

NATIONAL CARE SERVICE (SCOTLAND) BILL 2022

WHAT IT IS AND WHAT IT ISN'T

INTRODUCTION

The purpose of this paper is to take a critical look at the National Care Service Bill, as introduced to the Scottish Parliament¹ and explain why as currently drafted it will not deliver the vision of a comprehensive National Care Service (NCS) which we set out in *Caring for All*² and to highlight where amendment would improve it. We also explain why the measures it proposes may make care services worse, not better.

Our intention is to assist all those who want a National Care Service worthy of the name to come together and campaign for the changes to the Bill that might enable this to happen, so as well as critiquing the content of the bill we set out the main areas it needs to cover and the issues it needs to tackle.

BACKGROUND

In response to widespread concerns about the collapse of the care system during Covid, the Scottish Government set up the Independent Review of Adult Social Care which involved creation of an advisory panel³, but concerningly was chaired by one of the previous heads of the health and social care system in Scotland, Derek Feeley. The SNP Government accepted Mr Feeley's recommendations⁴ and then made a broad pledge in their election manifesto to deliver them through the creation of a National Care Service (NCS). The new SNP Government undertook a consultation on creating a new NCS last year and by lodging the National Care Service Bill in the Scottish Parliament on 20th June they could in part say they had met their manifesto agreement.

The draft Bill was accompanied by the usual policy and financial memorandums, a requirement for all legislation presented to the Scottish Parliament, and explanatory notes which help explain the legalese and how the bill fits with existing legislation and what needs to be amended. While this critique refers to those other documents, which in places help with understanding what the bill will and won't change, our focus is on critiquing what the bill itself as framed will and won't do, the desirability of what is proposed and the key omissions and what needs to be added.

Common Weal wishes to strongly note our particular concern about the undemocratic nature of the NCS Bill process. The Scottish Government has chosen to determine much of the design of the NCS, including critical details of its remit, costing and structure, through secondary rather than primary legislation. By choosing to proceed in this way, the government has failed to set out transparently what its version of a NCS actually is, undermining the democratic process. Instead of scrutinising the government's plans, Parliament – as well as bodies in civic Scotland such as ourselves and the trade unions who represent what will be the staff of the NCS – will have to spend time trying to discover what they are, because what's not in the Bill and the accompanying papers is key to how it will eventually function.

THE STRUCTURE OF THE NCS BILL AND ITS IMPLICATIONS

The title of the Bill is misleading, it is in fact a Health and Social Care services bill. As the Financial Memorandum makes clear, over half the budget of the proposed new service will be for community health provision. Moreover, the clauses in Part 2 on Information apply not just to the NCS but the whole of the NHS.

This is an enabling bill, which includes a few more clauses with fine sounding intentions than is usual in such legislation, but which fundamentally is designed to give more powers to Scottish Ministers.

The main content of the bill, which is contained in Part 1, serves to remove responsibility for care provision from local authorities and give it to Scottish Ministers and care boards appointed by them and in doing so it transfers almost all power over the care system from local democracy to central government. There are no mechanisms in the bill to counter this or to hold ministers to account, for example to ensure the Scottish Government provides adequate funding for the National Care Service. This has rightly been condemned as a power grab and attack on local democracy by a number of Trade Unions and political parties, the detail of which we consider below.

Section 35 of the bill then clarifies that there are two parts to the NCS, the care boards and Scottish Ministers. What this means is that the NCS centrally, or any NCS function that Scottish Ministers believe should be delivered centrally (there is nothing in the Bill to prevent Scottish Ministers running the lot), is a part of Scottish Government and therefore falls to ministers discretion how to organise. That is why there is nothing in the bill about matters like how training should be organised or the mooted National Social Work Agency. By making the NCS a part of central government, rather than an arm's length service, Scottish Ministers intend to give themselves absolute power.

We believe that is totally wrong and instead what is required is a separately constituted

NCS delivered through local authorities. At the national level, instead of giving Scottish Ministers the discretion to do what they want, the NCS Bill should set out the framework for a democratically elected board (with local authorities at its core but with provision for other stakeholders) and the functions which are best delivered centrally (workforce planning, training, research, the National Social Work Agency etc)

As if their proposed powers were not enough, under Clause 29, entitled “Power to re-organise the National Care Service” Scottish Ministers can by regulation – which are subject to lesser degrees of scrutiny by the Scottish Parliament – “transfer to themselves a function conferred on a care board”.

The justification provided in the policy memorandum for this power grab is as follows:

“The Scottish Government is committed to engaging with people with experience to co-design the detail of the new system, to finalise new structures and approaches to minimise the historic gap between legislative intent and delivery. For that reason, the Bill creates a framework for the National Care Service, but leaves space for more decisions to be made at later stages through co-design with those who have lived experience of the social care system, and flexibility for the service to develop and evolve over time. Some of those future decisions will be implemented through secondary legislation, others will be for policy and practice. Where those decisions are implemented through secondary legislation (under this Bill or through pre-existing powers), financial and regulatory impact assessments will be provided.”

