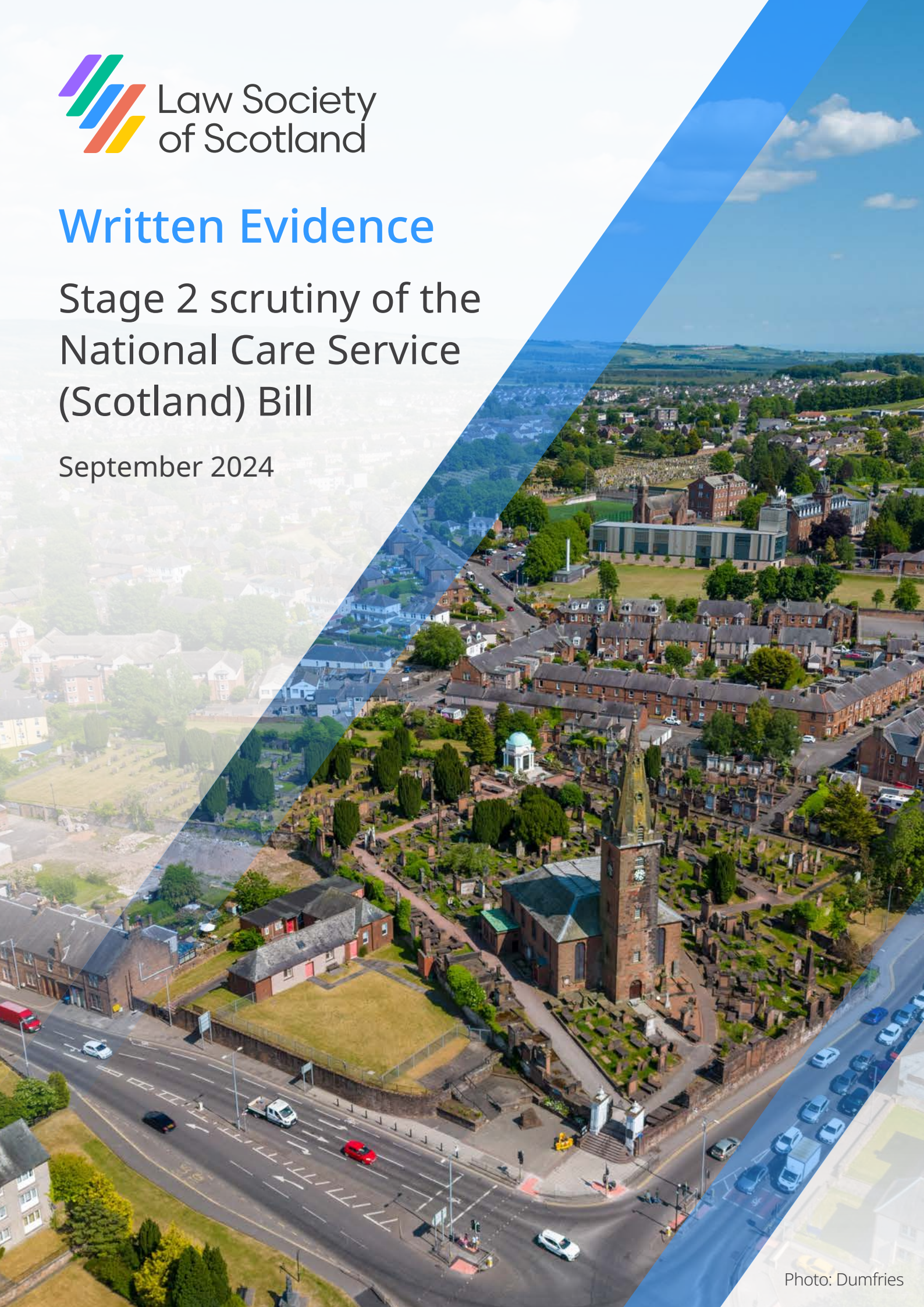


Written Evidence

Stage 2 scrutiny of the National Care Service (Scotland) Bill

September 2024



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Introduction

The Law Society of Scotland is the professional body for over 13,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the Health, Social Care and Sport Committee of the Scottish Parliament's call for views: *Stage 2 scrutiny of the National Care Service (Scotland) Bill*.¹ We have the following comments to put forward for consideration.

