill—which I am trying to read through very quickly just now—contain a reference to valuing contributions.

I have found the reference. The bill states:

“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”.

As I have highlighted, the principles are currently broadly drawn and, to pick up the points that Isla Davie has made, I do not think that it is clear to whom they will be directed and how the mechanisms for accountability will work. That is my main point. The bill refers to fair work in its principles, but we have already highlighted some concerns in that respect.

**Emma Harper:** I am thinking about the principles of fair work, employment and supporting people into career pathways and routes in a way that supports them as well as the people for whom they are providing care. How do we ensure, in the text of the bill, that those principles can be applied across the whole of Scotland?

I know that it is still early days, but I am thinking about, say, compensation for travel, support for education and aspects of employment—for example, whether someone is employed by one care provider or another. Those issues arise when we get down to the detail of how we support people to be carers, whether in a care home or through care at home. Does the bill have enough detail on that?

**Jennifer Paton:** We have not discussed that particular area in our consideration of the bill and, at present, we cannot take a view on it, because the detail is not there yet. As you have said, it is still early on in the process, and that detail is likely to come out in secondary legislation.

**Isla Davie:** Interestingly, ethical commissioning is one of the only parts of the bill in which reference is made to incorporating the principles. The Faculty of Advocates has suggested that, when the strategic plans are drawn up for care boards, it might be useful to have a system for oversight of or comparing those plans. Given the way in which it is structured, the bill has the potential to provide that consistency through an overview that would apply across the boards. It would—or could—incorporate that detail.

At this stage, because it is a framework bill, it does not go into that type of detail, but certainly the mechanisms that could be used are there. I agree that those aspects are important and that it is important to keep that kind of consistency. The bill has some of the ingredients for doing that, if they were to be translated through to the detail. Certainly, a couple of the suggestions that have been made, such as the oversight and comparison of strategic plans, would facilitate that.

**Frank Jarvis:** Picking up on the comment about the principles in relation to ethical commissioning, I think that it takes us back to the idea that the principles need to reflect human rights standards. If the principles were to be amended to make explicit reference to, for instance, the right to independent living, that right would have to be built into an ethical commissioning strategy. One of the key strands of the right to independent living is deinstitutionalisation, and it is difficult to see where that fits if it is not built into ethical commissioning to ensure that it is threaded all the way through from the principles.

On fair work, which Jennifer Paton mentioned, the commission has not carried out any detailed analysis of what is in the bill in that respect. Fair work is mentioned in section 1(g), but there is not a great deal more about it. We share a human rights and equality mandate with the Equality and Human Rights Commission, which has done a lot more work in this space, including making submissions to last year's “Becoming a fair work

nation” consultation. A lot of detailed proposals in that work could be reflected in the bill.

Finally, in looking at the bill, it has often been useful to put it alongside the Feeley review and see where the Feeley recommendations have been expressed and what has been left behind. There might be very good reasons for not reflecting in the bill everything in the Feeley review, and some things might have been passed on that should not have been. Clearly, though, the Feeley review had a lot more to say about fair work than we have seen in the bill.

**The Convener:** I call Paul O’Kane.

**Paul O’Kane:** The committee has heard that women over 50 make up 80 per cent of the social care workforce, and colleagues have touched on the point that informal caring and support is often a responsibility that people have outside their work. On a wider point about carers, I know that a framework bill is obviously not going to say anything about how we support carers with regard to, say, rights to paid leave, but do you think that it is important that there be at least a statement of intent on that? Frank Jarvis might want to comment on that from the human rights space.

**Frank Jarvis:** We have largely deferred to our sister national human rights institution in that space, so I cannot say very much, but I would be happy to write to the committee with further information. That said, I would make the general comment that building in some proposals and standards at this stage would, I think, be welcome, as much as a statement of ambition and intent as for any other reason.

**Paul O’Kane:** Thank you. More detail will be helpful, as I think that we will come back to the matter as we make progress.

On a more technical point, the bill does not outline exactly how the transfer of staff will happen and for whom transferred staff will work. We know that NHS staff will remain NHS staff, but we are less clear about, for example, social care staff, who are in the employ of local authorities. Is there a sense that, without that detail, it is harder to look at how fair work practices can be implemented, particularly given the differing pay scales and terms and conditions?

**Isla Davie:** That will probably fall under some of the transition issues that we are concerned about. There are lofty ideals involved, and I suppose that the concern is to ensure that they do not end up creating cracks. In the example that you have highlighted of people who work in a local authority but whose employer might ultimately change, that will present challenges with regard to how consistency is maintained and how they are supported in the workplace.

**Paul O’Kane:** Thank you.

**The Convener:** As no other colleagues have indicated that they have any more questions to ask, I thank the three panellists for their time this morning, and I suspend the meeting to allow a changeover of witnesses.

11:01

*Meeting suspended.*

11:11

*On resuming—*

**The Convener:** Welcome back. We move on to evidence from our second panel as part of our scrutiny of the National Care Service (Scotland) Bill. In this session, we will focus on local government.

One of our panellists joins us online and the other two are here in person. With us in person are Councillor Paul Kelly, health and social care spokesperson for the Convention of Scottish Local Authorities, and Eddie Fraser, chief executive of East Ayrshire Council, who is representing the Society of Local Authority Chief Executives and Senior Managers Scotland. Joining us online is Jackie Buchanan, director of legal and democratic services at Angus Council, who is representing the Society of Local Authority Lawyers and Administrators in Scotland. I welcome you all.

I hand over to the deputy convener, who will start off our questioning.

**Paul O’Kane:** Good morning, panel. I will begin with some questions on what is felt to be the lack of detail, which is being left to secondary legislation, and the lack of local accountability, on which many of you share comments in your submissions.

Starting with COSLA’s approach and its submission, I think that it is fair to say that it is very concerning to read local government’s view on what the bill will do to the provision of services by local government. At COSLA, unanimous cross-party concerns have been raised about the bill, and leaders have unanimously agreed that position. I was a councillor for 10 years and I do not recall such unanimity at COSLA, particularly through its leaders. Councillor Kelly, will you explain how that position was reached and what the concerns are?

**Councillor Paul Kelly (Convention of Scottish Local Authorities):** Good morning, everybody. I am glad to be here on behalf of COSLA. As Paul O’Kane has outlined, leaders—unanimously and on a cross-party basis—have very serious concerns on behalf of all local authorities across Scotland about the current

format of the national care service. It is clear to us that it is bureaucratic, centralised and expensive. We are also extremely concerned by the lack of detail in the bill as it stands.

All of us round the table know the vital services that we are talking about in relation to social care and social work. We know how important those services are to the people that we represent and the service users, and we know about the crisis that we are facing this winter.

11:15

The transfer of 75,000 staff, which is 29 per cent of the local government workforce, along with the lack of detail on the finance and what that transfer will mean, is extremely concerning to local government, our staff and our service users. There is a huge element of risk when there is such a lack of detail. There is also a lack of opportunity for committees such as this one to properly scrutinise the bill, look at the issues that we face and come forward with a plan—which we all want to see—to improve social care, social work and the services that people across Scotland get.

**Paul O’Kane:** Eddie, will you give your view? You speak from the officer level. Does SOLACE recognise much of what the politicians and leaders of COSLA have said? Will you share your concerns?

**Eddie Fraser (Society of Local Authority Chief Executives and Senior Managers):** We recognise what has been said. The submission from SOLACE is aligned with COSLA’s submission. Our concerns are about how we plan. Local authority leaders have no certainty about what our services will look like in the next three to four years. In the current circumstances, that is really destabilising for social work, social care and the rest of the council.

There seems to be a lack of understanding of how intertwined different parts of councils are. For example, for a council to deliver social care, that department must be linked to housing. There is also a lack of understanding about the ways in which social work services and education work together, and how our legal services and human resources services—everything down to our transport services—are interrelated. Because of the framework nature of the bill, we have no certainty as to where we are going, which means that we cannot plan for it.

Our other concern, which is a slight aside given the question that was asked, is about whether the proposals will deliver against what the principles set out to do. We all want to see improvements in social work and social care, but it is about how they are delivered and whether some of the things that are proposed, which relate to centralising

things away from local government, are necessary.