There is just one clause in the bill, under principles, that appears designed to make this happen: “services provided by the National Care Service are to be designed collaboratively with the people to whom they are provided and their carers”. Whether the term carer includes both paid staff and informal carers is not clear, it is not defined, but there are no mechanisms in the bill to enable redress should services NOT be designed collaboratively. The population of Scotland is being asked to trust Scottish Ministers, the same Ministers who in the view of many including Common Weal pushed people

infected with Covid-19 out of hospital into care homes.

Even if one did trust the Scottish Government absolutely, how they could possibly work with communities across Scotland to design care services and then embody this in secondary legislation and further policy prescriptions is not explained. There is a serious risk that this results in a one size fits all care service, which takes no account of the differences between areas in terms of needs, geography etc. It should be self-evident that for services to be designed by the people who use them, i.e those with “lived experience”, and their carers, both informal and paid, power needs to be devolved, not just to local authorities but within local councils to local communities. There is no mechanism in the bill to make that happen.

There is here, therefore a fundamental contradiction at the heart of the bill between its provisions and the Scottish Government’s stated intention to design services with people. It also seems to go against the principles of ‘community empowerment’ embodied in the 2015 legislation.

It is possible that some of changes we advocated as being fundamental to a National Care Service which are not included in the bill – such as collective bargaining, free service provision at the point of need, public ownership and even local control – could be included in secondary legislation but that would intend entirely on Scottish Ministers. In our view these principles should be embedded within the bill or, as a distant second option, the Scottish Government must set out a clear framework, including timescales, for how these issues will be addressed.

While Part 1 of the Bill on the structure of the NCS has 7 chapters and 35 clauses, Part 2 of the Bill on information has just two clauses.

Part 3 of the Bill is the only section that touches on the what and how services will be provided and includes the SNP’s manifesto commitment to introduce rights to respite for carers and Anne’s Law, the right to visit residents in care home. The policy memorandum does not explain why, if it was possible to introduce these rights, it was not possible to introduce others, starting with a

right to care provision for all those who need it.

KEY ISSUES IN THE BILL

Purpose and principles of the NCS

The bill does not set out the purpose of the NCS and, read in isolation, its content provides little idea of what this might be. The policy memorandum does, however, include this sentence:

“The purpose of the National Care Service (Scotland) Bill is to improve the quality and consistency of social services in Scotland”.

This in our view is fundamentally very conservative, the aim is to improve what is there, not fundamentally change the current system. To that the Scottish Parliament needs to consider what care is, why help and support with care is needed and from that determine what a National Care Service should do, as we did in Caring for All. Having considered those matters we proposed that the National Care Service should have three fundamental legal duties (or purposes):

1. To promote a caring society;
2. To support those who provide care informally through caring relationships;
3. To provide care directly where this is needed.

These three duties should be set out at the very start of the bill.

The first clause in the Bill is titled “National Care Service Principles” but, as we have argued elsewhere⁵, these are not so much a set of principles as a list of policy prescriptions and exhortations. Part of the explanation for this is they have not been derived from any proper consideration of what care is or what care provision should be about.

out eight principles which should determine how a National Care Service should be delivered, all of which were built upon Rights guaranteed by appropriate Resource allocation, the Responsibility of government and public sector agencies to deliver them, and the Relationships that underpin Care. What we called the Four Rs.

None of the eight principles we proposed in Caring for All appear in the Bill:

1. **Universality of Care and Promotion of Welfare:** care should be on offer to people throughout the whole course of their lives. At times when our own resources are insufficient to give us the support we might need, public care should be available. This includes necessary support to those who care formally and informally within families and kinship groups – whether parents, kinship carers, or other carers. The promotion of welfare is a fundamental public duty.
2. **Accessibility and Prevention:** care services, however provided and including publicly provided social work services, should be easily accessible within local communities and available at the earliest opportunity to those who require them.
3. **Services Built on Relationships, with Minimum Intervention and Minimum Bureaucracy:** care is most effectively delivered when it is provided by those whom we trust and know, or who are trusted and known within our communities. This might involve the maintenance of long-term relationships based on an open-door policy between workers and users of services. There should be no accusations of over-dependency – relationships between citizens and professionals should always be based on minimum interventions, not determined by pre-determined protocols or eligibility criteria. Elaborate bureaucracy should only be in place where of proven necessity e.g., in complex care situations.
4. **Service Provision Based on Individual and Collective Agreement on Need and Outcomes for Services Provided:**

workers tasked with offering care services within communities should agree need and desired outcomes with those they are supporting, whether collectively or individually. The Four Rs.

5. **Independent Living:** people with disabilities should be supported so that they can fulfil their potential and live their lives like all other citizens. This involves choice and the right to determine services required through agreement over assessed need.
6. **Public Provision Free at the Point of Need:** all care, from briefly-given advice on a particular issue to full time residential or nursing home care, should be free and publicly provided. This recognises the place of Third Sector (not-for-profit) provision to meet very specialised need.
7. **A Valued Workforce: the days of care being the role of unpaid or low paid women belong in history not in a modern care service:** Care and care work are fundamental to a progressive society that values all its citizens, and the recognition of its importance should be reflected in the training and pay given to a workforce who are the subject of sectoral collective bargaining. Social care is a highly skilled job and should be remunerated accordingly and all should have access to levels of qualification and training appropriate to their role; career pathways should be clear and open to all. Health and Safety should be accorded priority.
8. **Recognition of Diversity and Difference:** services must recognise that our communities are based on very different kinds of identity and culture, and their delivery must be sensitive to, and address issues that create barriers and potentially further discrimination and inequality.

