

National Care Service (Scotland) Bill Stage 2: calls for evidence on draft amendments

CCPS written evidence, submitted on 20th September 2024

National Care Service Strategy

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

Partly support and partly oppose. ✓

We cannot respond to the new sections 1A to 1E without also noting changes to the NCS Principles in the original section 1. We appreciate some amendments have been made, including attempts to incorporate elements of the to-be-deleted Public Bodies Act principles. However, as principles to apply to the full gamut of activities of an NCS, including the new provisions for a strategy in 1A to 1E, these are not sufficient. For example, key principles for social care, such as the principle of choice and control emphasised in the committee's own recent report on the SDS Act, are omitted. The government's own principles of ethical commissioning and procurement are not wholly replicated – providing a significant gap in the key commitment to instigate ethical commissioning, as per the Independent Review of Adult Social Care.

CCPS will shortly publish a paper comparing principles in relation to the commissioning of social care, which gives more detail on our concerns that these provisions provide insufficient clarity for accountability, do not reflect the ethos of social care, and offer no sanction to ensure compliance.

Generally, our response to the new sections 1A to 1E are mixed. We agree ministers should be accountable for setting a broad direction for the NCS, with engagement and regular review; but the new provisions do not go far enough.

The NCS strategy should be the guiding document for a linked, whole system commissioning strategy running through the NCS. Yet, the provisions omit key elements of a commissioning process (let alone an ethical one). There are no provisions for ministers to assess need (current or future) or the state of the available market, nor for ministers to publish the totality of funds available to a national care service, even on an annual basis, to deliver any strategic direction set through the 5 years. Without this there is a risk that any such strategy sets the NCS up to fail.

As a general point, the amended Bill (as the original Bill) fails to acknowledge that the social care and support system is wholly reliant on a mixed economy of providers – diversity which is central to the principle of choice and control – which goes beyond public sector provision. Without our not-for-profit members the social care system would collapse. Yet, our members are not statutory consultees in the new Bill (noting that engaging with provider organisations is not the same as engaging with the workforce), though they are still in some sections of the amended Public Bodies Act (e.g. Section 5, 2014). Indeed, these new additions to the Bill specifically define NCS institutions as the public sector alone – and whilst the structure of the Bill may justify this – we are disappointed that it has not been more radical in its vision of reform.

We also note that in the proposed amendments Ministers have accountability for the strategy, but overall accountability for the NCS in the original Bill is removed.

National Care Service Board

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)?

Partly support and partly oppose. ✓

At stage 1, CCPS supported the IRASC proposal for ‘a board of governance with a Chair appointed by, and accountable to, Ministers (and including) representation of the workforce, people experiencing social care support, unpaid carers, and providers. Even accounting for the fact that CCPS providers have no guaranteed seat on the Board – again missing the reality of our sector – the NCB provisions fall short of what we might have hoped.

- The primary function of the Board appears to be monitoring and improvement, largely after the fact. This lacks aspiration and curtails the role of any NCB to drive positive reform pro-actively. We do not see sufficient direct provision for the NCB to set policy that will direct the funding and activity of Local NCS Boards, bringing into question how it can address unjustified variation. It is not clear how it can drive innovation.
- Although Ministers may fund the board, it is not the main conduit for flowing resources to local care boards, significantly reducing its powers to effect change. Indeed, the flow of funding in the new Bill does little more than embed the status quo, which evidently does not work. We would also note that Ministers have had the opportunity to directly reform local implementation of social care provision whilst holding the purse strings but have not been able to effect the changes set out in IRASC; we do not see how an NCB could be more successful without being the driver of investment.
- Despite having contributed to the government’s Expert Legislative Advisory Group we still cannot map the relationship between the NCB and other national bodies, such as the Care Inspectorate and SSSC. Whilst one provision states the NCB must avoid duplication, the Bill does not clarify accountability, responsibility or direction. The statutory functions in relation to improvement seem remarkably close to activities currently within remit of the Care Inspectorate.
- In relation to the NCB’s direct commissioning role, we are not clear how this relates to the current role of Scotland Excel. Whilst we have significant concerns about the conflict of interest inherent in the local government ownership of SXL in relation to the NCS, clarity is needed.
- Despite policy commitments to ethical commissioning (which we note are lost in the new Bill’s wording) there are no responsibilities for an NCB to set national indicators around ethical commissioning and procurement to lever much-needed, long-awaited change as per IRASC – or to directly monitor and report on these.
- There are no indications that national workforce planning for social care staffing will sit with the NCB. Nor are we clear what role the NCB may have in any future approach to sectoral bargaining or Fair Work delivery.

An inclusive, effective NCB is key to the CCPS vision for an NCS – but these provisions are too limited or unclear in accountability, scope and membership to deliver on Feeley.