Questions in the Call for Views

1. What is your view of the proposed National Care Service strategy (see proposed new sections 1A to 1E)?

Tend to oppose

Please use the text box below to expand on your answer

Please note our general comment, below at Q9, on the approach to the Bill at Stage 2.

Our comments in response to this question relate to proposed sections 1-1E of Part 1, Chapter 1 of the marked-up Bill, as amended by Stage 2 SG draft amendments PCO28, 29, 30, 79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 95, 96, 128, and 129.

Section 1 as amended would set out revised National Care Service Principles. In our previous engagement with the Bill, we highlighted that the principles are very broadly drawn and that it was not clear:

- to whom these principles are addressed and to what extent they are supported by attributable duties or mechanisms for accountability and enforcement.
- how they will interact with existing rights and duties, for example under the Equality Act 2010.
- how these principles will be measured or evaluated. It appears that significant discretion will be afforded to the Scottish Ministers.

¹ <https://yourviews.parliament.scot/health/national-care-service-stage-2-call-for-views/>

It is not clear to us that the proposed amendments to the Bill address these concerns, and we would welcome further clarity on how adherence to the principles will be effectively monitored, evaluated and enforced.

We welcome the clarification provided in new subsection 1(2) as to the meaning of 'human rights' for the purposes of the subsection 1(1). In our previous comments, we highlighted that any new legislation relating to social care must contain clear and attributable rights and duties, and effective mechanisms for redress including legal redress. It must sit alongside and be integrated with work to incorporate human rights conventions. New legislation in this area must be based on and fully embed human rights principles, including the right to live independently and be included in the community as set out in Article 19 of the UN Convention on the Rights of Persons with Disabilities (UN CRPD), and must promote real and effective access to justice for service users and their families. It must be supported by transparent decision-making and robust complaints processes, and must promote accountability to service users. Whilst it is helpful for the Bill to point to the legal instruments underpinning human rights protection, it is important that any definition is sufficiently flexible to deal with any future changes in the legislative landscape. It is also essential that references to human rights within the Bill translate to meaningful realisation of these rights, rather than simply stating policy.

We welcome in principle the proposed introduction of provisions to allow for review and modification of the principles (proposed new sections 1A and 1B). We consider the proposed 5-year review period appropriate. We welcome the consultation provisions in proposed section 1A, however we consider that these could be strengthened by the inclusion of specific duties to consult the groups specified in proposed section 1A(2)(b). The draft amendments still afford significant discretion to Scottish Ministers. There is also no duty to report to Parliament on the findings of any consultation, or the way in which it has been carried out. In our view, the provision on consultation should include these safeguards.

We note that Regulations made under proposed section 1B would be subject to the affirmative procedure. We consider that modifications to the principles should be subject to effective parliamentary scrutiny.

Proposed sections 1C-1E would make provision for the National Care Service Strategy, to be prepared by Scottish Ministers. We recognise that this proposed amendment reflects the consensus agreement with COSLA on shared legal accountability. However, as highlighted in our previous comments on the Bill we note that Scottish Ministers already have certain powers in relation to social care under existing legislation, and we would welcome clarity as to how the proposed revised approach will differ from the existing position in real terms. It would appear that significant discretion will still be afforded to Scottish Ministers in determining the content of the strategy, and to the National Care Service Institutions in



exercising their functions. Whilst we welcome in principle the indication in the updated Policy Memorandum that “It is expected that the national strategy would present an opportunity to streamline and simplify existing national policies and strategies that impact on NCS services” (para 75) we remain unclear as to how this expectation will be met in practice and would welcome further clarity. We would also welcome clarity on how delay or uncertainty arising from additional layers of governance will be mitigated. We have concerns as to how a shared accountability mechanism may work in practice, particularly as regards ensuring that it is clear to individuals how and against whom they should seek to enforce their rights.