The Scottish Government is already effectively committed to some of these principles, in whole or in part: for example, it has repeatedly affirmed its commitment to Independent Living and its decision to abolish care charges means it too believes care provision should be free. We see no reason therefore to prevent

a more comprehensive set of principles from being incorporated in the bill. This would then provide the overriding framework for HOW the NCS should operate, however, organised and providing a means of holding whoever was responsible for the delivery of care to account.

Rights

The first of the Scottish Government's proposed principles refers to rights: "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". Having regard to rights – for example the care standards which have existed for over 20 years and entirely rights based – is not the same as making them happen and unless there is clear articulation of what entitlements the rights referred to actually convey, the principle is meaningless. There is nothing in this principle as it stands that is enforceable and it should be regarded therefore as a mere exhortation.

The NCS Bill does introduce two new rights, under Part 3 "Reforms connected to the delivery of care". The first, a right for carers to have a short break, has been created by a series of amendments to the Carers (Scotland) Act 2016. For the second, named Anne's Law, which enables Scottish Ministers to issue directions to care homes to allow visits, the word "right" is not mentioned –. In neither case does the bill provide carers or care home residents any means of redress should their rights be ignored, whether by a care board failing to provide a short break or a care home denying a visit. Rights without clear means of enforcement are effectively meaningless. It is telling that the only assessment of needs and financial costings produced in relation to the Bill is for this specific right for carers. The financial memorandum is clear that beyond this what care is actually provided through the NCS will depend on future govt budget decisions.

However, to the extent that these two measures do create new rights – and they are an improvement on the current position although disappointing to those who have campaigned for real change for so long – this begs the question of why the National Care Service Bill has not

created a comprehensive set of new rights by strengthening existing legislation. For example, given the IRASC's recommendation to abolish eligibility criteria why not, building on the Social Work (Scotland) Act 1968, give all people a right to a care needs assessment and a right to service provision where care needs cannot be met in any other way. To those who would object to the costs of meeting low level care needs, the response is that one of the Scottish Government's principles is "services provided by the National Care Service are to be centred around early interventions that prevent or delay the development of care needs and reduce care needs that already exist". A legally enforceable right to care would make early interventions possible and properly resourced community level services would ensure that they occur.

The National Care Service Charter (Clause 11) is no substitute. It requires Scottish Ministers to set out the rights and responsibilities of individuals in respect of the NCS and "a description of the processes available for upholding the rights in relation to the National Care Service of the persons whose rights and responsibilities the charter summarises". However, "Nothing in the charter is to— give rise to any new rights, impose any new responsibilities, or alter in any way an existing right or responsibility. All this will do is bring the current policy exhortations about rights into one place and rights will continue to be as unenforceable and meaningless as they are at present. Individuals, of course, can have no rights unless the state has concomitant responsibilities and there are means to enforce these. There is nothing in the bill which places new responsibilities on Scottish Ministers which could be enforced by the public.

The Bill, as drafted, is therefore a missed opportunity to set out clearly the rights of people needing care, informal carers and the workforce, the concomitant responsibilities of the NCS however organised and the creation of new procedures that would allow rapid and simple means of address to people whose rights are ignored.

Responsibility of Scottish Ministers

Clauses 2 and 3, under the title "Responsibility of

Scottish Ministers", combined with what follows give Scottish Ministers not just responsibility but total power over care provision.

The meaning of "It is the duty of the Scottish Ministers to promote in Scotland a care service designed to secure improvement in the wellbeing of the people of Scotland" is unclear. However, it is not equivalent to "It is the duty of the National Care Service to secure improvements in the well-being of the people of Scotland". Such a declaration of purpose would fit with our proposal that the first legal duty of a NCS should be to promote a caring society and the ethos of the Social Work Scotland Act 1968⁶.

Clause 2 (2) also hands absolute discretion to Scottish Ministers to interpret and implement the proposed principles, inadequate as they are, as they think fit:

"Everything that the Scottish Ministers do in discharging that duty is to be done in the way that seems to them to best reflect the National Care Service principles."

Clause 4, which is headed improvement, is equally limited: "It is the duty of the Scottish Ministers to put and keep in place arrangements for the purpose of monitoring and improving the quality of the services that the National Care Service provides". The duty is to improve the services that exist, not to ensure that there are sufficient services and of good enough quality to meet the need of the population.

In our view, these vague prescriptions for Scottish Ministers – the bill does not even commit to creating a separate Cabinet Secretary for Care of equal status and with equal power to the Cabinet Secretary for Health – should be replaced by a single responsibility: to ensure the National Care Service, however delivered, is properly funded to meet care needs.

