

Stage 3 Briefing

Care Reform (Scotland) Bill

June 2025



Stage 3 Briefing

Care Reform (Scotland) Bill

June 2025

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.

The Care Reform (Scotland) Bill was introduced as the National Care Service (Scotland) Bill by the then Cabinet Secretary for Health and Social Care, Humza Yousaf MSP, on 20 June 2022. The Health, Social Care and Sport Committee and other committees issued a call for views at Stage 1, to which we responded.¹ We also provided oral evidence as part of the Committee's Stage 1 consideration of the Bill on 1 November 2022.² The Health, Social Care and Sport Committee's Stage 1 Report on the National Care Service (Scotland) Bill ('the Stage 1 Report')³ was published on 22 February 2024 and the Parliament agreed the general principles of the Bill following the Stage 1 debate on 29 February 2024. We issued a briefing to MSPs ahead of the Stage 1 debate.⁴

In July 2024, the Health, Social Care and Sport Committee issued a call for views on draft amendments the Scottish Government proposed to make to the Bill at Stage 2, to which we responded.⁵ We also provided further oral evidence to the Committee on the Bill at Stage 2 on 1 October 2024.⁶ The Bill ended Stage 2 on 4 March 2025. As a result of amendments tabled at Stage 2, it was renamed the Care Reform (Scotland) Bill.⁷

We welcome the opportunity to consider and provide comments on the Bill ahead of the Stage 3 proceedings scheduled for 10 June 2025. Where appropriate, we have also commented on amendments tabled ahead of Stage 3.

¹ 22-09-02-ncswg-ncs-bill-written-evidence.pdf

² Minutes for Health, Social Care and Sport Committee 30th Meeting, 2022 Tuesday, November 1, 2022 | Scottish Parliament Website

³ Stage 1 report on the National Care Service (Scotland) Bill | Scottish Parliament

⁴ 24-02-29-ncswg-national-care-service-scotland-bill-stage-1-briefing.pdf

⁵ <https://www.lawsco.org.uk/media/zddnoise/24-09-20-stage-2-scrutiny-of-the-national-care-service-scotland-bill.pdf>

⁶ Minutes for Health, Social Care and Sport Committee 26th Meeting, 2024 Tuesday, October 1, 2024 | Scottish Parliament Website

⁷ Care Reform (Scotland) Bill as amended at Stage 2

General Remarks

The Care Reform (Scotland) Bill as amended at Stage 2 is substantially different from the National Care Service (Scotland) Bill as introduced.

Part 1 of the Bill as introduced made provision for significant structural reforms to establish a National Care Service, with Scottish Ministers responsible for providing care services and care boards established to plan and commission services on a local level. Amendments tabled at Stage 2 in the name of the Minister for Social Care, Mental Wellbeing and Sport removed Part 1 from the Bill. As a result, the Bill will no-longer make significant structural changes to the organisational landscape for the delivery of social care in Scotland.

The Bill as amended at Stage 2 makes provisions about the processing of health and social care information; support for carers; visits to or by care home residents (the provisions known as “Anne’s Law”); procurement; regulation of social services; protection of adults at risk of harm; the creation of a National Chief Social Work Adviser and National Social Work Agency; and for independent advocacy.

In our engagement with the Bill at Stages 1 and 2,⁸ we highlighted our concerns about structural reform within the complex existing legislative framework; the use of framework legislation and the opportunities for full and effective parliamentary scrutiny; the need to embed human rights principles within new social care structures and to align with the wider agenda of human rights incorporation; the importance of statutory safeguards to ensure both meaningful co-design and consultation; the need for adequate resourcing; and the need to manage the risk of conflicts of interest where functions are concentrated in a national body. Whilst the move away from significant structural reform mitigates these concerns to an extent, we do note that the Bill as amended at Stage 2 still contains a number of provisions for which the detail will be determined by regulations- particularly in relation to health and social care information. We remain of the view that the impact of the Bill on improving outcomes for the end users of social care services will depend on these details of implementation, which must be fully costed, evaluated and consulted upon to ensure that the Bill’s objectives are achieved without unintended consequences.

Comments on the Bill as amended at Stage 2

Part 2- Health and social care information

Part 2 of the Bill relates to health and social care information.