**Paul O’Kane:** I will expand on the point about the practicalities of the bill. It is a framework bill that has some very clear things to say, and it will have a very clear effect on local government, but the written submissions say that there is also concern about what is not said about secondary legislation. In its submission, Inverclyde Council says:

“Leaving so much to secondary legislation will mean there will be no effective consultation, no opportunities for expert advice and experience to influence the details and a lack of transparency and democratic accountability.”

To be fair to the Government, I think that it would contend that there will be a co-designed process, but is it your view that that is the wrong way round and that there should have been a co-designed process first, followed by the bill?

**Councillor Kelly:** Absolutely. We were made aware of the details of the bill only the day before it was published, and it is very difficult for COSLA to give an opinion about co-design when there is such a lack of detail about what we are co-designing. It would have been far more helpful for that process to have been done well in advance. COSLA and bodies in other sectors have a vision for radically changing social care and social work, but we are not being given the opportunity to articulate it.

The bill has a complete lack of detail and I think that the process of scrutinising it will be difficult. We have been very clear that we are willing to work with the Government—and we do work with it—on the joint statement of intent and in a number of other areas in order to try to make improvements right now, but the lack of detail in the bill leaves us in a position where it is very difficult for us to comment properly on what the outcome will be.

**The Convener:** I want to pick up on something. You asserted that there will be a lack of opportunity for scrutiny by this committee of the bill and its subsequent secondary legislation. How did you come to that view?

**Councillor Kelly:** It is very hard to scrutinise something properly when there is a lack of detail. There is a seriousness to this, especially for COSLA, because we deliver vital services such as social care and social work, and we all know about the pressures on those services. When we are talking about something that is so big, which involves the transfer of 75,000 staff and all the liabilities and assets that go with that, there is substantial concern that we do not have the proper detail. That makes it very difficult, and it will make the job of all committees very difficult if they do not have that detail.



**The Convener:** The bill is a framework bill that will allow co-design to happen. That will then inform the secondary legislation, which is where the detail will lie. We hear—as an elected member, you probably hear this too—that the public sometimes feel that things are done to them in a top-down way. There is a desire to put the voices of lived experience at the heart of the process so that the system is co-designed and the secondary legislation actively meets people's needs. Are you saying that that is the wrong way to do things?

**Councillor Kelly:** Personally, I think that, if things were to be done properly, COSLA would have liked there to be more engagement before we got to this stage. Everyone round the table in COSLA and the Scottish Government is committed to improving the lived experience of people who use our services. That is vital. However, you talked about a top-down system and, in our opinion, if the national care service comes in in the format that is currently proposed, it will be extremely top down. It involves centralisation. I am a local councillor, and people—

**The Convener:** My question to you is whether you agree that the co-design element, which will inform the detail of the secondary legislation, is the opposite of a top-down approach, given that COSLA will be among those who are asked for their input.

**Councillor Kelly:** We are talking about a substantial bill on a national care service that has been introduced without clear detail—

**The Convener:** Because it is a framework bill—

**Councillor Kelly:** As we saw at last week's meeting of the Finance and Public Administration Committee, there is a lack of detail on the financial aspects of the proposals. COSLA leaders have made a strong point about our not being part of co-design or the strategic board at this stage, because we are very concerned about the transfer of staff, assets and liabilities and what that will mean for service users—the people with lived experience. As I said, we have serious concerns about the lack of detail in the bill.

**The Convener:** I think that Tess White has a question on that.

**Tess White:** I do; I have a question for Eddie Fraser. SOLACE has said:

“there is very little detail or consideration of the significant implications for local authorities, not only in respect of workforce, but also in respect of council assets and liabilities”.

Do you agree with that assessment? Do you want to put on the record the effect that the bill will have

on local government workforce, assets and liabilities?

**Eddie Fraser:** At this stage, we cannot be certain about what will happen, because the bill is a framework bill that provides powers rather than certainty.

Some local authorities, including mine, have made very conscious decisions about how we deliver services. In my authority, 700 local people provide social care services and we have substantially in-house early years services. We have chosen to place services in areas that are quite deprived in order to ensure that people get decent wages and pensions. We now have no certainty, and the employees have no certainty about their future.

We are one of the areas that chose to go all in when health and social care were integrated. We have fully integrated our social work service, our health services, our local prison and our alcohol and drug services, which have a joint management team. Given how the bill sits, there is potential that, instead of supporting integration, it will disaggregate the management arrangements that we have. We have particular concerns about that.

You asked about the impact on assets, which includes buildings. We have no certainty about what will happen to our children's homes or our office accommodation, including our corporate offices. You will find very few offices in a local authority that house only social work and social care—offices tend to include housing functions and a range of other things. Our assets include everything from buildings right down to the substantial fleet of electric cars that our social workers use and our garage maintain. If you start stripping the assets out of a council, you need to consider where that approach will go.

Our legal team spends a considerable amount of time supporting our social workers at court. How viable will a legal team be in a small council if you take away the social work part of its job?

That is what we mean when we say that the bill cuts across the whole of the council's activities. There are also wider issues to do with councils' liabilities and assets, accountancy and so on. They are important, too, as the committee can see from a number of the written submissions. Councils do not fund social work and social care just through the Government grant; we also put local taxes towards that. There are a range of uncertainties about where the bill would take local authorities.

**Emma Harper:** This is mentioned in our papers, too, but I have in front of me the policy memorandum to the bill, which refers to the issue

of housing that Eddie Fraser talked about earlier. It says that

“a fully integrated”

national care service

“would work closely with other services, such as housing, homelessness, education, the justice system, and the Scottish Prison Service to ensure everyone has seamless access to the support they need.”

I am hearing the concerns that are being expressed locally in Dumfries and Galloway, and I have met Shetland Islands Council leaders who have said to me, “Dinnae mess with this, because what we have in Shetland is working.”

Do we not want to learn from what is working in other places, and from the integration of health and social care and the better services that people have achieved there, and pick up on that in the co-design work to ensure that we engage everybody and bring in housing and everything else that I listed? Is that not the whole point of the bill? Is it not framework legislation that we can say okay to and then work together to tease out the detail?

**Eddie Fraser:** We have to realise that, although things might work well together, that does not necessarily mean that that happens in a uniform way. When we look across the country, we find that things are designed differently depending on geography, on whether the setting is rural or urban, and so on.

You are absolutely right. If we are to improve social work, social care and our integration of health and social care, we need to look at and build on things that have worked. However, we contend that we do not need the bill in order to achieve that improvement. We believe that a national care service could play a role in setting standards, doing national workforce planning and so on—indeed, none of our submissions says that there is no need for such a service—but where it should stop is where we get down to issues of locality and how we deliver in local areas.

It is clear that the integration and delivery of health and care are not uniform across the country. We contend that, where there is variation, what is needed is supported improvement instead of legislation that would centralise and take things away from all the local authorities in the country.

**The Convener:** I am interested in what you said about assets. Where in the bill does it say that assets are going to be taken away from local authorities? That is not clear to me at all. The bill is about ministers being accountable for setting the standards that you have just welcomed. What part of it talks about assets being transferred?

**Eddie Fraser:** There is a clear paragraph in the bill that gives the Scottish Government the power

to transfer assets, including buildings as well as staff, to it from councils.

**The Convener:** Is that not about the accountability of what happens in those assets?

**Eddie Fraser:** No—my understanding is that the physical asset would be transferred.

**Sandesh Gulhane:** I have a question for Councillor Kelly. Inverclyde Council has said:

“The current lack of detail impacts on our ability to plan for coming years and secure investment in the sector when there are so many unknowns.”

Can you spell out for us the exact problem with the lack of detail and what it will mean in the coming years, not just for your council but for all councils?

**Councillor Kelly:** Absolutely. I have said a few times now that we have a serious concern about the lack of detail. The bill is a very significant proposal and we are being asked to consider it without the proper details. We know how important the services that we deliver at local level are to our communities, so it is critical that the detail is correct.