Whilst we welcome in principle the public consultation requirements in proposed section 1D, we note that there is no duty to specifically consult with people in receipt of care or unpaid carers. This would appear to be inconsistent with the overall policy aims, and we consider that this consultation requirement should be strengthened.

We consider that the review provisions in proposed section 1E are appropriate.

We note that Stage 2 SG draft amendments PCO4, 5, 26, 27, 34, 35, 36, 37 and 38 would remove sections 2-10 of the Bill as introduced.

[2. What is your view of the proposal to create a National Care Service Board, and the provisions about the role and functions of the Board \(see in particular new Chapter 1B of Part 1, and new schedule 2C\)?](#)

Tend to oppose

[Please use the text box below to expand on your answer](#)

Please note our general comment, below at Q9, on the approach to the Bill at Stage 2.

Our comments in response to this question relate to proposed Chapter 1B of Part 1 of the marked-up Bill and schedules 2C and 2D, as amended by Stage 2 SG draft amendments PCO17, 18, 19, 21, 22, 23, 24, 25, 41, 42, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 106, 107, 108, 109, 110, 111, 112, 113, 120, 121, 133, 134 and 135.

We note that the National Care Service Board will be established as a new public body, with a legal identity separate from the Scottish Government (Updated Policy Memorandum, para 76). We note that details of how the Board will work in practice will be informed by further co-design and stakeholder engagement (Updated Policy Memorandum, para 80).

In our previous comments on the Bill, we called for further clarity on the proposed role and powers of a National Care Service Board, particularly in relation to how the establishment of a new structure will add value within the already crowded legislative and organisational landscape, how it will interact with existing structures, and how it will deliver improved quality and consistency of social care

services in Scotland. Whilst we welcome the additional detail provided by the proposed amendments, we remain unclear as to how this additional layer of governance will in and of itself lead to improved quality and consistency of social care services in Scotland or deliver improved oversight and accountability. We remain unclear as to how it will interact with existing bodies such as the Care Inspectorate, and how unnecessary bureaucracy, duplication and expenditure will be avoided. We also note that the Board will have very general powers and purposes. We would welcome a more detailed specification.

Proposed section 12I would require the National Care Service Board to have and make publicly available a corporate plan. We welcome the requirement in proposed section 12I(2)(b) which would require the Board to set out how it intends to meaningfully involve individuals to whom the NCS provides services, carers and professionals in its decision-making, although we note that this would appear to afford significant discretion to the Board. We also welcome the consultation provisions in proposed section 12J(2), but consider that this could be strengthened by placing a duty on the Board to consult with the groups identified in 12I(2)(b), and by requiring the Board to publish the results of any consultation and the way it has been carried out.

We note that Stage 2 SG draft amendments PCO39, 40, 43, 44, 45 and 46 would remove sections 16 (Direction to care boards), 17 (Removal of care board members), 20 (Emergency Intervention Orders), 21 (Application for emergency intervention order), 22 (variation and revocation of emergency intervention order) and 26 (Compulsory purchase) from the Bill as introduced.

[3. What is your view of the proposal to establish National Care Service local boards and to remove other integration models \(see in particular Chapter 1A of Part 1, and new schedules 2A and 2B\)?](#)

Tend to oppose

[Please use the text box below to expand on your answer](#)

Please note our general comment, below at Q9, on the approach to the Bill at Stage 2.

Our comments in response to this question relate to proposed Chapter 1A of Part 1 of the Bill and new schedules 2A and 2B, as amended by Stage 2 SG draft amendments PCO2, 3, 114 and 115.

Proposed section 12B would provide that integration joint boards under the Public Bodies (Joint Working) (Scotland) Act 2014 would be renamed as National Care Service local boards, and would remove alternative integration models under the 2014 Act. In our previous comments on the Bill, we highlighted the omission of health and social care integration from the Bill as introduced. We therefore welcome this clarification. However, we would welcome clarity on how simply renaming existing structures and restricting scope for local variation will deliver meaningful change for the end users for services. We reiterate our view that the



governance model must be transparent from the point of view of service users, and must make redress possible and accessible.