This part of the Bill is relatively short, but has the potential to give rise to significant privacy implications. The Bill and supporting documents lack detail as to how effective information sharing will be achieved in practice against the complex background of health and social care. There is a lack of detail as to the

⁸ <https://www.lawscot.org.uk/research-and-policy/influencing-the-law-and-policy/our-input-to-parliamentary-bills/bills-202223/care-reform-scotland-bill/>

safeguards which will be in place to protect confidentiality of sensitive information, and to ensure consistency with the professional obligations of medical and health care staff. Consultation with professional bodies will be required on the detail of any scheme, and proper resourcing will be required in order to achieve the potential benefits to those receiving care and support.

The “information” concerned will include sensitive personal data, the dissemination of which needs to be carefully controlled. Any data sharing under any proposed scheme should be within a framework first approved by the UK Information Commissioner as compliant with UK data protection law. It is also important that nothing be done that might jeopardise the continuity and review of the Adequacy Determination accorded to the UK by the EU Commission.⁹ Finally, any scheme for sharing data requires to be delivered in a way which is consistent with wider approaches to data in health and social care in Scotland to avoid inadvertent conflict between different schemes impacting safe data-handling as well as individuals’ data access rights.¹⁰

Consideration should also be given to how information can be shared in cross-border situations, particularly cross-border within the UK. This will be particularly relevant for those who live in areas of Scotland which border England and who may need to receive some aspects of health and social care in England.

Section 36

Section 36 allows Scottish Ministers to make regulations for a scheme that allows information to be shared in order that public health and social care services can be provided efficiently and effectively.

Section 36(2)(b) of the Bill allows Scottish Ministers to make regulations which create civil or criminal sanctions for non-compliance. It is essential that any regulations creating sanctions are subject to appropriate parliamentary scrutiny and that individuals subject to the regulations are aware of and able to understand the scope of the sanctions and modify their behaviours accordingly. We note that there are no parameters on the face of the Bill for the criminal penalties which can be imposed by regulation under this section. We would welcome clarification as to what safeguards are in place to ensure this power is exercised appropriately.

We note that there appears to be no restriction within section 36 on the persons regulations made under this section (and associated civil or criminal sanctions) can apply to. We would welcome clarification on whether it is envisaged that requirements to share information could apply to service users and their families. If this is not the intention, we would welcome clarification as to what safeguards are in place to ensure that service users and their families are not subject to requirements under this section, and to civil or criminal sanctions. We note that, by

⁹ See <https://ico.org.uk/for-organisations/data-protection-and-the-eu/data-protection-and-the-eu-in-detail/adequacy/>

¹⁰ See for example the recent Scottish Government consultation: Data Strategy for health and social care - Scottish Government - Citizen Space (consult.gov.scot)

contrast, section 37B sets out a specific list of those to whom a requirement in an information standard may apply.

Regulations made under section 36 are subject to the affirmative procedure. We note the comments in the Stage 1 Report that the regulation-making powers conferred by section 36 must be subject to a further reinforced process of parliamentary scrutiny than is currently afforded by use of the affirmative procedure.¹¹ We note that the Bill has not been amended to strengthen this scrutiny, and the Scottish Government is of the view that the current level of scrutiny is suitable.¹²

Sections 37A-E

These sections, added to the Bill at Stage 2 to replace section 37 of the Bill as introduced, provide for Scottish Ministers to produce information standards which set out requirements in relation to the processing of Scottish health or social care information, and to make these publicly available.

Section 37A(2) provides that an information standard may set out requirements by reference to another document, including a document which is not in existence when the standard is produced. Section 37C creates a duty to comply with such standards. It is unclear to us how persons can be required to comply with a duty which depends on documents which are not yet in existence, and we would welcome clarity on how it is envisaged that these provisions will work in practice.

Section 37B sets out a specific list of those to whom a requirement set out in an information standard may apply. We note that amendment 7 in the name of the Minister would bring persons providing a range of services pursuant to certain provisions of the NHS Act within scope. This would appear to include those providing services including GP, dental and pharmaceutical services. We would welcome clarification on how it is envisaged that these provisions will interact with professional standards around confidentiality, and note that these standards are to some extent reserved to the UK Parliament.¹³

Section 37E is an interpretation provision for this part of the Bill. It defines “processing” by reference to paragraphs (a) to (f) of section 3(4) of the Data Protection Act 2018. These provisions of the 2018 Act include disclosure and dissemination, and would therefore appear to be drawn more broadly than simply the processing of data. We would welcome clarity on the intention behind these provisions and the safeguards which will ensure personal data is protected.