We are talking about 75,000 staff—75,000 individuals—being transferred to we do not know where, and we have still not confirmed the terms and conditions, talked about pensions and so on. That is creating significant worry among the staff to whom I speak on a regular basis. They have just come out of a pandemic during which, as we all know, they worked harder than anybody, as key workers, alongside our health and community health colleagues. We are now having to tell them, “Look, you could be transferred if this reform comes in, but we can’t give you any clarity about what that might involve or where you might end up.” That is putting an additional burden and huge pressure on staff.

Some councils have made it quite clear that, if the national care service legislation is taken forward as it currently is, their viability and ability to continue as councils will be put in question. Councils have been working under substantial cuts over the past few years, which has had a huge impact on the services that we provide.

We are working with the Government around the Feeley review to make improvements. We have a joint ministerial working group on social care and other areas, and we are committed to making those improvements without the national care service in its current form. We support a national care service that addresses terms and conditions and national standards, but it is not necessary to make the changes that we want to see.

11:30

**Sandesh Gulhane:** You said earlier that you were told about changes on the day before the bill came out. What meaningful consultation have you had, and where do you want to see that going?

**Councillor Kelly:** It is quite clear that, for the Government to introduce something as significant as those changes, which put the viability of councils at stake, and to give the detail to COSLA, which represents those councils, on the day before it publishes the bill puts councils in an unacceptable and very difficult position. The complete lack of detail also makes it difficult to represent councils' opinion on a national care service.

We are absolutely open to having dialogue with the Scottish Government, and we are quite clear that we would like to see the bill amended so that our staff, assets and liabilities are not transferred and so that centralisation does not take place.

**The Convener:** Thank you. Paul, do you want to come back in?

**Paul O'Kane:** We are trying to consider the bill with regard to the detail that is outlined in the framework. However, on the point that you have made, Councillor Kelly, about viability, and in relation to the amendments that you have mentioned, are your concerns based around, for example, the fact that there is no definition of the geographic spread of a care board—that care boards would not necessarily reflect what we have currently in the integration joint boards, which would have a potential impact on the geography of people's local authority, as they understand it, and on what their local authority would be responsible for?

**Councillor Kelly:** Absolutely. We are not clear what care boards will look like geographically, although we are clear that a minister will have central control over who is on them and over the decisions that are taken.

What we have right now is local accountability and local democratic direction in that, if an individual in a local community wants to raise something, they can have access to a councillor or somebody else to discuss the local issues that they face. The issues are different, depending on whether you are in Aberdeen or down in Annan—there will be variation in how you will want your social care and social work to be provided. However, our impression is that the national care service, as it currently is, will not give that local aspect, and there is a risk that it will not represent the geographical differences that we see across the country.

**The Convener:** I am conscious that a member of our panel is joining us online. Jackie Buchanan,

if you want to come in at any point, let us know in the chat box. Because you have not come in so far, I want to bring you in now to give your view on some of the points that have been raised in this part, before we move to the next theme.

**Jackie Buchanan (Society of Local Authority Lawyers and Administrators in Scotland):** Thank you. I am happy to do that. Can you hear me okay?

**The Convener:** We can hear you fine.

**Jackie Buchanan:** Generally, I agree with what the two representatives have said so far.

I will start by clarifying the point that was raised about the transfer of property. That transfer is provided for by section 32 of the bill, which details that

“the Scottish ministers may by regulation ... transfer ... property ... and liabilities”

from local authorities. So, it is clear that that is a proposal.

In its response, SOLAR mentions the lack of clarity, in particular. Much of the bill talks about powers that “may be exercised”, so it is not definitively clear that they would be exercised. There is a lack of definition of various aspects of the bill—it is not exactly clear what the terminology that is used means.

In addition, we do not know what the geographical area will be for each care board or what functions each will have, which makes planning incredibly difficult—other witnesses have indicated that, too.

On the point about secondary legislation, you will know that, in the legislative process, secondary legislation allows very little ability to change what is proposed. It is a case of accepting or rejecting it. Vast aspects of the bill that will impact on local authorities—for example, the transfer of staff, if that is to happen—will be implemented through the negative procedure, which gives no ability to amend what is proposed. That concern has been raised already.

I am happy to take further questions, if you would like to ask anything.

**The Convener:** Jackie, I reiterate that, if any member asks a question and you wish to answer but have not been asked directly, you can put an R in the chat box. I can see that and will bring you in. I am conscious that, when we have someone online, we want to ensure that they have ample opportunity to contribute.

We will move on to the next theme, which will be led by Carol Mochan.

**Carol Mochan:** The witnesses might have answered some of my questions, but I will ask

about local government integration with health and social care.

The Faculty of Advocates has given evidence that there seems to be

“a lack of provision in the Bill regarding the interrelation between the proposed national care boards and local authorities”,

which was much clearer when we introduced health and social care partnerships. Do the witnesses agree that that is the case? I ask them to be honest. There has been some suggestion that health and social care integration was slow and faced a lot of hurdles. I ask them to reflect on that. Are there things that the national care service could bring to the table in terms of integrating health and social care a little more easily or quickly?

**Councillor Kelly:** I will start with your comparison of the care boards’ relationship with the health service and councils to the relationship that we have under integration. The relationship with the health service and councils is not perfect, but, with the care boards, we have complete uncertainty about where the staff will go and what the responsibility will be. There is also centralisation. NHS boards are under ministerial control and care boards could be under ministerial control. A huge aspect of what councils do at a local level will be taken away from them and centralised.

Right now, under integration, although there are some cultural issues across the country, there is some really good partnership working between councils, integration boards and health services. I have sat on an integration joint board and on the health boards and have been the deputy leader of North Lanarkshire Council all at the same time. I can give examples of fantastic partnership working over the difficult period of the pandemic and the crisis that we currently face.

However, we must also remember that integration is a big piece of legislation, and it is new—the act was passed only in 2014. There are still many issues that we need to address, and we, as councils, are absolutely committed to working with the Scottish Government and with all our partners to make improvements to integration. However, we are saying that, if there are aspects that do not work at a small scale, let us not make huge and substantial bureaucratic, expensive and centralising changes that will not help the people whom we are elected to represent—our service users.

Right now, there is a commitment to progressing with integration, which includes considering the varying models and best practice across the country. We need to let that run and continue to improve integration.

**Eddie Fraser:** There is a substantial difference between the Public Bodies (Joint Working) (Scotland) Act 2014 and the proposed legislation. Under the 2014 act, local authorities retained the accountability for social care and local health boards retained the accountability for healthcare. They delegated that authority to the IJB, which took the resource and planned for the services locally, so local accountability to health boards and the councils remained. However, under the new proposals, that accountability goes. The minister appoints the board and approves the strategic plan, whereas, just now, it is the health board and the councils that endorse the strategic plan.

Under the bill, the minister has the accountability, which is a real change, and the chief executives of the care boards will be responsible to the minister. In some ways, that reflects the role of the chief officer in the IJB and their accountability to that public body. From 2014 to 2021—before I was in this job—I was the chief officer of an IJB. However, there is a secondary part to that: being a director of health and social care. That operational side does not seem to be being replicated. In that role, I was responsible to the chief executive of the council for social care and to the chief executive of the health board for healthcare. For me, that was not only about healthcare in East Ayrshire, but about primary care right across the whole of Ayrshire and Arran.

There are two aspects to the current job, and the role of the chief officer of an IJB seems to be being replicated under the proposed legislation in the chief executive of the new board, but nowhere does what I would call the integration of health and social care—that operational space—take place. That is not there just now, and it is not clear how it would be there. If the new chief executive is not responsible to the chief executive of the health board, how can they be a manager of the health staff who will be there? If they are not responsible to the chief executive of the local authority, how will they manage those staff?

The risk is that we will go backwards in the integration of health and social care because of the number of posts that have been developed—not just that of the director of health and social care, but, below that, the bringing together of, for instance, children’s social work, children’s health services and alcohol and drug services, which are jointly managed in many of the partnerships. Unless we have an arrangement that replicates the health and social care partnership, if I can call it that—the delivery arm, rather than just the IJB, which is the strategic planning arm—we will have a problem.