Creation of local boards and removal of other integration models

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. ✓

Whilst we have no objection to the plan to streamline the 2014 Act to provide a single model of integration, it seems to us that reform of the current arrangements for Integrated Joint Boards to become NCS Local Boards is otherwise minimal and, as such, is unlikely to result in the reform much-needed in the sector to meet people’s needs. We are unclear how the governance of local boards will change to ensure greater participation and decision-making powers to all those with a stake in service. We would like to see the Scottish Government and CoSLA’s response to the SDS Post Legislative Review Stage 2 report in relation to the operation of reformed IJBs in this context. We give further comment in this in our responses to the questions on commissioning, direct funding and “any other comments”.

We also note here our desire to see greater clarity around the inclusion of housing support and homelessness services.

Monitoring and improvement and commissioning

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)?

Tend to oppose. ✓

We have some confusion regarding the intent with regard monitoring of performance as the amended Bill is clear this relates to services provided, not to the performance of the NCS Local Board. We simply are not clear what this means for individual not-for-profit providers contracted to provide NCS services, nor how it relates to the existing work of the Care Inspectorate or SSSC – which at this point in the process is a significant concern, given the potentially profound consequences of these short new sections of the Bill.

Similarly, we assume the potential powers of intervention under the NCB’s support and improvement framework (New 12L) are to focus on service provision, and not the local strategic commissioning body of the NCS local board, in line with the wording of new 12K – although this is not explicit in the drafting.

We note there are no duties on the NCS Board to consult on development of the support and improvement framework.

The provisions with regard monitoring and improvement (new 12L) make no references to monitoring and improvement in relation to rights, quality, accessibility, ethical commissioning and procurement, workforce development, Fair Work, service sustainability or meeting of need – except in so far as they may relate to the principles indirectly through having regard to the national and local strategy documents. Provisions in the new 12K infer no duty to regard, even indirectly, to the principles of the NCS in development of the support and improvement framework. As we have also noted, the NCS principles themselves require improvement.

As a result of the above, it is hard to see how these core functions of the NCB will support implementation of the IRASC or result in a simplified and effective system of accountability and improvement.

Commissioning

Tend to oppose. ✓

Section 12M relates solely to procurement by the NCB – not to commissioning. It does not place duties on the NCB to prepare and consult on a commissioning plan for national or cross-NCS Local Care Board services (noting that the corporate plan of the NCB may not fulfill this function). It does not, as already noted, explain how these provisions will operate alongside SXL, or make the work of SXL redundant re social care. It sets no context for when, and what types, of services may be procured directly by the NCB, nor how funds will be released by Ministers to support national commissioning where the Board deems this appropriate – for example to support a Once-for-Scotland Best Value approach. It confers a power on the NCB to procure but provides no powers for the NCB to compel procurement across NCS local board boundaries.

As noted elsewhere, there is now no provision in the Bill on embedding ethical commissioning practice, and therefore no compulsion on the NCB to adhere to ethical principles in direct procurement.

As now written, it is quite imaginable that this power might never be enacted in practice.

National Chief Social Work Adviser and the National Social Work Agency

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. ✓

We do not have a specific view on the establishment of either the National Chief Social Work Adviser or the NSWA. However, we do have a concern that, by noticeable omission, there is no equivalent leadership role or workforce agency established (and by default funded) for the vast majority of social care and support professionals who will deliver the NCS and be in direct engagement with those who need support. For a largely female workforce who are already undervalued, under-remunerated and marginalised in public policy, this is a significant concern for CCPS.

Amendments to the Public Bodies (Joint Working) (Scotland) Act 2014

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. ✓

As noted under question 3, we are disappointed that options to address key challenges in delivery of the Public Bodies Act – including the local transfer of funds from crisis to prevention, dissonance in funding and governance regimes, tensions over funding flows and the lack of ethical commissioning and procurement – have not been addressed in the proposed reforms. Change seems minimal in relation to IJBs.

Sadly, the Scottish Government's deal with local government has removed the potential of direct funding to NCS Local Boards. The new provisions in the Bill on procurement – and amendments to the Procurement Act – still put procurement of NCS social care in the hands of local government, splitting procurement out from the full commissioning cycle. We are keen to see this artificial split removed, with clear accountability for decisions over the purchasing of support (through whatever means most appropriate) sitting with the NCS Local Boards and acknowledging local government as a partner in provision alongside those providing contracted public services out with the public sector. We believe this would have the potential to ensure NCS Local Board commissioning plans are enacted as intended, and to create a more level and sustainable playing field among providers of services. CCPS will shortly publish a new report on the current operation of IJB directions, which we will happily share with the committee, showing that the PB Act approach to IJBs using directions has not delivered as intended.