We would also welcome clarity on the proposed sequencing of changes to integration models and final decisions on the services which will be included within the scope of the NCS to ensure there is no unnecessary duplication or adverse impact on the end users of services.

4. What is your view of the proposed new provisions on monitoring and improvement (see new sections 12K and 12L) and on commissioning (see new section 12M)?

Monitoring and improvement

Tend to oppose

Please use the text box below to expand on your answer

Please note our general comment, below at Q9, on the approach to the Bill at Stage 2.

Our comments in response to this question relate to proposed sections 12K and 12L of the marked-up Bill, as amended by Stage 2 SG draft amendments PCO20 and 49.

We note that the updated Policy Memorandum indicates at para 99 that “The details of the support and improvement framework would be co-designed with shared accountability partners and other key stakeholders, including people with lived experience, once the Bill had passed.” We are concerned that this creates a lack of clarity as to how monitoring and improvement will operate under the Bill, and affords significant discretion to the Board. We remain unclear as to how the proposed monitoring and improvement functions of the Board will operate alongside the many existing bodies which play a role in monitoring and improvement in the social care sector.

Commissioning

Undecided / no opinion

Please use the text box below to expand on your answer

Our comments in response to this question relate to proposed section 12M of the marked-up Bill, as amended by Stage 2 SG draft amendments PCO48.

We have no specific comments at this stage.

5. What is your view of the proposed new provisions to designate a National Chief Social Work Adviser and for the creation of a National Social Work Agency (see new section 26A)?

Undecided / no opinion



Please use the text box below to expand on your answer

Our comments in response to this question relate to proposed section 26A of the marked-up Bill, as amended by Stage 2 SG draft amendment PCO90.

In our previous comments on the Bill, we noted that there was no separate provision for the NSW on the face of the Bill and called for clarity on how the NSW will ensure operational independence to be able to fulfil its role effectively. We welcome the clarification provided by proposed new section 26A but remain unclear as to how establishing a further public body on a statutory footing, alongside and separate to the NCS Board, will improve oversight and accountability for end users of social care services.

We reiterate our request for clarity on how the NSW will relate to proposed and existing structures within the organisational landscape including the National Care Service Board, the Care Inspectorate, Audit Scotland and the Mental Welfare Commission.

6. What is your view of the proposed amendments to the Public Bodies (Joint Working) (Scotland) Act 2014, as set out in the marked up version of the Act?

Tend to oppose

Please use the text box below to expand on your answer

Please note our general comment, below at Q9, on the approach to the Bill at Stage 2 and our comments on proposed changes to integration models at Q3, above.

7. What is your view of the Scottish Government's proposed approach to addressing the areas of further work outlined in the Minister's covering letter?

Direct funding

Undecided / no opinion

Whilst we do not seek to adopt a policy position on the detail of funding arrangements, we would emphasise the importance of any work in this area being supported by a robust evidence base.

Inclusion of children's services

Undecided / no opinion

Whilst we do not seek to adopt a policy position on which services should be included in a National Care Service, we would emphasise the importance of any move towards consistent delegation in this area being supported by a robust evidence base.

We also note that the proposed draft amendments to the Bill would remove section 30, which provided for consultation before bringing children's and justice



services into the National Care Service. In our view, effective consultation is essential.

[Inclusion of Justice Social Work](#)

Undecided / no opinion

Whilst we do not seek to adopt a policy position on which services should be included in a National Care Service, we would emphasise the importance of any move towards consistent delegation in this area being supported by a robust evidence base.

We also note that the proposed draft amendments to the Bill would remove section 30, which provided for consultation before bringing children's and justice services into the National Care Service. In our view, effective consultation is essential.

[Anne's Law](#)

Undecided / no opinion

[Please use the text box below to expand on your answer referring to the specific areas of further work that you are commenting on](#)

We responded to the Scottish Government consultation on Anne's Law in November 2021.² We highlighted that in our view, the aim of Anne's Law should be to allow adults living in care homes to effectively claim their existing rights, and to ensure that those rights are restricted only in exceptional circumstances and in a way that is proportionate and non-discriminatory in according with national and international human rights law. Whilst we do not take a view on how Anne's Law would best be delivered, we would emphasise the importance of consistency and coherence across the statute book.