**Carol Mochan:** I just want to be clear. It has been mentioned that the bill moves towards centralisation. To give me some idea of what

would be an alternative to that, will you talk me through what might allow us to get the good integration that we want?

**Councillor Kelly:** To be clear, COSLA and all local authorities are committed to working—and are working—with the Scottish Government on improvement, from the terms and conditions of our staff to how we support them. We are absolutely committed to that, and we are doing lots of joint working on that. However, we also need to look at how we recruit and retain staff. That is a substantial issue that we face. We have to look at the funding that is going into social care to support the work that is getting done against the background of the substantial cuts that have been made.

As I have said, we are moving towards centralisation—away, as Eddie Fraser has also touched on, from those local partnerships, which are doing a lot of excellent work across the country in difficult circumstances.

I reiterate that this is a new piece of legislation and we understand that there are cultural issues that need to be addressed, but we are absolutely committed to doing that, and we do not need legislation for a national care service in order to deliver some of these outcomes.

**The Convener:** I will bring in Stephanie Callaghan, who is online.

**Stephanie Callaghan (Uddingston and Bellshill) (SNP):** Going back to what has been said about working in partnership with local authorities, health boards and others, I absolutely take on board the amount of work that has gone on through the integration joint boards. However, the situation that we are looking at now is one of decision making happening via co-production—that voice of lived experience getting parity with the employees or the people who set the strategies—and the possibility that that brings for improvements. Paul Kelly, do you agree with co-production per se? What work are COSLA and councils carrying out just now that they are able to bring to the table to promote and embed co-production more widely?

**Councillor Kelly:** The service user is vital in everything that we do in local authorities. They are at the forefront of our thinking and our actions. Local authorities are constantly working on the co-design and co-production of our services and on innovation at the local level. Certainly, our communities reflect to us that they want to see decisions being made at the local level, and we are continually working on that.

As I have said, we are working with the Scottish Government and different working groups on the joint statement of intent, to see what

improvements we can make to the service right now.

We are not saying that everything is perfect as it is. We all know that it is not. We all know of the winter crisis that we face. However, it is critical that we look right now at those issues and how we deal with them, instead of being distracted by the centralisation of services and a bureaucracy that will be very expensive. Local government is very much grounded in local decision making, and we are committed to the service user being at the heart of that. Councils and integration joint boards throughout the country continually consult and listen to the concerns of service users. That is, as I say, at the heart of all our decision making.

11:45

**Stephanie Callaghan:** Are you saying that you do not really see the value of a co-production approach through the national care service?

**Councillor Kelly:** No. As I have said all along, there is a complete lack of detail. If we had more detail, perhaps we would be able to work better on what that looks like. As I have articulated, for such a significant piece of legislation, it would have been helpful to have had COSLA and local authorities much more involved in the process and the journey, instead of involving us a day before the bill was published.

**The Convener:** When you say “centralisation of services”—you have used that phrase a couple of times—the impression that is given is that services will be run from a central position, when, in fact, the framework sets out that it is about ministerial accountability for standards and that services will still be local. Do you not agree with that? Do you still want clarity on it?

**Councillor Kelly:** We absolutely want clarity on what care boards will look like and what that will mean. We are very clear that care boards will be under the remit of ministers, whereas what we currently have is local decision making and local input, which is vital. We have talked about the geographical differences across the country that mean that, whether in Aberdeen or Annan, different areas have different requirements and needs. Those are reflected in the current model so that people have the opportunity to shape their local services. From speaking to people as a local councillor or when I wear one of the other hats that I wear in different local roles, I am quite clear that people want their services to be delivered locally and not through decisions being made by ministers in Edinburgh.

**The Convener:** My point is that there is a difference between delivery and accountability. There will still be local delivery, but there will be ministerial oversight of the standards.

**Councillor Kelly:** My impression of the current format of care boards is that there will be a substantial impact on local delivery. Staff, assets and significant amounts of decision making will be taken away from the local level. We are not even clear where the staff will go—no one can give us an answer as to where those staff will end up. Will they be working through the council, the independent sector, the private sector or the third sector? There is no clarity. That will have a significant impact on the services that we provide.

We must also remember that, in the current make-up of councils and in integrated decision making, social work is aligned with local education and communities. Important connections could be lost when staff are moved into an unknown area that is yet to be specified.

**Tess White:** There are benefits to centralisation, but there are also benefits to keeping things local. The Faculty of Advocates was represented on the previous panel of witnesses, and its written submission says:

“There is clearly a risk that the quality of services previously provided effectively on a local model is diluted when provision is attempted on a larger, national, scale.”

Is the nub of your concern that the move to centralisation means that control, power and funding will go to the centre, at the expense of quality local services?

**Councillor Kelly:** Absolutely. We have been clear about that. We have stated that we support a national care service that looks at issues around national standards, leadership and how we support staff. That is acceptable. However, if all those important services that have been delivered locally and in partnership are moved over to a care body in which we are not certain who will be involved and that is under ministerial control, that will mean that services are centralised.

As I have said, improvements have to be made at a local level, and we are committed to doing that work, but we do not need a national care service in its currently proposed format to deliver those improvements.

**Emma Harper:** I have an initial question for Councillor Kelly. Before the bill was published, did COSLA reach out to the Government to say, “We’re here and we want to feed into this”?

**Councillor Kelly:** I have taken on the spokesperson role in recent months, and I have had continual meetings with ministers and the Scottish Government. We have made clear our feelings about the bill and how it was published, and about the transfer of our staff, assets and liabilities.

**Emma Harper:** I mean before the bill was published. Did COSLA engage with the Government before the bill was published?

**Councillor Kelly:** Absolutely. COSLA is continuously engaging with the Government.

**Emma Harper:** So you knew what was coming, kind of, before the bill was published?

**Councillor Kelly:** As I stated, we did not know what is in the bill until the day before it was published, because the Government did not share it with us. If the Government had been willing to share that information with us, we would absolutely have wanted to have it. If we could go back many steps before publication of the bill and have a more active role for COSLA and councils in the formation of the national care service, some of the issues that we are discussing today would have been more at the forefront.

**Emma Harper:** Okay.

I am keen to pursue the matter of centralisation. To me, it is about creating standards. We just had a care home close in Dumfries and Galloway, and during the pandemic NHS teams had to go into a couple of care homes because there were issues related to infection control. It is about knowledge, skills and taking a standardised approach; for example, staff not wearing personal protective equipment unless they are engaging in patient care. For me, a standardised approach is about fair wages and the level of skills for a certain band in the local authority. No matter where a person is in Scotland, there should be a standardised approach for development of knowledge and skills. Is not that part of what would be centralised, with local delivery then being based on the standards that are set across the whole of Scotland?

**Councillor Kelly:** As I said, we are absolutely committed to that; we are working with the Scottish Government right now on fair work and standardised practice, particularly in areas such as social work where there are retention and recruitment issues. As I said, we would agree with a national care service that looks at fair work and all the practices that are involved under the standards that Emma Harper mentioned. However, in the bill’s current format, the issue for local authorities is transfer of our staff, assets, liabilities and functions. Those are significant things that we think should be delivered at local level.

**Emma Harper:** Do you really think that the Government is gonnae take away your electric cars, Eddie?

**Eddie Fraser:** I dare say that if the social care workers who drive the electric cars were to transfer either to the national care service or another provider, the cars would need to follow

them. We have a real challenge around where this will go in relation to social care.

In how the bill is written, it is clear that local government will need to compete with the independent and third sectors for future contracts. Frankly, we cannot compete if our staff stay on the same terms and conditions as they are on now. As with any other staff member in local government or the NHS, in relation to having a decent pension paid for, there will—for local government—be 20 per cent added on to the costs of a social care worker. Our colleagues who work in care homes and in the third sector do not get that.

I do not for a second think that we should diminish the terms and conditions of local authority workers. There needs, instead, to be investment in valued colleagues in the independent sector who work in care homes, in order to bring them up. Then, we can have a discussion.