Care Boards

Clauses 4-5,16-19 and Schedule 1, which sets out the constitution of care boards, hands Scottish Ministers absolute power over care boards: to determine their geographical extent and purpose (4); to set their budget (5); to issue directions

that care boards are legally obliged to follow (16); to remove board members (17); to transfer a care boards functions to another person if Scottish Ministers judge an emergency exists (18); or if a care board has in Scottish Ministers opinion failed to perform a function in some way (19); and finally to appoint all Board Members, the Board Chair and the Board Chief Executive according to any regulations they decide. As if this wasn't sufficient, a number of other clauses introduce further ministerial powers, for example under Clause 8 all strategic plans produced by Care Boards require the approval of Scottish Ministers.

While it is not stated in the policy memorandum, the purpose of these clauses appears to be to remove all elements of local democracy from the Integrated Joint Board and bring them into line with Health Boards, which are totally under the control of Scottish Ministers. There will then be nothing to prevent Scottish Ministers amalgamating ("rationalising") the existing board structure so that instead of one board per a local authority, care boards are reduced in number and aligned with local health boards. Instead of care being devolved into local communities the boards responsible for care provision will become ever more remote.

Given this centralisation and concentration of power it is noteworthy that the care boards will be separate legal entities. This appear to be a means of protecting Ministers from being held accountable for their decisions. If a member of the public suffers serious harm from care provision their legal recourse is not to sue Scottish Ministers, despite the claims the Scottish Government makes that they are to be responsible for care provision, but the care boards who will have almost no power to do anything without ministerial say-so.

However deficient the current proposals, the question remains whether the NCS Bill should not introduce some new structures to deliver the NCS.

While in Common Weal's view care should be delivered through local authorities, to ensure that happens every local authority would need to set up appropriate governance arrangements. That could be done by a Care Committee, which might be a Committee of the whole Council such

is the importance of care, but in order to give stakeholders a statutory right to be involved in such a committee, a care board might be appropriate. Our main concern is that any representatives on such a care board should not be nominated by Scottish Ministers or Local Authorities but accountable to the people they represent.

But we think the NCS Bill should go further than this and require local authorities to devolve power to the local level and set up appropriate structures to do this. That might mean every locality having its own care board, with the people on that board chosen by the people they represent (it would include councillors as the people chosen by the local electorate) and accountable to them.

Finance and resources

Resources are key to the future success of care provision, whether this is to ensure sufficient services exist to meet need or to ensure that the staff working in the care system are properly paid. How this will be delivered – it will take time – should be central to the bill and indeed is the main justification for creating a National Care Service. The bill, however, contains just a single clause on finance (not even a chapter_ and all this says is "The Scottish Ministers may provide any financial assistance to care boards that they consider appropriate." "May", not "must" – once again absolute power is handed to Scottish Ministers.

Moreover, the second proposed principle states that for services to be regarded as an investment in society "services must be financially stable in order to give people long-term security". While this could be read as a reason to avoid private care provision, which has become increasingly unstable as the care industry has been financialised, it also reads as a continuation of the current system which puts resources and budgets before need. The current system, with budget cuts year on year and almost no long-term financial planning, is in fact anything but financially stable but the Bill provides no mechanisms that might enable Ministers to be held to account for the budget that will be allocated to the NCS.

This points to a crucial omission from the bill, its failure to require Scottish Ministers to ensure the National Care Service collects data on all unmet care needs which can then be used to inform what budget is required, as happens with waiting lists in the NHS. Without such data it will be impossible for the Scottish Government to eliminate what they call the postcode lottery which is one of their main justifications for centralising power within the NCS. The term “postcode lottery” itself implies that someone’s address means that they cannot get care that they need but would get if they lived elsewhere in Scotland. Ending the lottery does not mean nationally mandated blanket control of all care (so that people don’t get care they need regardless of where they live) but that community level services are properly resourced and enabled to provide locally focused care, in an accountable way and can ensure that the people in their community get the care they actually need. “Unmet need” must include the need for provision of services at community level that encourage and sustain personal relationships and community cohesion, promote optimum wellbeing and avoid the risk of crisis and acute harm. It should not be based on the lack of availability of services essential to avoid emergency intervention, nor the absence of resources that enable individuals to experience an acceptable quality of life.

The finance clause, as framed, does not even require Scottish Ministers to determine before allocating budgets whether they are sufficient to meet legislative requirements, i.e all the legal obligations that councils currently have which the Scottish Government wishes to transfer to care boards.

The likely result of these omissions – checks on the power of Ministers that promote rational allocation of resources – is that the continued downward pressure/cuts in care budgets will continue accompanied by the usual exhortations that people working in the care system need to do more with less. This is likely to have significant implications in practice for delivery of previously made promises around ethical procurement and Fair Work in Social Care.

Strategic planning

Clause 6 requires that where Scottish Ministers decide to provide a service centrally, they must have a strategic plan for it. There is no provision to require Scottish Ministers to have a strategic plan for the NCS as a whole, which might provide a means of ensuring that services were developed and extended to meet unmet needs.

Clauses 7-9 set out a number of prescriptions for care boards strategic plans that are extremely bureaucratic. The history of care since New Labour has been one type of strategic care plan after another, with very little evidence that they have achieved anything. They do, however, take up large amounts of managerial time.