However, our view is that the amended Bill largely codifies the current system which is neither delivering for people who need support, nor supporting our members sufficiently in their delivery of public service.

Areas of further work

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. ✓

We have read the Minister's letter but feel too little information is given in this to have an opinion on any proposed amendment. We support direct funding of the NCB but, as we note in our answer to question 4, the new provisions on NCB procurement are too vague at this time to enable its effective use. In our answer to question 6 we note our disappointment that funding is not flowing direct to NCS Local Boards with them taking direct accountability for procurement.

Inclusion of children's services

Undecided / no opinion. ✓

Our members have differing views on the inclusion of children's services. Some fear the disintegration of whole family support across education, housing and other non-NCS services

and the loss of C&YP voice, if included; some fear loss of integration with wider health and social care, support for transition and reduced funding and profile if excluded. However, wherever this debate lands politically, we struggle to see how an NCB can be established with the right powers and expertise without clarity.

Inclusion of Justice Social Work

Undecided / no opinion. ✓

Again, whilst there are differing views on the place of justice within the Bill, we note that discussions have now focused on justice social work, not a discussion of wider justice services within social care.

Anne's Law

Tend to oppose. ✓

We note the significant concerns raised about the current wording of Section 40. In discussion with our members, we note in particular that the Bill does not recognise that key family members / carers are “significant others”, not just visitors. Concerns have also been raised over whether the provisions are inclusive enough of all settings in which people may be receiving end of life care or living with life-limiting conditions. We hope to see a further iteration of Section 40 to address the concerns over the disconnect between intent and legislative provision.

Draft National Care Service Charter

8. What is your view of the initial draft of the National Care Service Charter?

Undecided / no opinion. ✓

We appreciate the importance of a clear document which sets out for people, and those providing the NCS, the legal rights a service must uphold and the culture which should be embedded within it. This is particularly important given that social care and support is delivered at the intersection of many pieces of separate legislation, not just the NCS Bill. We note, at this point, our disappointment that work on a Bill to incorporate human rights has been shelved.

We are acutely aware that this document is in development before the Bill has completed its passage and therefore not subject, in draft, to the final provisions of the NCS legislation. In this context we note, for example, that the draft Charter emphasises independence, choice and control – which is inherent to the Self-Directed Support Act principles, but not yet reflected in either version of the NCS Bill. Similarly, the section on care home visits cannot yet reflect the final provisions re Anne’s Law.

At this point, our key focus is on influencing the primary legislation to inform a charter. However, we do note that some of this existing work would be helpful to use as a checklist to assess the proposed principles for an NCS.

Other comments

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

The loss of commitments to ethical commissioning and procurement is deeply worrying and misses a fundamental point of the Feeley Review – that fairness, collaboration and equity are required to invest for the public good. We see nothing yet to underpin a fundamental shift in commissioning practice.

In particular, section 41 is limited in a number of ways. We understand that this provision has been previously considered in relation to procurement regulations suited primarily to a “once only” option to apply to outsourcing. In its current form (with the 5- and 3- year limitations) its usefulness is limited and may indeed have the unintended consequence of excluding providers from awards. The definition of a qualifying organisation is not clear. We are concerned it may also inadvertently and unintentionally exclude some not-for-profit organisations. We seek clarity here.

The provisions address only procurement, which is just one option for awarding funds. The caps for direct award are not amended or wholly removed, for example.

We see no definition of public service mission.

In March 2024, 83% of respondents to a CCPS survey of not-for-profit providers said they were providing a public service despite a deficit budget. Forty-four per cent were drawing on reserves to deliver a publicly commissioned service. And 61% were discussing the viability of their current contracts with councils. The need to introduce effective commissioning and procurement reform is beyond urgent.

We are exploring options to address the inequities and challenges faced by our members with civil servants. We have shared the English Health Care Services (Provider Selection Regime) Regulations 2023 to explore whether these may provide a helpful basis for a model in Scotland. We note, from paragraph 7.3 of the memorandum accompanying these Regulations, the focus on addressing the same issues which were outlined in the IRASC.

As we noted in our 2022 proposals for amendments, the original legislation needed much work but gave the basis for significant changes, which may have pushed the Bill closer to Feeley. Following the local government deal, and the new bill, this appears to be a legislative change which will largely embed the status quo, not IRASC. The one major change to current provision – an NCS NCB – has accountability for, but few powers to drive, change.

We continue to engage with the government – and all partners – to listen, propose alternatives and evaluate potential. The sector needs major reform and investment now. Our members can contribute expertise and experience and have a significant stake in the good use of public funds for people. But in the midst of the crisis we face, this Bill does not yet demonstrate that an NCS will value that provider voice, nor does it yet provide a clear route map for hope.

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