Right now, I do not see how we could win, if a contract with a care board came up for a local authority to bid for. To protect our staff, we would need to transfer them into the national care service; otherwise, the risk would be that we would lose a contract and they would transfer over to an independent sector provider.

Those are simple things, but the solution is obviously what we talk about in terms of fair work, which means that no matter which sector of social care a person works in, there is enough resource to provide them with decent terms and conditions and a decent pension when they finish working.

**The Convener:** That leads on nicely to a question from Gillian Mackay about fair work. Gillian has to go soon, so I will bring her in now.

**Gillian Mackay:** Thanks, convener. I apologise to everyone; I have to go to the Parliamentary Bureau in a couple of minutes.

My question is particularly for Councillor Kelly. You referenced geographical variation around delivery, but there is also geographical variation around terms and conditions and working conditions for staff. How would you like that to be strengthened in the bill?

**Councillor Kelly:** As we have said, we are committed to the national care service addressing elements of fair work and looking at practice across the country. Eddie Fraser made a point about the third sector and the independent sector and how people are paid. Whether workers are in a council, the third sector or the independent sector, they are all helping individuals and communities in really difficult circumstances, so they deserve to have fair wages, fair work practices and improvements to those practices.

We would like to see that in the bill, but we do not actually need a national care service in order

to do that. We are working on that right now with the Scottish Government. On Thursday, I will attend, with the minister, the joint ministerial group on fair work in social care. We are absolutely committed to doing that right now. Why should we wait for a national care service to put such practices in place? That should be happening right now.

Given what the workers have given us—whether they are in councils, the independent sector or the private sector—and given the work that they did during the pandemic, and are currently doing, to help some of the most vulnerable people in society, they deserve exactly what you mentioned: fair work practices.

**Gillian Mackay:** I appreciate the work that is being done at joint ministerial working group level and all that sort of thing, but what work is being done at COSLA level to make sure that good terms and conditions exist? One thing that is being looked at in the creation of the national care service is making terms and conditions consistent across the country. What is being done in relation to the services that are delivered by local authorities to ensure that terms and conditions and working conditions are consistent across the country? Also, what is being done where services are contracted out by councils? The variations are wild, in some places.

**Councillor Kelly:** The points that you make are things that we are continually working on in COSLA, which I am representing, and in all local authorities. We want improvements and we want to drive up standards across the workforce because that is absolutely what the workers deserve. However, we cannot afford to do that as local authorities, which is where national Government comes in; we need the Government to support us by funding that. We have seen substantial cuts across councils in recent years, which is why we need to work with the Government.

To be fair, I note that I think that we have a shared agenda. We all want to drive improvements, because if we do not do that we will continue to have problems with staff retention. We particularly want to make social care—whether workers are in councils or in the independent and private sectors—the attractive and well-rewarded job that it should be, with opportunities to progress.

You are absolutely correct. It is a focus of councils right now to make sure that standards are similar for everyone across the country.

**Gillian Mackay:** I appreciate that. Some of this is absolutely about resource but, as you referenced earlier, it is also about culture, which does not always need pounds behind it. What is

being done by COSLA to improve the culture in which people work?

**Councillor Kelly:** At council level, culture is really important for our workforce. You are absolutely correct to point that out. I give you the commitment that councils are absolutely committed to improving the culture across the organisations, and to ensuring that wherever our workers are working hard on the front line, they are supported and given opportunities to improve, and opportunities to have fair work and fair pay and conditions. That is an absolute commitment.

However, we do not actually need a national care service to deliver that. We are working on it right now, and we are committed to working with the Scottish Government on it.

**Gillian Mackay:** If there is anything specific going on in councils, it would be really useful for the committee to hear about that.

**Councillor Kelly:** Absolutely. I will take that opportunity. Thank you.

**The Convener:** Paul O’Kane has a question on fair work, but he also wants to pick up on co-design, I believe. I will then go back to Emma Harper, who has some questions on fair work.

**Paul O’Kane:** Thanks, convener. I appreciate that we are dipping into different themes, but that is the nature of the discussion.

Following on from Gillian Mackay’s point about trying to achieve fair work principles and improve terms and conditions, I have a question about recruitment. We know that there is a huge challenge in social care recruitment. I think that there is a suggestion that, through the bill and the national care service, action can be taken to look at recruitment on a more national basis, or through a national campaign.

Councillor Kelly, do you sense that we need a national care service to do that, or would you rather see interaction between COSLA and the Government on national work on recruitment? Has anything happened between the Government and COSLA on that? What has the Government done?

**Councillor Kelly:** A lot of fantastic local recruitment initiatives are going on in councils around the country. Since I took on my role as spokesperson, I have articulated in discussions that I have had with the cabinet secretary how important I believe a national recruitment campaign is to support councils and social care. In fact, it is vital, because we all know the recruitment issues that councils are having.

I have raised the issue regularly with the Government and we would certainly welcome its support. However, we do not need a national care service to deliver that—we absolutely have to

focus on national recruitment now, because it is vital in encouraging people to get into social care and social work, which is an excellent sector to be involved in. We are absolutely trying our best to put recruitment at the top of our discussions with the Government.

12:00

**Eddie Fraser:** There is a role for a national care service in wider workforce planning and in working with Scotland’s colleges and so on to ensure that the right workforce comes through for us. As we have seen in the past, there is also a place for national advertising about social care roles and about the value of social care, which is a worthwhile profession. However, effective recruitment tends to happen in localities. Practically every council area holds recruitment fairs for social care in all sorts of local areas, because it tends to be local people who deliver social care.

A dual approach is needed. We need to work alongside the colleges to bring through people with the right qualifications for social care; we need national advertising about the worth of social care; and we need local recruitment, too. The work needs to go across those areas, and it must happen at the same time as consideration of terms and conditions across social care, which we have spoken about before. Someone who is working and paying into a pension is much more likely to stay in their role than someone who has a zero-hours contract and is zigzagging into and out of a role. Terms and conditions are an issue because we are talking not just about recruitment but about retention in social care, which is really important.

**The Convener:** With Paul O’Kane’s permission, I will bring in Sandesh Gulhane, who wants to pick up on one point.

**Sandesh Gulhane:** Eddie Fraser talked about the workforce and recruitment. The general practitioner contract was supposed to support that, but it has failed. Are you concerned that the national care service could lead to the same problems in the workforce and recruitment?

**Eddie Fraser:** If the national care service’s role was to work with colleges on ensuring that people come through, and to run national advertising, that would be effective. As you know, some work on the GP contract was about conditions and people achieving the right balance with family life. It has been interesting that, over the pandemic, we have moved more to blended working; people have been able to do that in various professions.

There is a role for the national care service, but what is essential to recruitment is local activity and people seeing the value of social care. There is a challenge—people often ask whether, given the



level of pay for staff, we value social care and the compassion and skills that it involves. A question around social care is about what we actually value in society. If we really value social care workers, should not we pay them enough to stay in their roles and ensure that they do not have to do excessive hours? Are people who work in the independent and voluntary sector getting terms and conditions that are similar to those in the local authority and health sector and which will keep them in a career?

**Paul O’Kane:** I will return briefly to co-production. For some people, it seems to be new, but my sense is that it has existed for a long time. We were talking about how integration has worked. Integration is still young—it is not yet 10 years old. Given that Eddie Fraser was responsible for delivering services through a health and social care partnership and that he is now a council chief executive, I ask for his view on what co-production has done in that space. When I sat on an IJB—which was not yesterday—it had carer and patient representatives and people from the staff side; co-production ran throughout how things were discussed. I also ask Jackie Buchanan to give her sense of how the structure works and to comment on any other bits.

**Eddie Fraser:** There is co-production at a range of levels. A good thing in the bill is the focus on independent advocacy, which helps people’s voices to be heard. At the local level, co-production can involve visible leadership. Practically every local authority area has some type of group of care-experienced young people that it can hear directly from about how things can improve. We call it a pizza and Coke night, where local councillors and senior officers sit with care-experienced young people and learn from their experience.

We also have our learning disability awareness groups, which involve people who work in the sector and people with learning disabilities. It is about them working together. For example, a few years ago I learned to tap-dance so that I could tap-dance along with folk with learning disabilities. It is about how to do things differently together; we can really engage with and understand people.