Under clause 7 Care Boards are required to have 3-year strategic plans for the services they provide, which include budget projections. How they can do this when there is no requirement on Scottish Ministers to fund these service plans or set budgets for more than a one-year period, is unclear. If 3-year plans are to have any chance of working, they need to be accompanied by three-year budget allocations from the Scottish Government.

The strategic plan has to include an ethical commissioning strategy even though a strategy should precede a plan. The content of the clause headed “Meaning of ethical commissioning strategy” — is legal gobbledegook:

“References in this Chapter to a person’s ethical commissioning strategy in relation to a service is to the person’s strategy for ensuring that the person’s arrangements for providing the service best reflect the National Care Service principles.”

While the Scottish Government, where it decides to operate a service, only has to consult publicly on its draft plan (Clause 6 (5)), care boards must then consult (Clause 7 (3)) first its community planning partners and neighbouring care boards, and then the public. This exemplifies top-down planning and is a lost opportunity. In our view any planning that takes place should start in local neighbourhoods – there is a precedent here with local place plans that are being developed in the planning system before Local Development Plans are drafted – and be developed by people

with care needs, their informal carers and paid care staff. In other words, strategic plans should be developed from the bottom up. In our view there is a contradiction between the top-down and tokenistic approach set out in clauses 7-9 and the Scottish Government's declared intention to co-design services alongside previous commitments to empower communities.

Commissioning and regulation

While both the IRASC and the NCS consultation devoted considerable attention to how commissioning might be improved, there is no section in the bill that sets out commissioning requirements. In our view one of the fundamental failures of the NCS Bill, as drafted, is it fails to require care to be not-for-profit nor does it mandate that the care service should be publicly owned. This we believe these two requirements are preconditions for effective commissioning that involves people, rather than businesses, in the design of services, i.e. what the Scottish Government says it wants.

There is however a section on Procurement and Clause 41 allows contracting authorities, i.e. the Scottish Government or care boards, to reserve contracts to particular types of organisation. This confirm that the Scottish Parliament does have the legal power to require services to be not for profit, as is already the case with foster care services.

The Bill also introduces new legal provisions which enable Scottish Ministers to take action against contractors through Emergency Intervention Orders (Clause 20-22) and for the Care Inspectorate to close services by cancelling their registration (Clause 42). In our view, the time to have introduced such provisions was after the collapse of Southern Cross in 2008. But local authorities already had the power to achieve the objectives intended by these clauses through including such provisions in contracts. The problem has been they have been discouraged from doing so, with a clause in the National Care Home Contract that enabled local authorities to step in and take over failing services being removed as a result of pressure from providers.

In our view, enough effort has been spent over the last twenty years trying to get the private market to work to see it will never work and we should stop wasting further time and resources on trying to improve the market and instead make care not for profit like the NHS. Commissioners could then work with both the public and voluntary sectors to ensure services are co-designed with the people who need them and work in them.

That would also enable the current regulators, the Scottish Social Services Council and the Care Inspectorate to be reformed as we advocated in 'Caring for All'. Sections 42 and 43 of the bill, which cover regulation, are in our view a missed opportunity and clause 43 only a bureaucratic change to enable Healthcare Improvement Scotland to charge for assisting the Care Inspectorate, although whether it the Care Inspectorate or providers who will be required to pay those fees is unclear. What we believe the NCS Bill should do is amalgamate the regulatory functions of the SSCC and CI into a new merged regulatory body and transfer their other responsibilities, for supporting staff and services and workforce planning to the NCS nationally. It would be important that any review and strengthening of the powers of regulators, including our proposal that they be merged, incorporate an emphasis on the working conditions and health, safety and welfare of social care staff and the development of close linkage with other relevant regulators, in particular the Health and Safety Executive, Local Authority Environmental Health Departments and Public Health Scotland.

Unfortunately, the absence of any description from Scottish Ministers of how they intend to organise the NCS at national level helps conceal the opportunities for reform. But if Scottish Ministers, for example, are to have responsibility for all aspects of how care is delivered, it really makes no sense to leave responsibility for workforce planning with a stand-alone body.

Research in Care

Scottish Government support for research in social care in Scotland is woefully lacking. Most of the research that is commissioned goes to

centres that depend on the Scottish Government for funding. The situation is contrary to that in Wales where Health and Care Research Wales have funding schemes specifically for social care research⁷. Their Social Care Grant (SCG) award aims to support capacity and capability building in social care research by funding high-quality research projects with clear relevance to social care service users, carers, practitioners and policy makers. This is a competitive and transparent scheme that attracts research bids from all Welsh universities. Research funded under this scheme can provide robust evidence to support the efficient and effective organisation and delivery of social care services in Wales, and/or improved service user or carer wellbeing. Health and Care Research Wales also runs a separate scheme offering PhD scholarships in social care.

In relation to the health, safety and welfare of social care staff, there is a need to specify the need for research, but also an imperative to draw on exiting evidence of the known problems relating to working conditions for which there are known solutions available.

Workforce

The NCS Bill contains no provision in respect to the workforce apart from the final principle which states it “is to be an exemplar in its approach to fair work for the people who work for it and on its behalf, ensuring that they are recognised and valued for the critically important work that they do.”