There does not appear to be any requirement on the face of the Bill for Scottish Ministers to undertake any consultation prior to producing an information

¹¹ Stage 1 Report, para 75

¹² National Care Service (NCS)(Scotland) bill: Scottish Government response to Stage 1 Report, at page 86: <https://www.parliament.scot/-/media/files/committees/health-social-care-and-sport-committee/correspondence/2024/ncs-report-full-response.pdf>

¹³ Scotland Act 1998, Schedule 5, Section G2

standard. We would welcome clarification as to how it will be ensured that affected parties are consulted on the content of any information standard.

Part 3- Reforms connected to delivery and regulation of care

Part 3 of the Bill makes provisions for reforms connected to the delivery and regulation of care.

Sections 38 – 39A

Sections 38-39A make provisions about carers. We have no specific comments on these sections.

Section 40

Section 40 modifies the Public Services Reform (Scotland) Act 2010 to require Scottish Ministers to use their powers under the 2010 Act to impose a duty on providers of care home services for adults to identify Essential Care Supporters, and to facilitate visits to and by care home residents. Ministers must also prepare a code of practice providing guidance on fulfilling these duties.

These provisions make provision for ‘Anne’s Law’. We responded to the Scottish Government consultation on Anne’s Law in November 2021.¹⁴ 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 accordance with national and international human rights law. We therefore welcome the specific reference to the importance of realising the human rights of residents as one of the paramount consideration in fulfilling duties under the code.¹⁵ We consider that the code itself should include a definition which makes clear that this reference to human rights includes the full range of rights established in ECHR and UN treaties, including the UN Convention on the Rights of Persons with Disabilities.

We note that these provisions in the Bill after Stage 2 are more detailed and prescriptive than those in the Bill as introduced. We also note that in terms of the 2010 Act,¹⁶ proposed regulations must be laid in draft before, and approved by a resolution of, the Parliament. We consider this level of scrutiny appropriate. We would welcome clarification on whether it is envisaged that such regulations will also be subject to the consultation requirement in section 78(5) of the 2010 Act. If this requirement does not apply, we would welcome assurances that there will be consultation with affected parties before draft regulations are laid. We welcome the consultation requirement in relation to the code of practice set out in inserted section 78C(5).

¹⁴ 21-11-02-ppc-annes-law-consultation.pdf (lawscot.org.uk)

¹⁵ Section 78C(2)

¹⁶ Public Services Reform (Scotland) Act 2010, section 104(2)

We note that the Bill as amended at Stage 2 does not contain detail of a process of review or redress if a care home were to be perceived to have unreasonably refused a visit under these provisions. We note that a number of amendments¹⁷ tabled ahead of Stage 3 seek to address this by introducing notification, review or complaint processes. Whilst we do not seek to express a view on the most appropriate mechanism, we do support the principle of a review or redress process being available to residents and their families.

Section 41

Section 41 of the Bill modifies the Public Contracts (Scotland) Regulations 2015 to allow the right to participate in procurement to be reserved to certain types of organisation. It does this, in the spirit of the European Union (Continuity) (Scotland) Act 2021 by introducing a new Regulation 76A that draws upon article 77 of EU Directive 2014/24/EU.

This effectively acknowledges international obligations of the United Kingdom under not only the Agreement on Government Procurement (AGP) but also related provisions of the Trade and Co-operation Agreement between the UK and the EU. Similarly, for the World Trade Organization's Agreement on Subsidies and Countervailing Measures.

It should be noted that where provision is to be sourced from an entity with particular social characteristics, subcontracting should not be allowed to bypass the requisite characteristics.

It should also be noted that the EU had produced detailed material about the process of procurement (or, instead of procurement, "entrustment") of social services in the general interest.¹⁸ 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.

Sections 41A-C

Section 41A is a new section added at Stage 2, which modifies the Public Contracts (Scotland) Regulations 2015 to give Scottish Ministers the power to amend the threshold amount for contracts related to health and social care.