Another example is our tea dances for older people. They are social events, but you will also find some of our more senior councillors sitting down at a tea dance and listening to what people are saying.

Co-production with our formal partners is also really important. Locally, we had a challenge around how we were providing support for young people with complex needs over the summer. We do not think that we have all the answers. I go to partners, such as the Health and Social Care Alliance Scotland, and ask them to come in and

work with our people to help us to improve, so co-production definitely has a place.

Co-production has a place in a national care service, too. We should see a national care service as being the place where we set standards and expectations, but those standards and expectations should come from the people who use the services. I do not think that there is any difference between what COSLA, SOLACE and the Government are saying at that level, in terms of the principles. There is a difference between us when it gets down to transfer of functions, transfer of the staff and how to deliver the service, but the ambition to change is there.

We have said a few times that some of the changes could be done outwith the bill. There is the joint statement of intent by COSLA and the Scottish Government about improvement, and the improvement board for social care and community health has just been established, which is chaired jointly by SOLACE, COSLA and the Scottish Government. That is about considering what we can improve now. We recognise that we cannot wait four years for some of the improvements; there is work that we need to do now.

Through the independent review of adult social care, we know that some people quite rightly feel stuck in a complex needs system. Again, we are looking at how we can move the people who are stuck in the system closer to home and how we can deliver closer to home.

Our contention is that we recognise all the improvements that are required, but we just do not think that responsibility for delivering those improvements has to move from a local system up to a national system. Indeed, those improvements can be delivered only through a local system, because it takes the local third sector and local housing people, along with social work and health services, to deliver for the people with the most complex needs.

The ambition is likely very much shared between the Scottish Government and local government. The issue for us is around how it is delivered.

**Jackie Buchanan:** What Eddie Fraser has been speaking about is more at the operational level of health and social care; I absolutely recognise what he is saying. I represent SOLAR, which is looking more at the legal side of the legislation, because it is more a legal body.

I can speak about co-working, however, from my experience of working with an IJB and supporting the chief officer of the IJB in relation to quite difficult challenges that have come up. We have worked really well together on ensuring that governance is effective in relation to any reports that have gone to the IJB, and on ensuring that

there is appropriate consultation. When things are complex, difficult and challenging, consultation allows all the stakeholders to be involved; that is certainly about co-working with them.

**The Convener:** I will come back to the issue of fair work, because I believe that Emma Harper has a question on that before we move on.

**Emma Harper:** Yes. What I wanted to ask about has mostly been covered already, but I will just say to Eddie that, every time you come to committee and give us information, no matter what your role is at that point or what hat you have got on, your knowledge and everything just demonstrates what an asset you are, and I want to say thank you.

Obviously, Dumfries and Galloway has issues as a rural area. I love the idea of electric cars—I am pursuing that already with Dumfries and Galloway Council. I think that that is absolutely the way we need to go, especially with petrol being so expensive.

I am thinking about the other aspects around social care, such as delayed discharge, and you have been able to tackle that in your area, too. I am also thinking about recruitment and retention. It is not just about encouraging young folk to go to school and college; it is also about the fact that social care is delivered mostly by women, the average age of those carers is about 50, and most of them have other caring roles and responsibilities. The papers from the previous panel of witnesses raised the issue that people who are providing care might also be caring for their parents or their kids. There are challenges with regard to recruitment and retention, so what are your thoughts about the fact that some local authorities pay a lot less than others do? Fair approaches to recruitment, retention and remuneration are, therefore, part of what we need to consider—including with Paul Kelly, I suppose.

**Eddie Fraser:** Each local authority has a job evaluation scheme and it will put any role through that scheme, so social care workers, classroom assistants, early years workers and so on will be placed in a band on the salary scale. That is why it really challenges councils when people suggest, for example, paying social care workers a bit more money. Councils have evaluated all those posts and decided that those different skills and talents are equivalent, so if you pay social care workers more, what do you do with the early years workers and classroom assistants?

You are right to say that many local authorities have tried to look at the skills in social care and say that, because those staff work so closely with health services, they are equivalent to healthcare staff. They have therefore asked whether they should re-evaluate those posts. I agree that we

need to look at that, but the local authority would have to do that within employment legislation, and Jackie Buchanan might be able to talk about that better than I can. I have already touched on the wider considerations of whether we value the skills of social care workers—the skills of compassion, communication, patience—and all those things that a social care worker has to do, such as sitting with somebody who has a learning disability, a mental health problem or dementia or going into challenging circumstances to work with someone who has an addiction problem. My question is a wider one about whether we value those skills to the extent that people feel valued and therefore stay in the sector.

You are also absolutely right about the profile of the social care workforce—we must also consider our social work workforce—which is such that, unless we ensure that these jobs are attractive and unless we can draw people into them, as the years go on and there is increased demand for these services, because our working-age population in many areas is going down, we will be heading towards a crisis. Many places would say that they are already facing that crisis, because they do not have enough social care workers or social workers. Sometimes, we forget that part of the challenge is having enough social workers to complete the assessments before we can deliver social care. When we consider some of the pressures in communities, we see that there are more people who are waiting for a social work assessment than there are waiting for the delivery of social care. Therefore, we need to consider both of those aspects.

Recently, Social Work Scotland published a report, “Setting the Bar for Social Work in Scotland”, which clearly laid out some of the pressures on the social work profession. The report made the point that a social worker who has 35 people to work with and works 35 hours a week does not have much time to work with people to build up relationships and do things differently. The need for those improvements in social work and social care is undeniable, but it must be done by working together, and we must be clear about how we deal with it.

On self-directed support, for example, we have legislation that many people would say is some of the best in the world, but how do we ensure that it is implemented? Our model of social care in Scotland means that the vast majority of people are cared for in their own homes, and that is not the case in other places—the committee has heard about some of the international comparisons. We have an ambitious approach to, and have reached a good place in, social care.

I started working in social care 35 years ago, when the care at home that we offered was done

by home helps who worked 9 am to 1 pm, Monday to Friday. That was the extent of care at home. People with learning disabilities and mental health problems lived in big institutions. We have made huge advances and improvements in that time, and that is why sometimes, when I see it written that there is no scope for improvement in the current arrangements, I just think that those people are short-sighted and do not know where we have come from. We have come a huge way.

12:15

However, that does not stop our ambition to go further. We should always be ambitious in that respect, but we should not forget the improvements that we have made in this country. We should be proud of some of the services that we deliver and, indeed, some of the legislation that has been passed, which has probably not been fully implemented. I think that they call it the implementation gap when you have good legislation that has not been fully implemented, and we should be looking at improving some of those things instead of making further structural change.

**Emma Harper:** We have looked at the issue of self-directed support, and I know that it is being reviewed. It seems to work really well in some places but not in others. You have highlighted the need to work with colleges, which is about co-working and co-engagement, and I know that, in both its Stranraer and Dumfries campuses, Dumfries and Galloway College is doing a great job in looking at future care providers. I just do not think that people know exactly what self-directed support is or means and how it can be implemented.

**Eddie Fraser:** That is fair comment. The other thing that we are doing just now is giving out two different messages. On the one hand, we are sending out this message of empowerment and co-production with regard to self-directed support for individuals while, on the other, we are saying, "But there are eligibility criteria"—which we should actually call rationing. We are sending people out there with two messages; we are saying to them, "Go out there and get people to tell you the important things that need to be changed in their lives," while there is this second message about the management of resources, which is basically about eligibility criteria. There are mixed messages at times out there.

Ironically, if you ask people what they want and help to deliver it for them or if you intervene early enough and give people help when they first need it, it can cost less. However, we are giving out mixed messages about the different things that we are doing.

**The Convener:** Although we do not have a specific theme to ask about on it, I wonder whether part 2 of the bill, which is about records and data systems and the sharing of data, might help with regard to integration and the potential for care users to have a bit more agency and not to have to tell their story a million times to a million different people. What are your views on part 2?