That is despite the claims in the Scottish Government press statement which accompanied the launch of the bill <https://www.gov.scot/news/national-care-service-bill-published/> which said the aims are to: “ensure fair employment practices and national pay bargaining for the social care workforce”.

With employment rights being reserved to the UK Parliament, there are clearly some mechanisms that could be used to deliver fair work which are not available to the Scottish Parliament. There are, however, other ways to embody fair work into the NCS as happens in the NHS. The starting point for this is to appreciate that the

root of the problem lies in the private sector and the current procurement regime, which undermined the terms and conditions of the workforce and enabled providers to extract large profits at the expense of the workforce (and the public). The solution to this issue to require all care services legally to be not for profit, as is within the power of the Scottish Parliament to do.

A similar approach could be used to bring foster carers and personal assistants into the NCS workforce. Both have a specific status in care provision, as a result of the Foster Care and Direct Payments Regulations which has resulted in the pay and conditions of both groups being generally even worse than that other care staff. There is no need to reform employment law to address those problems, only a need to amend the relevant legislation. This includes the Looked After Children (Scotland) Regulations 2009, which could be amended to change the status of foster carers to paid employees and abolish fostering allowances and the Direct Payments/Self Directed Support regulations so that instead of people employing their own staff under Option 1, having chosen who they wish to work with them, those people are then employed by the NCS. One possible issue that needs to be resolved is that Foster carers are not employees and are classed as self-employed. Careful thought would need to be given to the service implications of changing this. If you look at it as an hourly rate rather than a fee they are not well paid. The detail of this raises quite complex issues which would need further discussion and would be best addressed through regulations but the NCS should contain provisions which set out the overarching framework for such reforms.

If that was agreed, the NCS Bill could then introduce a legal requirement for Scottish Ministers to introduce national pay scales and national terms and conditions for staff like Agenda for Change in the NHS. If instead of the current procurement regime, voluntary sector providers were paid to provide services according to agreed costs we cannot see any reason why they would fail to co-operate, unlike the private sector whose primary purpose is to safeguard profits. The introduction of such national terms and conditions and all the transitional issues (see below) could then be negotiated through national collective bargaining

whether or not it was within the competence of the Scottish Parliament to state this in the bill.

The Fair Work Convention Framework, the implementation of which has so far been limited to financing providers to pay the Scottish Living Wage, would mean developing and supporting a strong worker Voice, including the encouragement of trade unions, as well as ensuring security of employment, opportunity for professional development and advancement. A key element of Fair Work (which runs through all 5 dimensions) is protecting the health, safety and welfare of social care workers. (It is disappointing that the lessons learned during the pandemic regarding good PPE provision, ventilation and hygiene are not referred to and built upon) There is no mention of any of this in the Bill. There should be a requirement, ideally through national collective bargaining, for trade unions to be directly involved in ensuring good working conditions that are fit for purpose.

As well as increasing pay, Common Weal proposed a number of reforms in Caring for All including actions to ensure all care staff: are properly trained to undertake what is often a very complex and demanding jobs requiring knowledge, skills and an ability to take ethical decisions; have sufficient time to care (no more 15 minutes care visits which are bad for both staff and those they care for) and are empowered to take everyday decisions about how they organise their workload; that built in to their job should be opportunities for peer support and support and provision from managers; and that there should be clear pathways to career progression and professional development. Training should also include explicit content on occupational health and safety.

While it would not be appropriate to embody provisions for such requirements in the NCS Bill, not least because a framework for addressing these issues should be agreed through national collective bargaining, it is likely that some of what was agreed should then be embodied in regulations. There is however not provision for this in the bill. To give one example, under Clause 34, The Scottish Ministers and care boards may— NOT must – “provide training courses for individuals to equip them with knowledge and skills relevant to providing

services on behalf of the National Care Service”. The availability of training for staff should be a right, not a matter of Ministerial discretion, and we believe can only be delivered if the NCS is required to provide it. The clause therefore should read “Scottish Ministers and care board MUST provide training courses for staff sufficient to equip them to do the jobs they are employed to do” and require further details of how this will be done to be set out in regulations.

The role of social work in the NCS

The role of social work is not mentioned once in the NCS Bill, although there are references to the Social Work (Scotland) Act 1968 and subsequent legislation which helps determine its function.

This is a major omission, part of the explanation for which is that a National Social Work Agency, as proposed in the NCS consultation, would be part of government and therefore a matter for the Scottish Ministers to decide without any requirement to consult the Scottish Parliament or indeed the social work profession.

It is also a lost opportunity for reform. The Social Work profession has been subject to a large number of legislative requirements in the last thirty years, including the 22 laws listed at the end of the draft bill, as well as endless policy advice. This has turned social workers from professionals whose job it was to help and support people into staff whose primary job is to act as a gatekeeper to resources and protect children and adults. As the entire consultation leading up to the NCS Bill has shown, it has not worked, and social workers are being blamed for not respecting people’s rights or offering support when it is the system that has driven them into that role. Present practices and policies have driven social work to become a reactive service concerned only with a never-ending spiral of crisis. The result is burgeoning caseloads (as outlined in Social Work Scotland’s recent Setting the Bar report⁹) and early escape down other career paths.