[8. What is your view of the initial draft of the National Care Service Charter?](#)

Undecided / no opinion

[Please use the text box below to expand on your answer](#)

In addition to the draft Charter, our comments in response to this section relate to proposed sections 11-12A of Part 1, Chapter 1 of the marked-up Bill, as amended by Stage 2 SG draft amendments PCO52, 55, 56, 122, 130, 131 and 132.

In our previous comments on the Bill, we highlighted that it was not clear whether the Charter would have any legal status, or what processes- if any- would be available for enforcing the rights set out in the Charter. Having reviewed the draft Charter, we would make the following further comments:

- While the Charter contains a useful summary of some (not all) of the rights of people using the NCS, we believe it is unhelpful to create a document in

² [21-11-02-ppc-annes-law-consultation.pdf \(lawscot.org.uk\)](#)

statute which, according to section 11(4), has absolutely no legal effect. This is not true of other documents created by virtue of primary legislation, such as Codes of Practice. We do not see why the Charter could not have a similar status.

- Section 11(4) calls into question the meaning and effect of some of the Charter itself, for example the statement that ‘you can also reasonably expect that the NCS will deliver everything set out in this charter, even if the law doesn’t say we have to’. ‘Reasonable expectation’ is a well understood concept in judicial review. The wording of the Charter clearly implies that it should operate in terms of statements contained in the Charter. If section 11(4) negates that, the Charter itself is misleading.
- The new provision at section 12(4A) that Ministers can delegate the drafting and review of the Charter to anyone they choose could further undermine the status and authority of the document.
- It’s not clear who the ‘we’ is in the document. Does it include, for example, private care providers?
- There is a very substantial overlap with the National Care Standards. It is not obvious that having two overlapping documents saying similar things will improve clarity and accountability for service users.
- Most importantly, the Charter does not deliver the aim set out at section 11(2)(b) and para 189 of the updated Policy Memorandum of empowering service users “with clarity on the pathway to uphold their care-specific rights or human rights in relation to the NCS”. It lists two mechanisms for upholding your rights – making a complaint and judicial review. There are numerous other routes to upholding relevant legal rights, including other forms of legal action and involving regulatory bodies, human rights institutions and inspectorates. Failing to mention these undermines rather than strengthens accountability.

If the Charter is to remain in the Bill, we believe its legal effect should be strengthened and clarified, and it should be substantially reworded.

9. Do you have any other comments on the Scottish Government’s proposed draft Stage 2 amendments to the National Care Service Bill?

Please use this text box to provide your answer

General Comments

In our previous comments on the Bill, we have highlighted our interest in the creation of good law which is clear, effective, efficient and which achieves its objectives without unintended consequences. Effective scrutiny is a crucial element of the creation of good law. Given the nature of the reforms proposed under the Bill, the importance of full and robust scrutiny cannot be overstated.

The draft amendments would make significant changes to the Bill as introduced. Whilst we note the Scottish Government’s view that purpose of the Bill and the ‘vision’ for the NCS remain unchanged, the draft amendments would

fundamentally change the proposed structures of the NCS and the approach to accountability. The scope of the amendments reflect a significant change in policy intention and will render much of the evidence given at stage 1 nugatory. Whilst we welcome the opportunity to engage with the lead committee's further call for evidence, we would highlight that the volume of additional material, the format in which it has been provided and the timescales for response over the summer period have made meaningful engagement challenging. We would query whether this is consistent with the emphasis on co-design and on engagement with people who access and deliver care and support.

In our previous responses, we have also highlighted the complex existing legislative framework for social work and social care services in Scotland, and that it is important that any new legislation within this landscape is linked to a demonstrable public interest justification and leads to improved outcomes for the end users of social care services. New legislation must not simply add a further layer of complexity to an already complex operational environment. We are concerned that the marked-up Bill remains difficult to navigate and interpret, which may lead to legal challenges.