Section 41B was added to the Bill at Stage 2, and modifies the Regulation of Care (Scotland) Act 2001 to give the Scottish Social Services Council power to require information from third parties. We would welcome clarification on how this may interact with data protection and confidentiality considerations highlighted elsewhere in this briefing. Section 41C was added to the Bill at Stage 2, and

¹⁷ See amendments 35, 55 and 56.

¹⁸ See COMMISSION STAFF WORKING DOCUMENT "Guide to the application of the European Union rules on state aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest 15.2.2013 SWD(2013) 53 final https://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf

modifies the Regulation of Care (Scotland) Act 2001 to clarify the delegation functions of Scottish Ministers.

We have no further comments on these sections.

Section 42 and Section 43

Sections 42 and 43 make provisions about regulation of social services by way of modification to the Public Services Reform (Scotland) Act 2010.

Decisions to close services may be made without serving an improvement notice. Exercise of this power may lead to costly judicial reviews.

We recommend that regulations under inserted section 64(1A)(b) set clear parameters for the use of this new power of cancellation without notice, including provisions to protect residents and service users who may lose a home or vital service.

Section 43A

Section 43A was added to the Bill at Stage 2, and amends the Adult Support and Protection (Scotland) Act 2007.

Inserted section 5A would give certain health care services a power to share information with Councils and others where they believe someone is an adult at risk and action needs to be taken to protect the person from harm. “Relevant health care services” are defined in inserted section 5A(4) and include doctors, dentists, pharmacists and others. We would welcome clarification on how it is envisaged that these provisions will interact with professional standards around confidentiality, and note that these standards are to some extent reserved to the UK Parliament.¹⁹ We would also welcome clarity on why these provisions create a power, rather than a duty, on health care services.

Section 43B

Section 43B provides for the appointment of a National Chief Social Work Adviser and the creation of a National Social Work Agency.

In our previous comments on the Bill, we noted that there was no separate provision for the NSWA on the face of the Bill and called for clarity on how the NSWA will ensure operational independence to be able to fulfil its role effectively. We welcome the clarification provided by section 43B but remain unclear as to how establishing a further public body on a statutory footing will improve oversight and accountability for end users of social care services. We would also welcome clarity on how the NSWA will relate to existing structures within the organisational landscape including the National Care Service Board, the Care Inspectorate, Audit Scotland and the Mental Welfare Commission. It appears that

¹⁹ Scotland Act 1998, Schedule 5, Section G2

much of the detail will be left to Scottish Ministers and to the National Chief Social Work Adviser, once appointed.

Section 13

Section 13 allows Scottish Ministers to make regulations regarding the provision of independent information, advice and advocacy in relation to public social care services.

Regulations made under section 13 are subject to the affirmative procedure.

We note amendments 44 and 45 tabled in the name of the Minister which would remove advice and information from section 13 and create a further, separate regulation making power in relation to independent advice and information in a new section. We note that this proposed new power would also be subject to the affirmative procedure by virtue of amendment 50. We consider this level of scrutiny appropriate.

We note that section 13 does not contain a definition of independence or of advocacy. This is unlike other legislation including the section 259 of the Mental Health (Care and Treatment) (Scotland) Act and section 10 of the Social Security (Scotland) Act 2018. Concern was expressed about this by the lead Committee in its Stage 1 Report.²⁰ We would stress the importance of any regulations protecting the independence of advocacy from the Scottish Government, as well as from health and care services. We note that amendments 72 and 73 in the name of Mark Ruskell MSP would add definitions of advocacy and independence, which may be helpful. However, true independence is more than not being directly provided by the Government or a public body, and we would welcome assurances that the regulations will include a more expansive protection of the independence of advocacy services. Regulations should also include mechanisms to ensure quality, which is particularly important given the often vulnerable position of those receiving advocacy services.

Part 4- Final Provisions

Section 45

We have no specific comments on this provision.

Section 46

Section 46 relates to regulation-making powers.

Where we have specific comments on the regulation-making powers within the Bill, we have commented on them above. We have no further comments.

Sections 47 and 48

We have no specific comments on these provisions.

²⁰ Stage 1 Report, at para 439



For further information, please contact:

Jennifer Paton
Policy Team
Law Society of Scotland
DD: 0131 476 8136
JenniferPaton@lawscot.org.uk