The NCS Bill therefore should at the least set out the role of social workers in the NCS, which will require a new direction for social work, such as what Common Weal has set out in “Struggling

to Care”⁹ and “Care in the Community”¹⁰, a requirement on Scottish Ministers to instigate a reform programme. As things stand, the Financial Memorandum to the Bill provides no reassurance that unmet need for and under-resourcing of social work services will be addressed within the NCS.

As an example of the NCS’s Bill failure to address these issues, Clause 14 states that Scottish Ministers “may by regulations make provision about the provision of independent advocacy services in connection with the services that the National Care Service provides.” We would argue this is unnecessary and a tacit acknowledgement that the real failings in the current care system won’t be addressed. Social Workers used to advocate for people and are still trained to do so but are prevented from fulfilling this role because they mainly act as gatekeepers or in a protection role rather than actually helping people. To address this gap, over the last 20 years various so-called independent advocacy services have developed, many of whom take on staff without any training. We believe that if social workers were once again allowed to act as independent professionals, the need for advocacy would greatly reduce but, where it is required, this should be provided by an appropriately qualified professional, as when the courts appoint someone to safeguard a person’s interests.

Information

Part 2 of the NCS Bill is entitled Health and Social Care Information and applies to the NHS as well the NCS. There is one main clause (30) which allows Scottish Ministers “by regulations provide for a scheme that allows information to be shared in order that services can be provided efficiently and effectively by and on behalf of” the NCS and the NHS. It also enables Scottish Ministers to “create sanctions (civil or criminal) for those who fail to comply with the regulations’ requirements.”

This is quite extraordinary for a number of reasons. First, if Scottish Ministers can create sanctions for those working in the NCS who fail to share information, they could also create sanctions against those managers or care boards who fail to provide the services people

need. Second, it ignores the fact that what is key to sharing information/reducing duplication is appropriate information technology that communicates. Third, there is no mention of the right of people to control their own data under data protection laws – indeed as worded it is not clear whether the Scottish Government intends service users and carers as well as staff working for the NCS will be covered by the proposed regulations.

The fundamental issue here is that the Scottish Government has approached the question of information sharing from the top down, instead of the bottom up. The starting points should be people’s rights to control their own information and decide how it should be shared. If people had their own data file, the problem would change from trying to force organisations all of which have designed their own information systems for their own purposes, for a new system based on the citizen which could encompass not just health and care information, but other information relevant to both services, such as housing. There would then be no need for any citizen who requires a service to repeat personal information when seeking help, they would simply give permission to the professional concerned to access their file and then add any other appropriate information to it.

The section on Information therefore appears to be a further part of the power grab, which proposes centralised management of information rather than devolving control to individuals and their carers (for example in the case of those who lack the mental capacity to consent to information about them being shared).

Freedom of Information

Schedule 2, Article 3 of the NCS Bill explicitly includes Care Boards within the scope of the Freedom of Information (Scotland) Act 2002 (FOISA). This will allow members of the public to submit FOI requests about care to these boards in the same way as they currently can with care activities provided by Local Authorities. Our reservations against Care Boards as a concept aside, this is the minimum that we would expect from transparency of information if activities are being transferred from Local Authorities to these

Care Boards. However, with much of the care sector privatised and the NCS Bill not ruling out an expansion of privatisation in the care there is a significant concern that transparency could be eroded or critical information deliberately hidden by privatising out care services. There may also be problems with gaining access to the data required to make an informed decision about care that is provided privately (such as performance records or costs charged to users and to the public purse). For this reason, Common Weal supports a further amendment to FOISA to extend it to all activity provided by a private company using public money on the same terms under FOISA as those same activities would be subject if that money was spent by a Local Authority, Care Board or any other public body¹¹. This should be the case for all activities conducted by the private sector using public money but the need for it is particularly acute within the scope of a National Care Service.

Transfer of powers including transitional issues

Clause 27 enables Scottish Ministers to transfer functions from local authorities and a list of 22 Acts of Parliament that are thought to cover these functions are set out in Schedule 3. The opportunity to rationalise these powers and bring them together into one piece of legislation, as happened with the Care Bills in England and in Wales has been missed.

While Clause 30 requires Scottish Ministers to consult further before developing regulations to transfer Children's and Justice Services to the NCS, whatever the outcome of the consultation there is nothing in the NCS Bill to prevent the transfer going ahead. This clause appears to have been inserted into the NCS purely to placate those working in Children's and Justice Services who are rightly concerned about what will happen if they are "integrated" with health. The response of the Scottish Government to those concerns should have been to abandon its plans for Care Boards under centralised control and instead deliver the NCS through local authorities. One inevitable consequence is that significant areas of activity in children's social work such as child protection and education support will have established relationships disrupted.

While Common Weal is opposed to the transfer of care functions from local authorities, having advocated instead that care should be devolved within local authorities, there are a number of major financial and human resources issues that are not addressed by the bill. That has happened in other re-organisations, such as the fire service, and the evidence from this suggests that many issues, such as different pay grades, have not been addressed almost 10 years later. For this reason, what structure for an NCS is finally approved by the Scottish Parliament, it MUST include clear provisions for how any transfers of powers and transitional issues will be addressed.