**Eddie Fraser:** If we could manage to get an integrated health and care record across the country, that would be fantastic. Clearly there is a range of boundaries in that respect, including human rights considerations, and with cradle-to-grave records, whether they be for health or social work, the question is what it is relevant for people to see. However, the fact is that it can be very difficult to manoeuvre between different systems, and there is certainly an ambition to bring things together in order to do that. Indeed, before the pandemic, many workers I knew in integrated authorities had to sit with two screens: their local authority screen and their health screen.

It clearly makes sense to have an integrated system if we are to give people integrated care, as long as we put the right boundaries around it and ensure that people see everything that is relevant to them. For example, ward staff would be able to click and see the services that somebody was getting before they had to go into care, the district nurse could see what the social care worker was doing and so on. Those things are really relevant in joining up care.

We talk about the integration of health and social care, but in the original legislation, it was all about integration from the perspective of the person receiving care. We forget that wee bit at the end. The fact is that, although things might be a guddle, it sometimes does not matter as long as the person sitting there feels that everything is joined up, and a joined-up record might help achieve that.

**The Convener:** Paul Kelly, you were nodding. Do you want to come in on that?

**Councillor Kelly:** Yes. We are committed to shared records, as Eddie Fraser has outlined. To be clear, we do not need massive structural change to deliver that; it is something that we should be working on right now.

To go back, you raised relevant issues around the nature of our workforce and that is why we need to ensure that those fair work terms and conditions and pay stay at the top of our agenda. As I keep reiterating, we are working with the Government on that and we do not need a national care service to deliver those changes. We are committed to ensuring that those changes happen for the workforce.

One of the workforce's biggest concerns—this is true for both social care staff and social workers—is what is going to happen to them if there is a transfer. They are asking what will happen to their terms and conditions and their pensions, and they are also raising employability issues. We mentioned that earlier and perhaps Jackie Buchanan could touch on that. People want that clarity. What will happen to the workforce is a serious concern that is raised regularly.

**The Convener:** On that prompt, I will bring in Jackie Buchanan.

**Jackie Buchanan:** We would need to look at the Transfer of Undertakings (Protection of Employment) Regulations and their impact. Just to be clear, TUPE is national UK legislation, rather than Scottish legislation. The bill talks about the Scottish ministers determining the terms and conditions where people transfer, but the way it works with TUPE is that employees are transferred on their current terms and conditions. If we look at that from a practical perspective, we are talking about potentially having 75,000 employees on different terms and conditions throughout Scotland transferring to a centralised local care board, or to a department within the Scottish Government, which seems to be an option for direct control. There would need to be quite a long lead-in period to allow that to happen.

At the moment, because the bill is not clear what staff would transfer, it makes it very difficult to plan. We would have to look at the role of each individual person. There is a rule of thumb—it is not definitive—that if 50 per cent of a person's work relates to the functions that are to be transferred, they will be considered to be TUPE-ed over. If 60 per cent of a person's functions were transferred and 40 per cent were not, technically they would need to transfer. That would leave a huge issue for the residual employees in local government. There is a question about how that would work in relation to whoever takes those employees on, because potentially they might have too many. That would raise huge issues in relation to redundancies and claims.

If an employee were to have their location moved, they could say that it was unfair because they did not want to have to move and could claim for unfair dismissal on the grounds that their terms and conditions had been changed. It will take a considerable amount of time for all that complexity to work its way through. That is compounded by the fact that there is currently a great degree of uncertainty about what is intended. Is it simply the people who are directly providing the service or will it also include the legal, human resources and finance support staff? How will that affect the local authorities and their ability to cope in those areas?

The only similar scenario that I can think of was the change from regional and district councils to unitary authorities. I understand that, when that happened, there was a shadow authority for a year. That was a lot clearer because where people were moving was made specific—we were very clear about what the new bodies were and all the functions were transferring over. There was not a hiving-off approach, where just parts of the local authority were transferred elsewhere. The logistics of achieving that will be mind boggling. The impact on staff cannot be overestimated. Many staff have already felt the impact of recent events, particularly Covid, and resilience is not as high as it could be.

I can see there being real issues in terms of the logistics and how that impacts on the people who are moving. During that interim period, that will create uncertainty, as well as having an impact on local government, which will be left without those functions and without the people delivering those functions.

**The Convener:** We must move on, because we are rapidly running out of time. There are questions around the transfers of specific services. Evelyn Tweed will go first, and then we will go to Stephanie Callaghan.

**Evelyn Tweed:** I will roll my questions into one, as we are struggling for time.

Good afternoon to the panel. Eddie Fraser, I noted your positive comments on what has been achieved so far; that is appreciated. I echo Emma Harper's comments on what you have brought to the committee—thank you. In your view, is there any case for some services to transfer instead of others, for reasons of consistency and quality? Also, what are your thoughts on the exclusion of homelessness services?

**Eddie Fraser:** I understand why, when people look externally at what is delegated to IJBs, they see inconsistencies. That is because, in local systems, people have looked for and seen what fits that local environment. It is interesting that, when regulators come in and look at such things as adult and child protection matters, what they actually see is what the local structures are. They should not then say, "If you use X or Y structure, it would be better," because local systems are about leadership and relationships that deliver in local communities. How we do things is about local relationships.

In East Ayrshire, the fact that we have older people services, children's services, justice, and alcohol and drugs services within the IJB means that that set-up suits us. It suits our arrangements, but in another local authority, it might not. It might not fit with the historical arrangements that were already strongly established there; for example, a

children's services unit might have already been established there. Different things can fit. The differences do not necessarily mean that one structure is right and one is wrong—it is about what fits the local arrangements.

As for homelessness—and we spoke earlier about complex needs and the involvement of the housing service—I think that it is very important that it is dealt with within a local system. As a council chief executive, I have ultimate responsibility for the delivery of social care through the IJB and for the housing service. At my corporate management team meeting every week, I have in both the people who are responsible for all that. Those services do not need to be integrated, because those people are there and they work as a corporate team.

Similarly—and I know that this is a burden, because I did it for years—the IJB chief officers also sit on the health board, which is like a corporate team. Their role there is to see to that interface between community health, acute health and primary care, so that role is there.

I would go back to the point that I do not think that the structure in itself matters. The local leadership and local delivery and accountability are what matters. Homelessness, justice and mental health problems are clearly entwined, and having those different service areas in the local systems can work, through local leadership and the local systems.

**Stephanie Callaghan:** I want to touch again on the co-production aspect, which is what really lies at the heart of this. It also means that services will be co-designed, because, up to now, it has not been enough just to listen to what people say and then hand in a policy for design and delivery. We need the direct involvement of lived experience all the way through the process.

Eddie, I want to ask you about the transfer of services. Should children's services, justice and social work be transferred at the same time? What are your views on the proposals to undertake further consultation on that? Also, what are the top risks that you have identified for the transfer of services, and what, if any, opportunities do you see for improvements?

12:30

**Eddie Fraser:** As I reflected a moment ago, if services are going to transfer, the question is how that should happen. Again, I think that that should be very much down to how local systems work.

Back in 2012, when I was chief social work officer and we were first starting to talk about the integration of health and social care, I wrote to my chief executive to say that all services in our

system should be integrated and go into that local system—and it is important to emphasise that the proposal related to the local system within which we worked and in which I, as chief social work officer and subsequently chief officer, had the local authority chief executive as my line manager.

As it stands right now, if adult social care and adult social work were definitely going to transfer, it would be unlikely that I would think that our children's services or justice services should be taken out, too. I would rather wait and see what the consultation on that looked like. Local arrangements, and how things are delivered locally, are of real importance—I cannot emphasise it enough that this is about local leadership and accountability. That is how things are delivered.

There is no worked example of a move to ministerial oversight—to centralisation, if we can call it that—delivering uniformity and improvement. We have variance across our health services just now, even with ministerial oversight, and there are local issues in local health boards that are causing difficulties. Again, that is not an up-or-down thing—that is just where things are, so we need to improve them.

We should be committed not just to co-production but to co-design, which you are right to mention, and we should find models that will allow us to continue to have oversight on what is working. Again, as I have said, we have some of the best legislation in the world with regard to, say, self-directed support. However, the bigger question is: how do we go in and improve that?