We have further highlighted the challenges arising from scrutiny of the Bill taking place in advance of the co-design process. We continue to be concerned that this limits the potential for full and effective scrutiny at the stage of primary legislation as important details are not available.

In light of all of the above, and whilst we do not take a position on the policy issue of whether a National Care Service should be established, we would query whether a more appropriate approach may have been to withdraw the current Bill and introduce a new Bill, possibly subject to a focused and abbreviated Stage 1 with agreement of the lead committee. We are concerned that the current approach at Stage 2, whereby fundamental changes are being made to reflect a significantly revised policy intention, limits the scope for full and effective parliamentary scrutiny and is therefore inconsistent with the creation of good law.

[Further comments on the Scottish Government's proposed draft Stage 2 amendments not covered above.](#)

Further proposed changes to proposed Chapter 1C (sections 14, 26B, 13 and 15) of the marked-up Bill (Stage 2 SG draft amendments PCO33, 103, 116, 117 and 118)

Proposed section 26B would allow Scottish Ministers, by regulations, to confer additional functions on the National Care Service Board. Whilst section 26B(2) requires Scottish Ministers to consultation with the Board, local authorities and health boards, we note that there is no requirement to consult with the public generally or with carers or those receiving or providing services. We consider that this consultation requirement could be strengthened.



We note that regulations under proposed section 26B would be subject to the affirmative procedure. We consider that modifications to the principles should be subject to effective parliamentary scrutiny.

We note that Stage 2 SG draft amendments PCO6, 7, 8, 9, 10, 11 and 12 would remove sections 27 (Power to transfer functions from local authorities), 28 (Power to bring aspects of healthcare into the National Care Service), 29 (Power to re-organise the National Care Service), 30 (Consultation before bringing children's and justice services into the National Care Service- see our comments above), 31 (Transfers of staff), 32 (Transfers of property and liabilities etc.) and 33 (Interpretations of expressions about functional transfers) from the Bill as introduced.

Further proposed changes to Chapter 7 of the marked-up Bill (Stage 2 SG draft amendments PCO50 51 and 119)

We have no specific comments at this stage.

Proposed changes to Part 2 of the marked-up Bill (Health and Care information) (Stage 2 SG draft amendments PCO92, 93, 94, 97, 98, 99, 100, and 102)

The “information” concerned will include sensitive personal data, the dissemination of which needs to be carefully controlled. Any steps towards data sharing should be within a framework first approved by the UK Information Commissioner as compliant with Data Protection law. It is also important that nothing be done that might jeopardise the continuity and review (in 2025) of the Adequacy Determination accorded to the UK by the EU Commission (see <https://ico.org.uk/for-organisations/data-protection-and-the-eu/data-protection-and-the-eu-in-detail/adequacy/>).

Proposed changes to Part 3 of the marked-up Bill (Reforms connected to delivery and regulation of care) (Stage 2 SG draft amendments PCO91, 104, and 105)

Whilst we have no specific comments at this stage on the proposed amendments to these sections of the Bill, in relation to procurement we would emphasise the need to ensure that any procurement carried out must be consistent with the UK's international obligations and relationships with the EU.

Proposed changes to Part 4 of the marked up Bill (Final Provisions) (Stage 2 SG draft amendments PCO32, 47, 81, 101, 123, 124, 125, 126, 127, 136 and 137)

We have no specific comments at this stage.

Proposed further changes to the schedules (Stage 2 SG draft amendments PCO13, 14, 15 and 16)

We note that draft amendments PCO13, 14, 15 and 16 would remove schedule 1 (CARE BOARDS: CONSTITUTION AND OPERATION), schedule 2 (CARE BOARDS: APPLICATION OF PUBLIC AUTHORITIES LEGISLATION), schedule 3 (ENACTMENTS GIVING RISE TO TRANSFERABLE LOCAL AUTHORITY



FUNCTIONS) and schedule 4 (MODIFICATIONS IN CONNECTION WITH PART 1) from the Bill as introduced.

We have no specific further comments at this stage.



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