This section considers the main issues IF the Scottish Government's current proposals go ahead. The bill includes powers for the Scottish Government to transfer in full or in part functions relating to care which are currently carried out by either the NHS or local authorities and along with those powers transfer some staff (NHS staff are explicitly excluded from this) and property.

The Bill is completely silent on the financial implications of this. At the macro level, if the NCS is now to be centrally funded (which we believe is what is needed) that means budgets currently held by local authorities being transferred to the NCS. But how to do this fairly if there is indeed a post-code lottery? Will councils that "overspent" on care get to keep more of their budgets while those that "underspent" pay more? Or will a new formula be invented to determine local authority funding?

And what happens if functions are only partially transferred or, as the Scottish Government appears to be proposing, transferred over time? How will the Scottish Government work out what local authorities need if, for example, they retain children's services for a period?

This is further complicated by the very varying structures within local authorities. If, for example, there is a single section dealing with both adult and children's services, how will the Scottish Government determine what staff should be moved to the new service and what should stay with local authorities. In other words, it is not just simply a matter of transferring functions, but also has implications for how local authorities are organised.

Local Authority staff. The bill allows for local authority staff to be transferred to care boards or the NCS nationally under Section 31 which states that “the Scottish Ministers may by regulations transfer individuals from the employment of the original function holder into the employment of the new function holder”. The bill indicates that this would be a TUPE transfer. This is weak protection for local authority workers who would possibly be moving from employment with collective bargaining to employment with no collective bargaining and whose pay and conditions, including protection of health, safety and welfare could worsen after the first year or so of employment by Boards.

This links to the lack of clarity in Schedule 1 Clause 18 “Staff appointed by a care board are appointed on such terms and conditions as the Scottish Ministers determine”. It is unclear whether Scottish Ministers will create national pay and conditions or whether they might set different pay and conditions for each care board to reflect current differences in local authority pay scales. Whatever the case, experience shows there are likely to be considerable challenges rationalising different pay structures particularly if money is short supply. There is little clarity about how staff could be transferred to the NCS. Para 55 of the explanatory notes implies that voluntary and private sector staff have been explicitly excluded from such transfers. Additionally, there are obvious concerns here about pay, conditions and pensions for transferred staff and so a firm “no detriment” condition should be applied at minimum.

There will also be a host of issues relating to staff whose functions include both those that are being transferred to care boards and those that aren't, all the way down from Chief Social Work Officers who at present cover all social work services (who employs them if children's services remain in local authorities) to the cleaners who clean a number of council buildings. In addition to which will be those finance staff, responsible for collecting income from service users, whose jobs will no longer be required if care charges are abolished. Will local authorities be responsible for paying their redundancy or will the Scottish Government fund that?

NHS staff. While Scottish Ministers can under section 31 transfer functions from the NHS to the NCS, most likely primary care services, 31 (b) says they may not transfer staff from health boards. This means that any health staff working in the NCS would still have their pay and conditions determined through Agenda for Change and national collective bargaining within the NHS and be NHS employees. **There is an inherent unfairness in the reference in Part 1 Chapter 6 of the Bill, that NHS staff enjoy a protection that Local Government staff facing transfer do not. On close scrutiny of the wording, this may be illusory, but whether it involves relegating Local Government staff to second class citizenship, or opening up another front of outsourcing Health staff, neither is acceptable.**

This has serious implications unless Scottish Ministers intend to harmonise any NCS terms and conditions with Agenda for Change. Instead of one set of pay and conditions in the NCS, there will be two, which creates the possibility that staff doing the same job (e.g.

finance and human resources staff) could have different pay and conditions. That is clearly unfair, a recipe for discontent and will almost certainly in time open up care boards to equal pay claims.

And before NHS staff breathe a sigh of relief, while Scottish Ministers can transfer certain health functions to the NHS, it is then up to care boards to contract with the NHS to supply the staff they need. In other words, health staff are likely to be in the same position as care workers and social work staff employed by local authorities, subject to commissioning processes which may or may not determine they are needed and/or affordable.

Property. The bill also enables Scottish Ministers to transfer property from local authorities to care boards. This too, is not as simple as it appears. Will local authorities receive compensation? Can Ministers transfer buildings or land that are part of local authority Common Good funds? What happens where social work and care staff share buildings with others? Will properties solely dedicated to social services be transferred while those that are shared remain with local

authorities which will require the negotiation of complex lease arrangements? What happens to the maintenance staff who now tend to work across council departments?

CONCLUSION

To say that Common Weal are disappointed with the Bill as proposed would be an understatement. In fact, we consider it quite dangerous: as we have outlined, democracy and accountability have been sacrificed on the basis of building on what is already there in the failed Health

and Social Care Partnerships. The Bill removes the role of local authorities, and we would be concerned about their future as a bedrock of democracy – despite all their flaws. Our own alternative is outlined in Caring for All, and we will engage in the consultation process and continue to argue the case for the properly funded and robust National Care Service that Scotland deserves.

Common Weal gratefully acknowledges the advice and assistance we have received from experts, practitioners and trade union representatives in the Scottish care and social work sectors during the writing of this critique.

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