Often, people think that self-directed support is not working, just because a lot of people are not taking direct payments. However, that is not the case. When you go in and offer people all the options, many will say, "I quite like option 3. Are you going to take responsibility for getting personal carers in to see mum a couple of days a week, three times a day or whatever?" That is one of the legitimate options that are available for people to choose under self-directed support, but it has to be offered in an honest way. People have to be genuinely offered all the options, and they might well choose that one; in any case, we should continue to have oversight of that. The fact is that people's ambitions change over time. That is why you were right to talk about not just co-production but co-design, and about people being at the table when it comes to oversight.

People often talk about a differentiation in IJBs between voting and non-voting members; in our case, four councillors and four NHS non-execs have votes, while other people do not. However, I would just point out that, in the seven years in which I was the chief officer of an IJB, we never

once had a vote. Everyone was able to speak up and say what they wanted.

It is so important for people to have a real say and, indeed, to be empowered to have their say so that, when they sit down at whatever the new board table might be, they can represent something other than their own individual views. That goes for whoever is sitting at that table. How we do that is really important. There is a range of ways in which that can be done, but the commitment to doing it should be there. With a national care service, as with any local arrangement, one of the questions that should be asked regularly when carrying out oversight should be, “How are you doing co-production and co-design?”

**The Convener:** Listening to you, Eddie, I have to say that it strikes me that you are talking about good practice, which is the way that things should be. In certain parts of the country, though, things might not be working in the way that you have described. Is there an opportunity with this legislation to have consistency of approach and standards and, again, to ensure that people with lived experience have agency and are constantly at the table with the people who offer them support?

**Eddie Fraser:** The legislation gives an opportunity to clarify expectations of what should be in the national framework. No one in health or care gets out of their bed to do a bad job every day—they just do not do that. If things are not working in an area, people do not need to be blamed; instead, they need supported improvement in order to be helped out of that situation, as well as an understanding of why things are not working as well in that area. Every area will have some things that are working well and some that are not, so people will need supported improvement.

Both COSLA’s and SOLACE’s submissions are clear: we think that there is a role for a national care service in setting that national framework and standards. The issue, then, is how people are accountable to the local population for delivering against that framework.

One of the dangers is that responsibility and accountability to the local population get lost. Just now, you have accountability to your local population; in the new arrangement, however, your accountability goes up to the minister instead. We need to be clear about the standards that we set and how we hold people to account, but that accountability has to be to your local community.

**The Convener:** We will now move to the issue of local accountability, which has been much discussed throughout the session. As Sandesh Gulhane has a question on that, I will go to him

first and then come to Paul O’Kane. After that, we must wrap things up.

**Sandesh Gulhane:** The bill aims to provide consistency in social care across Scotland. Have you seen any evidence that the bill will improve quality?

On the back of that, I am reminded of other one-size-fits-all models such as the vaccination programme, for which there was a centralised service. That was great for those who lived in urban areas, but a disaster for those in rural areas. Do you foresee such issues arising here?

**Councillor Kelly:** We have not seen any evidence that moving services, functions and so on to a centralised model will improve the quality of the service, which is the most important thing for all of us.

There are significant risks. We have just talked about the transfer of services; the fact is that those services support some of our most vulnerable individuals, and the lack of clarity will lead to significant risks for social care and social work. That is an unacceptable situation.

To be frank, I think that we can focus on some of the differences in practice across the country that we have discussed without needing structural change at the level of a national care service. I do not think that such a change is required, and we are committed to focusing on that point.

As for the different geographical issues that you referred to with regard to rural and urban areas in the vaccination programme, we see those differences in services, too. As I have said a few times now, there are local differences in the services provided in Aberdeen, Annan or somewhere else. That is as it should be, because services replicate the area’s local requirements. With a move to a central model that is under the control of a minister and which is not locally accountable, that element is in danger of being lost.

**Sandesh Gulhane:** You have just referred to “a minister”, but that is not what we have heard. In the bill, it is all about “ministers”—there does not seem to be “a minister”. Is that your understanding?

**Councillor Kelly:** Is it my understanding that all ministers would be in control of the care board? Yes, absolutely. However, the point that we are making is more that decision making will happen at national level when we think that that would be best served at local level, and we can evidence why, despite some of the difficulties in the system, that is the case.

**Paul O’Kane:** I have a brief question for Eddie Fraser, after which I will ask a final question.

At the end of the previous section of questions, Eddie, you outlined the alternative approach of local and national Government working together to try to find national standards and to implement them in a national care service. Do you see any parallels with what happened in 2017 when proposed education legislation sought to make ministers responsible for improvements in education through regional improvement collaboratives? That legislation was taken away, and there was collaboration and co-design with all the partners to create what we now recognise as RICs, which are run regionally but have local accountability and committees. Might we want to learn from that process here?

**Eddie Fraser:** We want to learn from that process because, in both instances, this is about a joint commitment between the Scottish Government and local government on improvement. It was the same with early years.

However, this proposal is slightly more complicated. We are focusing a lot on the social work and social care aspects, but we need to remember that community health services will also fall under the strategic oversight of the new care boards, so health colleagues have to be fully engaged in all of this, too. This is all about getting to a continuum with regard to what is a health need, a social need or a wellbeing need. We need to be really careful about separating wellbeing from social care and health, because doing so will lead to more demand on health and social care instead of creating prevention as intended.

The short answer is yes. I see the parallels, because the parallel is about a joint commitment to improvement. In the case you have highlighted, it was about education, and in this case, it is about social work and social care.

**Paul O’Kane:** My other question is more for Councillor Kelly. This morning, we have heard you, as COSLA’s representative, express concern about a wholesale transfer of services from local government to the national care service. I have heard it described by people as councils essentially becoming providers in a larger framework. Do you think that there is a principle at stake here for local government?

In its written submission, the Law Society of Scotland said that it is concerned about a lack of evidence for a national care service, which raises the

“question whether the centralisation of what”

is currently delivered locally

“can be justified in terms of the European Charter of Local Self-Government”.

I bring that up, because of the shared commitment by the Government and COSLA to

incorporate that charter. Do you think that principle is at stake, too?

**Councillor Kelly:** Very much so. I think that it is at stake under the current proposals, because one third of council staff, assets and liabilities would be transferred to a care board. That is what is at stake. There is a lack of evidence on how that will improve things for service users, and given that that is what we are all committed to doing, it is a serious concern for councils.

We also believe that where there is good partnership working at the local level, with integration of health, we can deliver for our local communities. That was shown during the pandemic. We are committed to making improvements right now that do not require a national care service, and we are also committed to working with the Scottish Government on some of the stuff we have discussed with regard to fair work and funding.

**The Convener:** Emma Harper has a brief question, after which we must wrap up.

**Emma Harper:** I am trying to get my head around what Dr Gulhane said about the roll-out of vaccines being a “disaster” in rural areas, because of the central approach. That was not my experience; I was a vaccinator in Dumfries and Galloway and the roll-out was fabulous.

With regard to the issue that everybody has raised about centralised versus local accountability, although ministers will have accountability, the delivery of care should happen locally, because different aspects affect rural, urban and island communities. Is that not what this bill needs to deliver?

**Councillor Kelly:** There is a risk in that respect. That might be what you think this will deliver, but a serious risk arises when staff and functions are taken out of local areas. If they become disconnected from education, communities and the other services that we provide—integration et cetera—the ability to react to local issues is lost. That is a serious concern.

We are not sure that the bill will deliver what you say it will deliver. The care boards will be under national Government decision-making control, and I am not sure that such an approach will reflect the local issues of the communities that we represent.

**The Convener:** We must wrap up now, as we are rapidly running out of time. I thank the witnesses for their time this morning—they have been very helpful. At our next meeting, the

committee will continue its scrutiny of the National Care Service (Scotland) Bill with two more evidence-taking sessions.

*Meeting closed at 12:44.*

I now close the meeting.



This is the final edition of the *Official Report* of this meeting. It is part of the Scottish Parliament *Official Report* archive and has been sent for legal deposit.

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